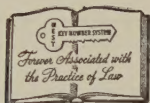


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BURKE v. MAGUIRE. (S. F. 4,668.)

(Supreme Court of California. Oct. 17, 1908.

Rehearing Denied Nov. 16, 1908.)

1. TRUSTS (§ 371*)—MANAGEMENT OF TRUST
ESTATE—BREACH OF TRUST—ACTIONS—COM-
PLAINT.

One seeking to charge a trustee with a breach of trust must state a clear case, and acts of a trustee which may, or may not, be breaches of trust, must be so alleged that they appear to be breaches, and thereby rebut the presumption in favor of performance of duty by the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 592; Dec. Dig. § 371.*]

2. TRUSTS (§ 371*)—MANAGEMENT OF TRUST
ESTATE—BREACH OF TRUST—ACTIONS—COM-
PLAINT.

A complaint in an action by legatees against the administrator of the executrix, which alleges that at the distribution of the estate the executrix had on hand a specified sum which she was directed to pay over to trustees on their executing a bond conditioned on their keeping the sum and paying the income to executrix for life, and at her death to pay the fund to the legatees, that the trustees did not qualify, and that the executrix retained possession of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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fund as executrix until her death about eight years afterward, and which fails to show that the fund was mingled with her own property, or converted to her own use, does not state a cause of action in equity to have the fund declared a lien, and to have it or its equivalent paid over to the legatees.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 371.*]

3. EXECUTORS AND ADMINISTRATORS (§ 128*)—REPRESENTATIVE OF DECEASED EXECUTOR—COLLECTION OF ASSETS.

A complaint in an action by legatees against the administrator of the executrix which fails to show that the fund held by the executrix or chose in action representing the same, or any property into which it had been converted came into the possession of the administrator, does not state a cause of action against the administrator personally; for under the express provisions of Code Civ. Proc. § 1353, it was not the duty of the administrator to take possession of the fund as administrator, and he could not perform the duties imposed on the executrix.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 532; Dec. Dig. § 128.*]

4. REPLEVIN (§ 11*)—CONDITIONS PRECEDENT—DEMAND—ALLEGATION—NECESSITY.

One lawfully in possession of property which he does not claim, and which he has not converted to his own use, but is holding for the rightful owner with the intent to deliver it to him on demand, is entitled to an opportunity to comply with his duty before being subjected to a suit to recover it, and a demand for the delivery of the property must be alleged and proved.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 85-97; Dec. Dig. § 11.*]

5. APPEAL AND ERROR (§ 854*)—REVIEW—SCOPE—REASONS FOR DECISION.

Where a demurrer is sustained in the lower court, the party demurring is entitled on appeal to a decision on all questions presented by the demurrer and necessary to the decision made, and, if the complaint is insufficient on any ground properly specified in the demurrer, the order must be sustained, though the lower court considered the complaint sufficient in that respect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403-3412; Dec. Dig. § 854.*]

6. EXECUTORS AND ADMINISTRATORS (§ 314*)—DISTRIBUTION—PROCEEDINGS FOR PAYMENT—PLEADING—SUFFICIENCY.

Under Code Civ. Proc. § 1493, requiring demands against an estate, founded upon contract, to be presented for allowance, and section 1500, providing that no action shall be maintained on any claim against an estate unless the claim is first presented, except in the case of an action brought to enforce a mortgage, a complaint against an estate sounding in contract, and not within the exception, which does not aver that the claim has been presented to the administrator fails to state a cause of action, and, where a testator willed a certain sum to certain beneficiaries of whom plaintiff was one, but there were not sufficient funds to pay the legacies in full, and on final accounting, B., the executrix, was directed to pay the sum in her hands to trustees upon their giving bonds, etc., but the trustees never qualified, and B. held the funds until her death, a complaint in an action against her administrator for a share of the legacy under the distribution is founded on contract, and within the rule.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

7. PLEADING (§ 201*)—GENERAL DEMURRER—SPECIFICATION OF GROUNDS—NECESSITY—EXCEPTIONS.

A general demurrer need not state the grounds of objection, except where the benefit of a personal privilege such as the statute of limitations is claimed. Hence, in an action against an administrator on a money claim against the estate, the defense that no claim therefor was presented to defendant for allowance is raised by general demurrer, even though not specified as a ground therein, for failure to allege the presentation of a claim does not come within the reason of the exception, since the administrator acts in a representative capacity, and it is not his personal privilege to waive the requirement of presentation, which is intended to protect estates from unnecessary litigation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 475; Dec. Dig. § 201.*]

8. APPEAL AND ERROR (§ 907*)—QUESTIONS PRESENTED IN LOWER COURT—PRESUMPTIONS—MATTERS NOT SHOWN BY RECORD.

The fact that an order sustaining a general demurrer does not mention a certain ground urged on appeal is no proof that the ground was not presented in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 907.*]

9. COURTS (§ 122*)—JURISDICTION—AMOUNT IN CONTROVERSY—DEMAND BASED ON MORE THAN ONE COUNT.

Under Const. art. 6, § 5, providing that the superior court shall have jurisdiction in all cases where the demand exclusive of interest, amounts to \$300, where a complaint in two counts claims less than \$300 on each of the respective counts, but the amount demanded is fixed to include both counts so that the sum exceeds \$300, a demurrer on the ground of lack of jurisdiction will not lie.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 122.*]

10. LIMITATION OF ACTIONS (§ 192*)—PLEADING—FRAUD—RELiance ON FRAUDULENT STATEMENTS—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 338, providing that an action for relief on the ground of fraud must be brought within three years after the cause of action accrues, where a beneficiary under a will sues the administrator of the estate of the executrix of the will 14 years after the testator's death, for a balance of a bequest due out of property alleged to have been omitted from the executrix' inventory, and alleges that she concealed certain assets from the court and plaintiff and the other legatees, and falsely represented to them that the testator owned no property other than that listed, and that plaintiff did not know or discover that the testator was the owner of said concealed property, or that the executrix came into possession of it on his death, etc., until after her death, when plaintiff was informed of the facts through the administration proceedings on her estate, but the complaint fails to allege that plaintiff believed the allegations, or that the fourteen years were suffered to elapse in reliance thereon, the complaint is insufficient.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 192.*]

11. EXECUTORS AND ADMINISTRATORS (§ 314*)—ACTIONS FOR LEGACY—COMPLAINT—PROPERTY OMITTED FROM INVENTORY—SUFFICIENCY OF DESCRIPTION.

Where a complaint against the estate of an executrix for the balance of a legacy merely alleged that there came into the possession of the executrix the sum of \$40,000 in money and \$10,000 in notes and mortgages belonging to the testator's estate, and that plaintiff did not know of or discover that the testator was the owner

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

of such property, or that the executrix had come into possession of it, until after her death, and does not otherwise state conditions excusing a timely discovery of the facts, it is defective and uncertain as to the description of the property alleged to have been concealed, especially the notes and mortgages and is subject to demurrer on that ground.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Annie Burke against James Maguire, administrator of Bridget McDermott. From a judgment for defendant sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The following is the opinion of SHAW, J., in department No. 1, with whom ANGELLOTTI and SLOSS, JJ., concurred:

This is one of nine appeals taken in nine actions against the defendant, each by a different plaintiff. The several plaintiffs are legatees under the will of Hugh McDermott, deceased, and distributees under the final distribution of his estate. Bridget McDermott was the executrix of his estate, and each plaintiff is herein suing the administrator of her estate to recover the share of the legacy to which he is entitled under the distribution. The lower court in each case sustained a demurrer to the complaint, and gave judgment for the defendant, from which plaintiff appeals. The allegations are the same in each case, and by order of this court, upon the stipulation of the parties, the nine appeals have been consolidated and are presented to this court for decision upon the transcript of the record in the case wherein Annie Burke is the plaintiff.

Hugh McDermott died on January 9, 1890. His will bequeathed to these plaintiffs each a separate money legacy, amounting in all to the sum of \$16,700. This sum was to be delivered to two persons named as trustees to be kept by them during the life of his wife Bridget McDermott, the interest and income therefrom to be paid to her during her lifetime, and, upon her death, the fund to be by them distributed to the legatees thereof. The trustees were to qualify by giving bonds. The will was duly probated, Bridget McDermott qualified as executrix, the usual proceedings in administration were had, and a final distribution was ordered in accordance with the will. According to the final account, as settled, the amount applicable to the payment of all these legacies, after paying debts and preferred legacies, was only \$1,593.66. This sum the executrix was directed by the decree to pay to the trustees upon their giving the bonds as required. The trustees did not qualify by giving the required bonds. The decree of distribution was made on April 7, 1894. Bridget McDermott

died December 30, 1902. These actions were begun June 27, 1904.

1. The second count of the complaint alleges the facts aforesaid, avers that the money distributed to the trustees was never paid to them, but that Bridget McDermott, until her death, retained possession thereof as executrix of Hugh McDermott's estate, and that plaintiff is entitled to a part of the fund of \$1,593.66 applicable to the legacies, and asks judgment against the estate of Bridget for the share due plaintiff. The order sustaining the demurrer states that "the same is hereby sustained upon the grounds as heretofore stated in the opinion on file herein." It is claimed that the order cannot be affirmed unless this court agrees with the lower court in the opinion referred to in the order. We do not so understand the law. If the complaint is insufficient upon any ground properly specified in the demurrer, the order must be sustained, although the lower court may have considered it sufficient in that respect, and may in its order have declared it defective only in some particular in which we hold it to be good. The defendant is entitled to the decision of this court on all questions presented by the demurrer and necessary to the decision made. *Wilson v. Carter*, 117 Cal. 53, 48 Pac. 983; *Wakeham v. Barker*, 82 Cal. 50, 22 Pac. 1131; *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129.

The second count does not aver that any claim for the demand sued on therein was ever presented for allowance against the estate of Bridget McDermott. A money judgment only is demanded. No attempt is made to follow specific trust property. The demand is clearly founded upon contract. The Code of Civil Procedure requires that such demands be presented to the administrator of the estate for allowance (section 1493), and provides that no action can be maintained thereon, unless a claim therefor has been so presented before the action is begun (section 1500). A complaint against an estate, stating a cause of action sounding in contract, which does not aver that a claim for the cause of action sued on has been thus presented to the administrator, fails to state a cause of action against the estate. *Morse v. Steele*, 149 Cal. 304, 86 Pac. 693; *Morrow v. Barker*, 119 Cal. 67, 51 Pac. 12; *Humboldt Soc. v. Burnham*, 111 Cal. 345, 43 Pac. 971; *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466; *Lichtenberg v. McGlynn*, 105 Cal. 45, 38 Pac. 541; *Ellissen v. Halleck*, 6 Cal. 393. This count is therefore fatally deficient for this reason.

It is urged that this point cannot be considered in this court on appeal because it is in the nature of matter in abatement, and the general demurrer merely states that this count "does not state facts sufficient to constitute a cause of action against said

defendant," without specifying this omission as the particular point in which it was claimed to be lacking. It was decided in this state very soon after the adoption of the practice act, which in this respect is the same as the present Code of Civil Procedure, that a general demurrer need not specify the particulars wherein the complaint failed to state facts constituting a cause of action, but that, if couched in the language above quoted, it would search the entire complaint, or the count thereof to which it was directed, for any and every failure to state a material fact. *Ellissen v. Halleck*, 6 Cal. 393; *Williamson v. Blattan*, 9 Cal. 501. Afterwards, in *Brown v. Martin*, 25 Cal. 91, an exception to this rule was made in cases where the bar of the statute of limitations appeared on the face of the complaint. Apparently, though not expressly, applying the familiar common-law rule that the benefit of this statute is a personal privilege which is waived unless specially pleaded, the court in that case held that a general demurrer which did not specify the bar of the statute as the defect relied on was insufficient to present that objection. This precedent has been uniformly followed ever since, so far as the statute of limitations is concerned. The opinion in the case also attempted to establish and recommended the future observance of a rule to the effect that a general demurrer must always specify the particular facts which it is claimed are not alleged, else it will be disregarded. This attempt proved futile, and in *Kent v. Snyder*, 30 Cal. 666, the rule suggested was repudiated, and it was declared that no specifications were necessary in a general demurrer, except where the benefit of a personal privilege, such as the statute of limitations, was claimed. Thenceforward this has been the accepted rule of pleading, and, so far as we are aware, the statute of limitations is the only personal privilege which has been declared to fall within the exception.

The failure to allege the presentation of a claim does not come within the reason of the exception. The presentation is required in order to protect the estate against unnecessary litigation, the administrator acts in a trust capacity, and it is his duty to insist upon a compliance with the plain provisions of section 1500. Its benefits are not personal to him, and it is not his personal privilege to waive them. It has been for many years uniformly considered that this objection was properly presented by a general demurrer not specifying any particulars. See *Morse v. Steele*, supra, and the other cases cited. In some cases, where no demurrer was filed, it has been held that the objection could not be raised on appeal, but must be first presented in some manner in the trial court. *Hentsch v. Porter*, 10 Cal. 555; *Peterson v. Hornblower*, 33 Cal. 278. It is difficult to sustain the distinction attempted to be made in these cases, but they

have not been questioned. In other cases cited by appellant there was either a defective allegation of the presentation of a claim, which this court held to be sufficient in the absence of a demurrer for uncertainty (*Chase v. Evoy*, 58 Cal. 353; *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 183; *Guerian v. Joyce*, 133 Cal. 405, 65 Pac. 972), or a presentation made after the action was begun and which was duly alleged and no demurrer was filed (*Bemmerly v. Woodward*, 124 Cal. 574, 57 Pac. 561), or the defendant had died after the suit was begun and before trial, and the court held that the objection that there was a failure on the trial to prove presentation of a claim to the defendant's estate, as required by section 1502 of the Code of Civil Procedure, in such cases is waived, if not made in the court below (*Coleman v. Woodworth*, 28 Cal. 568; *Bank v. Howland*, 42 Cal. 134; *Drake v. Foster*, 52 Cal. 227; *Preston v. Knapp*, 85 Cal. 559, 24 Pac. 811). None of these cases is in point here.

The appellant argues that the record shows that this point was not presented in the court below because it is not mentioned in the opinion of that court referred to in the order sustaining the demurrer. This does not prove the proposition. The opinion does not purport to state what points were presented in argument. The share of the \$1,593.66 due the respective plaintiffs is less than \$100, except in two of the cases in which it amounts to \$477.14. The demurrer on the ground that the court has no jurisdiction would be well taken but for the circumstance that the amount demanded was fixed to include both counts, and exceeds \$300 in each of the nine cases. Const. art. 6, § 5.

2. The first count of the complaint alleges that upon the death of Hugh McDermott there came into the possession of his widow, Bridget McDermott, some \$40,000 in money and \$10,000 in notes and mortgages, belonging to his estate, and which belonged to him in his lifetime; that she did not list this property in the inventory of the estate filed by her as his executrix and did not mention it in her accounts filed, nor account for it in any way, but concealed it from the court and from the plaintiff and other legatees, and falsely represented to the court and to said parties that Hugh McDermott at his death did not own any property, and none had come to her possession or knowledge except that listed in the inventory and mentioned in her accounts; that the plaintiff, the trustees named, and the other legatees, did not know or discover that Hugh McDermott was the owner of said concealed property, or that Bridget had come into possession of it upon his death, or had concealed its existence from them, or that her statements that the inventory and accounts described all his property and that none other had come to her possession or knowledge were false until after her death; that plaintiff was then, for the first time, informed of these facts, "by reason

of the administration proceedings," upon her estate "wherein it appeared" that she came into possession of said concealed property belonging to said Hugh McDermott, upon his death, and retained possession thereof until her death. This count alleges that the trustees failed to qualify, but it does not aver that the \$1,593.66, ordered distributed to said trustees, was not in fact paid to them, or that the plaintiff has not received her share thereof. In this count a recovery is sought only for so much of the concealed property as will be sufficient to pay the balance of plaintiff's legacy, after deducting her share of the \$1,593.66, distributed to the trustees. It alleges the due presentation of a claim for this balance.

The inventory containing the alleged false list was filed on October 18, 1890, nearly 14 years before these actions were begun. It is not alleged that the plaintiff did not know the contents of the inventory. It was a statement of record that the property therein described comprised the entire estate of Hugh McDermott. The several accounts and the petition for distribution were reiterations of the same statement. It is not averred that Bridget McDermott made the alleged false statements to the plaintiff in any other manner, or at any other time or place, than in these documents. Concerning such belated discoveries, this court has said: "After the lapse of so much time, and after the death of the original parties, equity, for the peace of society, scrutinizes with great particularity such bills as this, and it is not satisfied to retain one unless the fullest possible credible showing is made by the applicants for relief. It is not sufficient, therefore, to allege ignorance at one time and discovery at another. The facts and circumstances must themselves be pleaded in order that the court may determine whether the sources of knowledge at last availed of were not at all times open to plaintiffs, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiffs upon discovery, what was the nature of the concealment practiced, whether it consisted in mere silence, or was accompanied by active misrepresentation and fraudulent deception. * * * All are questions, which, upon the demand of the demurrer, should be answered by the bill in order that the chancellor, to whose conscience, in the first instance, the equity of the bill is addressed, should satisfy himself that plaintiffs have not neglected or slept upon their rights." *Robertson v. Burrell*, 110 Cal. 578, 42 Pac. 1086.

The complaints in these cases leave the court uninformed upon some of the points as to which disclosure is declared to be necessary. They do not state where the plaintiffs lived, nor whether or not they were acquainted with Hugh McDermott, in his lifetime, or were familiar with his property and possessions, or were so situated that they had

no knowledge thereof. The will, which is annexed to and made part of the complaint, indicates by its terms that Hugh McDermott was not acquainted with some of the plaintiffs, and that some of them at the time it was made lived out of the state. But these are mere inferences, and they cannot take the place of the positive allegations of fact which the law requires the plaintiff to make in order to show that his discovery or imputed knowledge of the fraud was within the period of three years before the action was begun. It is not stated that plaintiffs did not know of the actual existence of the \$40,000 in money and \$10,000 in mortgages. The latter, it may be presumed, were of record. It does not so appear in the complaints, nor do they state in what county the mortgaged property was situated, or explain why the plaintiffs still remain entirely ignorant of everything concerning them, excepting their aggregate amount. By the provisions of the will other legacies were preferred, and the plaintiff's legacies could not have been paid in full unless Hugh McDermott had possessed an estate worth more than \$80,000. His will was made December 7, 1889, a month and two days before his death. The petition for its probate, alleging that his entire estate consisted of certain notes and mortgages worth \$12,000 and certain real estate worth \$6,000, was filed March 15, 1890, some two months later, and the inventory and appraisal showing its value to be only \$18,728.58 was filed in the following October. We must assume that plaintiffs knew of these facts. They were at least sufficient to suggest some inquiry concerning the reasons for the great disparity between the bountiful provisions of the will and the meager ability of the testator to respond to its demands. No inquiry whatever was made.

It is not stated that plaintiffs believed the alleged false representations concerning the estate, nor that it was in reliance thereon that they suffered 14 years to elapse without the least diligence to learn the reason for the insufficiency of the estate to pay the liberal legacies provided in a will made so shortly before the death of the testator. It is the general rule that one who claims that his conduct has been influenced to his prejudice by alleged false statements of another must allege that he believed the false statements to be true and relied on them in his subsequent action relating to the subject thereof. 14 Am. & Eng. Ency. of Law, 106, 111; 8 Ency. of Plead. & Prac. 906; 20 Cyc. 39; *Estep v. Armstrong*, 69 Cal. 536, 11 Pac. 132; *Colton v. Stanford*, 82 Cal. 378, 383, 23 Pac. 16, 16 Am. St. Rep. 137. The first count shows on its face that the action is barred by the provisions of section 338 of the Code of Civil Procedure, unless brought within the exception of subdivision 4 thereof. We are of the opinion that it does not aver sufficient diligence to excuse the failure to discover

the alleged fraud within three years after it was perpetrated, or before the death of Bridget McDermott; that it does not sufficiently disclose the facts and circumstances surrounding the parties at the time the concealment is alleged to have taken place; and that it is insufficient because it does not aver that they believed the alleged false statement, and were thereby led to forego further inquiry. It is also defective in that it is uncertain as to the description of the property alleged to have been concealed, particularly of the notes and mortgages. A special demurrer presents this objection. No reasonable excuse is given for the alleged inability to give a more particular description of property of this character "discovered" in the manner alleged. The demurrer was properly sustained.

In each of the appeals the judgment of the superior court is affirmed.

Sullivan & Sullivan and Theo. J. Roche, for appellant. John J. Barrett, George C. Ross, and Ross & Ross, for respondent.

SHAW, J. A rehearing was granted in order to consider more fully the question whether or not the second count of the complaint, although insufficient as a complaint on a debt against the estate of Bridget McDermott, could be held good as a complaint in equity to follow a trust fund and obtain an order upon Maguire, either personally, or as administrator, to pay over to plaintiff the fund claimed by her, or her share of it, as money belonging to her which has come into his possession or control.

The complaint is clearly insufficient for that purpose. The general rule as to charging trustees is thus stated: "The general rule is that a plaintiff who seeks to charge a trustee with a breach of trust is bound to state a clear case upon his bill. Therefore acts of a trustee which may, or may not, be breaches of trust, must be so alleged that they necessarily appear to be breaches, or a demurrer will be sustained. The presumption is in favor of the performance of his duty by the trustee. The plaintiff must therefore allege and prove affirmatively a breach of the trust." 2 Perry on Trusts, § 890. "All the facts necessary to rebut these presumptions must be specifically averred." 2 Beach on Trusts, § 756. No breach of trust either by Bridget McDermott in her lifetime or by her administrator is shown. At the time of the distribution of the estate of her husband, Hugh McDermott, she had on hand the sum of \$1,593.66 which she was directed by the decree to pay to Byrnes and Maloney as trustees, upon the execution by them of a sufficient bond, the said sum to be by them kept during her lifetime and the income thereof paid to her, and at her death the principal to be paid to the several plaintiffs in these actions, as provided in Hugh McDermott's will. Byrnes and Maloney never qualified as such, nor did

other trustees in their stead, and hence Bridget McDermott could not pay the money to them, but was obliged to keep it herself. It is alleged that until the date of her death, some eight years afterwards, she "retained possession thereof as executrix" of her said husband's will. Under the circumstances this was her duty. It is not alleged that it was mingled with her own property, or converted to her own use. Neither of these facts can be presumed. Being entitled to the income from it, she had the right to invest it so that it would produce an income, using due care to invest safely. It is presumed that she did her duty as trustee of the fund, and hence we must assume that she kept it separate from her own property, and that, if she invested it, she did so in such manner as to show on its face that it was not her own but belonged to others and was held by her in trust for them. If the trustees mentioned in the will had qualified and upon their demand she had refused to pay over the fund to them, they could under the provisions of section 1666 of the Code of Civil Procedure have maintained an action against her to recover it as a debt. Perhaps, after her death, the beneficiaries could claim the same right under that section and could demand the sum of her administrator and sue for the same as a debt of her estate, although it had been converted by her to her own use. It seems perfectly clear that the complaint was framed on this theory, and that the omission in the second count to aver a presentation of the claim to the administrator was accidental. But, however this may be, it is certain that, without a showing that the trust fund is mingled with some part of her estate into which it can be traced, no action in equity can be maintained to have it declared a lien thereon, and to have it or its equivalent paid over to the beneficiaries, and that without averments of a conversion, or some other breach of trust by her, no action at law can be sustained against her estate without averring a presentation of a claim therefor.

With respect to the liability of the administrator personally, the complaint is equally defective. It is not averred that the fund, or any note, mortgage, or chose in action representing it, or any property into which it had been converted, ever came into his possession. It was no part of her estate, and, being segregated from the estate, as we must assume, it was not his duty to take possession of it as administrator of her estate. It was held by her as executrix of the estate of Hugh McDermott he did not succeed to her rights or duties as executrix of that estate, and he had no authority to act in that behalf. Our law so provides. Code Civ. Proc. § 1353; *Chevassus v. Burr*, 134 Cal. 434, 66 Pac. 568; *Bush v. Lindsey*, 44 Cal. 124. Upon her death the trust

ceased to be active, and nothing remained to be done under it except for the beneficiaries to take possession of the fund. Under these circumstances, if the administrator of her estate took possession of it, he would have no title or right in it, but would be a mere custodian or depository, to keep it until the persons entitled applied for it and thereupon to deliver it to them. His duty with respect to it in that case would be the same as with respect to any other property of another which might come lawfully into his possession without title or right to keep it against the rightful owner. If there is any presumption that he did take possession of it, which we do not say, it would be a presumption of fact, not of law, and if the plaintiff desired to rely upon it as a fact necessary to complete the statement of a cause of action against the administrator personally, the rules of pleading require that she should aver the fact. Furthermore, one lawfully in possession of property which he does not claim and which he has not converted to his own use, but is holding for the rightful owner with the intent to deliver it to him on demand, is entitled to an opportunity to comply with his duty before being subjected to a suit to recover it; that is, to a demand for its delivery. Such demand in such a case is a condition precedent to the right to maintain an action to follow the specific property, or recover it, and it must be alleged and proven. 13 Cyc. 806; 1 Cyc. 408, 694; *Bushnell v. McCauley*, 7 Cal. 421; *Campbell v. Jones*, 38 Cal. 507.

The case of *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141, is almost parallel. The complaint there did not allege the presentation of a claim, and hence was held insufficient as a complaint on a debt against the estate. A rehearing was granted to consider again whether or not it could be upheld as a complaint to enforce a trust. The court then said: "The defendant cannot be charged and held to account as trustee, except upon the averment that he has come into possession of the trust fund, or its substitute. If, at the time of his death, the defendant's testator was in possession of the trust fund, or other property into which he may have converted it, *and such fund or other property had come into the possession of the defendant*, he would have held it upon the same terms as his testator held it. * * * Such fund would have constituted no part of the testator's assets, and the defendant would not have held it in his capacity as executor, but in his capacity as succeeding trustee to the plaintiff's ward, and might have been compelled to account as such." (Italics ours.) See, also, *Rowland v. Madden*, 72 Cal. 17, 12 Pac. 226, 870.

It is suggested in the petition for rehearing that the case of *Elizalde v. Elizalde*, 137

Cal. 634, 66 Pac. 369, 70 Pac. 861, is authority for the claim that the complaint herein states a cause of action in equity to enforce a trust. That case is clearly distinguishable from the present case by the material fact, there distinctly alleged, proven, and found, that the trust fund in controversy had been by the testator mingled with money of his own which, including the trust fund, had come into the possession of the executor, facts which are entirely wanting here. The opinion cites *Lathrop v. Bampton* with approval, and it does not hold or intimate that it was not necessary in a suit in equity to aver that the administrator had come into possession of the trust fund which he was to be required to pay over. James Maguire is not made defendant in his personal capacity, but solely in his capacity as administrator. The prayer of the complaint is applicable jointly to both counts, and it does not ask for the enforcement of any trust, but does ask specifically for judgment "against said defendant" for a stated sum covering the demands set forth in both counts, "all to be made payable in due course of administration," which is the appropriate prayer in an action to recover a debt from an estate. These formal indications of intent to plead a mere debt might be disregarded and the complaint held good upon a different theory, in the interests of justice, if the facts alleged would warrant it. But the facts do not authorize it, and these forms of expression serve to emphasize what is reasonably apparent from the complaint as a whole, including both counts, that plaintiff's counsel believed that some advantage, possibly a jury trial, could be obtained by drafting the complaint as for a debt, instead of as a bill in equity, and that, with that end in view, the averments which might make it possible to hold it good as a cause of action to enforce a trust were purposely omitted.

We adhere to the opinion heretofore rendered in department, and adopt it as the opinion of the court in bank.

We concur: ANGELLOTTI, J; SLOSS, J; HENSHAW, J; LORIGAN, J.

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DE FORREST v. COFFEY, Judge. (S. F. 5,030.)

(Supreme Court of California. Oct. 21, 1908.)

1. MANDAMUS (§ 38*)—MINISTERIAL DUTY.

If a judge had no discretion, in a receivership proceeding against an insolvent trust company, to refuse a petition for leave to file an independent suit, petitioner is entitled to a writ of mandate to compel the judge to grant the petition.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 38.*]

2. RECEIVERS (§ 174*)—LEAVE TO SUE—JUDICIAL DISCRETION—INTERVENTION OR INDEPENDENT SUIT.

It was within the discretion of the superior court, in a receivership proceeding against an insolvent trust company, to require a petitioner to litigate his claim to recover money fraudulently received by the company for deposit after it became insolvent and suspended payments, by intervening in the receivership proceedings, and hence it was not an abuse of discretion to deny leave to sue the receiver on the claim in an independent suit; the court having ample legal and equitable jurisdiction to grant petitioner any relief which the facts alleged in his petition may entitle him to.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 336; Dec. Dig. § 174.*]

3. MANDAMUS (§ 168*)—PROCEEDINGS—LEAVE TO SUE RECEIVER—PRESUMPTIONS.

On petition for a writ of mandate to require the superior court, in a receivership proceeding against an insolvent trust company, to grant leave to sue the receiver in an independent suit for money fraudulently received by the company for deposit after it became insolvent, it must be assumed that the money claimed came into the receiver's possession and is held by him under claim that it is part of the assets.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 168.*]

4. RECEIVERS (§ 174*)—LEAVE TO SUE—JUDICIAL DISCRETION—INTERVENTION OR INDEPENDENT SUIT.

While the court in a special proceeding to liquidate the affairs of an insolvent bank holds the assets through the receiver, it only does so to conserve the interests of those properly entitled to share in them; and while the court will not permit interference with the property without its leave, it will not withhold it from one showing himself entitled to it, but whether it will permit an independent suit relative to property in the receiver's hands or will compel intervention is a matter within its discretion, when the rights involved can be as fairly determined in one way as in the other.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 336; Dec. Dig. § 174.*]

5. RECEIVERS (§ 166*)—ACTIONS—INTERVENTION—SCOPE OF PROCEEDING.

On a claim by an intervener in a suit to liquidate the affairs of an insolvent bank, trial of the issues formed on the petition of intervention proceeds as in any ordinary action, and the proceeding is substantially an independent action from the judgment in which any party aggrieved may appeal; the court being empowered to call a jury, findings of fact and conclusions of law being made and filed, and judgment being entered allowing or denying the claim.

[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 166.*]

Beatty, C. J., dissenting.

In Bank. Application by J. De Forrest for a writ of mandate to the superior court of the city and county of San Francisco, and to J. V. Coffey, judge thereof. Alternative writ discharged, and petition dismissed.

Milton T. U'Ren, for petitioner. J. V. De Laveaga and E. De Los Magee, for respondent.

LORIGAN, J. This is an application for a writ of mandate to compel the respondent, as judge of the superior court, to make an order granting leave to the petitioner to

bring an action against E. J. Le Breton, as receiver of the California Safe Deposit & Trust Company, a banking corporation, to recover from said receiver the sum of \$2,100 alleged to be in his possession but belonging to the petitioner.

The petition for the writ sets forth, referring to its recitals in a general way, that for a long time prior to the 30th day of October, 1907, the California Safe Deposit & Trust Company was a corporation organized under the laws of this state and engaged in a general banking business in the city and county of San Francisco; that on the last-mentioned date, about the hour of 2 o'clock p. m., said bank, being insolvent, suspended payments and ceased to do business; that, notwithstanding this, the officials of the bank permitted and allowed its receiving teller to remain at the receiving window of said bank and accept deposits; that on said 30th day of October, 1907, about the hour aforesaid, the petitioner, having no knowledge of the insolvency of the bank or that it had ceased to do business, deposited with said bank, and there was accepted by said receiving teller, with the full knowledge of the insolvency of the bank, the sum of \$2,100, which consisted of a check drawn upon the Anglo-Californian Bank, Limited, by the California Title Insurance & Trust Company, payable to the petitioner and duly indorsed by him and delivered to the receiving teller; that the said California Safe Deposit & Trust Company immediately upon acquiring possession of said check caused it to be carried by special messenger to the Anglo-Californian Bank, where it was cashed by said bank and the \$2,100 carried back to the office of the California Safe Deposit & Trust Company, which took control and possession of the money and retained possession thereof until said money was taken possession and control of by the Bank Commissioners of the state of California, and thereafter delivered into the possession of said E. J. Le Breton as a receiver; that after the bank commissioners had so taken possession of this money, together with the property and effects of said California Safe Deposit & Trust Company, an action was commenced on December 9, 1907, in the department of the superior court of the city and county of San Francisco, of which the respondent is presiding judge, in the name of the people of the state, by the attorney general thereof, against the said California Safe Deposit & Trust Company and its directors and trustees, to have it decreed that said corporation was insolvent, and to have a receiver appointed for the purpose of winding and closing up the affairs of said corporation; that thereafter on a hearing duly had a decree was entered by said superior court adjudging said corporation insolvent, prohibiting its directors and trustees from transacting any further

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

business, and appointing E. J. Le Breton receiver of said bank for the purposes of liquidation under the direction of said court, and ordering said bank commissioners to surrender the property of said corporation then in their possession to said E. J. Le Breton as receiver of said bank; that said E. J. Le Breton qualified as such receiver, and the bank commissioners delivered to him the property and assets of said bank, and in particular delivered to him said sum of \$2,100, of which the said receiver is now in possession; that on April 15, 1908, petitioner filed a verified petition setting forth the above facts, and asking for an order of court allowing and permitting him to file an independent action against the said E. J. Le Breton as receiver to compel him to deliver and pay over to the petitioner the said sum of \$2,100 deposited in said bank as aforesaid, which petition coming on for hearing, after notice to the receiver, was by the respondent denied.

Petitioner now applies to this court in this original proceeding in mandamus to compel the respondent to grant said order permitting him to sue said receiver.

The answer to the petition here avers that the superior court of the city and county of San Francisco, respondent presiding therein, had duly made it a rule of practice and procedure that all matters, things, causes of action, or petitions affecting in any way the possession of any property whatsoever in the hands of E. J. Le Breton, as receiver of the California Safe Deposit & Trust Company, or in any way affecting the assets thereof, in the hands of said receiver or the distribution thereof, shall be tried by a petition in the nature of an intervention filed by the person claiming any rights with reference thereto, in the action wherein said receiver was appointed, "and that upon the filing of said petition said superior court shall thereupon and ex parte make and give its order directing * * * such receiver to show cause upon a day fixed * * * why the relief prayed in the petition in intervention shall not be granted, and that upon such hearing the said superior court shall proceed to try such issue of fact or law as the said receiver may raise to said petition in the manner of the trial of an ordinary action at law, and that, upon a final hearing of such issues * * * the said superior court shall make its decision and judgment and shall file its findings of fact in the manner of an ordinary action."

While other matters are stated both in the petition and answer, those which we have mentioned are the material ones and form the basis upon which the legal proposition involved is to be determined.

The original proceeding in which the receiver was appointed is still pending in the superior court, but the petitioner did not file any petition in the nature of an intervention in that proceeding itself, as required by the rule of practice and procedure set

forth in the answer. In fact, the position he assumes on the application for this writ of mandate is that he was not required to do so, but had an absolute right, on his application therefor, to have an order of court made granting him leave to maintain a separate and independent suit in another tribunal against the receiver for the recovery of the property, and that it was the clear duty of respondent to have granted him such leave. It must, of course, be conceded that if, upon the showing made upon the application for leave to sue, no discretion was left to respondent but to grant the petition, then petitioner is entitled to the issuance of this writ of mandate to compel respondent to act as the law required him to do.

This brings us to the real question in issue, namely, whether upon that showing any discretion was vested in the court to grant or refuse the application.

It is claimed by the petitioner upon the facts set forth in his petition that, the bank having received his deposit after it had become insolvent, the title to the deposit never passed from him, and that, notwithstanding it went into the hands of the receiver as an apparent asset of the insolvent corporation, petitioner had a right to maintain an action at law against the receiver to recover the full amount of said deposit.

The position of the respondent is that, conceding the receipt of the money by the bank while insolvent, still the title to the property passed to the bank subject to a right on the part of petitioner to rescind the contract of deposit for fraud and to recover the money as a trust fund if he is able to trace it, and, hence a suit against the receiver is purely of an equitable nature. We do not discuss these different theories as to the nature of the action the petitioner might maintain, because it is of no moment to the question here. The only proposition with which we are concerned is, did the court have the discretion to require the petitioner to litigate his claim, whether legal or equitable, by intervening in the proceeding in which the receiver was appointed? and that it had, we think is well settled by the authorities.

Independent of the fact that but one form of action is permitted in this state, whether the action is of a legal or equitable nature, it is to be observed that the same tribunal which has jurisdiction in a special proceeding involving the liquidation of an insolvent banking corporation has also ample legal and equitable jurisdiction to grant the petitioner any relief which the facts alleged in his petition may entitle him to. There is nothing in the procedure with reference to special proceedings involving the liquidation of insolvent banking corporations which limits or constrains the exercise of the ample legal and equitable powers of the superior court, so that one making such a claim as the petitioner does here, against the receiver, as to the assets of

the corporation, cannot have his claim as fully and fairly determined by intervention therein as by bringing an independent action. For the purposes of present consideration it must be assumed that the money to which the petitioner asserts his right came into the possession of the receiver and is held by him under claim that it is a part of the assets of the insolvent corporation. While the court in the special proceeding for liquidation takes charge of the assets of an insolvent bank and holds them through its officer, the receiver, it only does so to conserve the interests of those who are properly entitled to share in them. It assumes the administration of the entire estate; controls the conduct of the receiver, who is its officer, and whose possession of the assets is the possession of the court; it holds the property and administers the insolvent estate through the receiver in the interest and for the benefit of those who it may ultimately determine are entitled to it. The receiver is under the control of the court, as is the property of which he is the custodian, and while the court will not permit any interference with such property without its leave, neither will it withhold such property from one who shows he is entitled to it. But whether the court will permit, upon application, an independent suit to be brought relative to the property in the hands of the receiver, or will compel intervention in the proceeding in which the receiver is appointed, is a matter for its discretion. It is not required to assume jurisdiction of all controversies to which the receiver may become a party, but may upon application permit them to be determined in some other competent tribunal. It is not, however, in all cases required to do so, but may reserve to itself the determination of these matters in the original proceedings in which the receiver was appointed, when such rights can be as fairly determined by intervention as if an independent action were brought. When the court cannot afford the same relief in intervention as a claimant would be entitled to in an independent action or where by virtue of some statutory or constitutional provision a particular kind of action must be brought in some jurisdiction other than where the original special proceeding is pending, the court will undoubtedly grant leave to bring it, and it would be an abuse of discretion not to do so. So, too, even in cases where it would be proper for the court to dispose of the controversy under an intervention in the original special proceeding, it may, nevertheless, grant permission to bring an independent suit. It is not, however, required to do so, and when, by virtue of its ample legal and equitable jurisdiction, it can grant full relief in all proper form of law to a party asserting a claim against the receiver by his intervening in the original proceeding, it is no abuse of discretion to re-

fuse him permission to bring an independent suit. This is the rule as uniformly laid down by the authorities.

It is said by High in his work on Receivers (section 254b): "The more common practice, and that which has been generally commended by the courts, is to hear and determine all rights of action and demands against a receiver by petition in the cause in which he was appointed, without remitting the parties to a new and independent suit; and it rests wholly within the discretion of the court to grant leave to bring an independent action against its receiver or to determine the controversy upon petition in the original cause, directing, if necessary, an issue to be tried by a jury as to questions of fact or of damages. * * * So, if an equitable right or title is asserted in property which is in the custody of a receiver, the court will not ordinarily permit an action to be brought against him, but will require the claimant to proceed by petition; and persons having a claim or lien upon a fund in a receiver's hands should assert such claim by petition, rather than by an action against the receiver."

The same rule is stated in Alderson on Receivers (section 523), where the author says: "It rests in the discretion of the court to allow a party claiming rights against its receiver to bring an independent action against him or to compel such party to proceed against him by petition in the action in which he is receiver. * * * If the relief is sought by an intervening petition, the court may direct that issues of fact be tried by a jury, and whether such issues shall be tried by a jury or referred to a master for determination and investigation is a matter in which the court may exercise its discretion. Persons having claims against property in the hands of a receiver are not required to institute a new action to enforce them, but instead of asking leave to bring such action they may intervene in the original suit by petition and have their rights adjudicated, and this is the common practice. * * * If, when leave to sue is asked, it appear that the case is plain and that there is no necessity for instituting a new suit, the court may proceed to a final determination. An order denying an application to sue a receiver will be affirmed unless there has been an abuse of discretion."

Pomeroy, in his work on Equity Jurisprudence (volume 5, § 177), says: "While it is in some instances proper to direct the prosecution of an action at law against a receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief to the court in which the receiver is acting."

See, also, *Meeker v. Sprague*, 5 Wash. 243, 31 Pac. 628; *Mechanics' National Bank, etc., v. Landauer*, 68 Wis. 44, 31 N. W. 160; *Melendy v. Barbour*, 78 Va. 544; *Kennedy*

v. I. C. & L. R. Co. (C. C.) 3 Fed. 97; *Gunning v. Sorg*, 113 Ill. App. 332; *Barton v. Barber*, 104 U. S. 126, 26 L. Ed. 672; and *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815.

In the latter case, at page 479 of 149 U. S., at page 1010 of 13 Sup. Ct. (37 L. Ed. 815), it is said: "It is for the court, in its discretion, to decide whether it will determine for itself all claims for or against the receiver or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust or settle them without suit, as in his judgment may be most beneficial to those interested in the estate. Any claims against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; but no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him."

Aside from these authorities, this court has in *Pacific Railway Company v. Wade*, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754, 25 Am. St. Rep. 201, recognized this as the established rule. In that case the question was whether the court in the original proceeding in which the receiver was appointed had jurisdiction to determine the amount of damages which would be sustained by the insolvent street railway company in having its track intersected and used by another street railway company. It was held that it had; this court, at pages 453 and 455 of 91 Cal., at pages 769, 770 of 27 Pac. (13 L. R. A. 754, 25 Am. St. Rep. 201), saying: "The question to be determined is, simply, whether the court, which, through its receiver, has the custody and control of the insolvent corporation's property, has the power to determine the compensation, * * * or whether the electric company must * * * bring an action therefor against the receiver with the permission of the court. * * * The only question to be determined is, what the amount due the cable company is? It is like any other claim for damages or compensation in favor of a corporation whose property is in the hands of a receiver, and is to be determined in the same way. As to the manner of determining such question, there has been some discordance of opinion among judges, but so far as we have investigated the subject, there had been no conflict of decisions; the cases all hold that while it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver to determine the amount of compensation or damages to be paid, the better and more commonly recognized practice is to apply for relief to the court by petition, in which the receiver is acting. The rule applies to all

cases of damages to person or property, whether occasioned prior or subsequent to the appointment of the receiver."

Certainly, no sound reason can be advanced why, if the court has the right to take jurisdiction of the question of damages in the original proceeding in which the receiver is appointed, it has not equally jurisdiction to determine the simple question of the right of the petitioner to recover personal property in the hands of the receiver, or to have a preferential lien impressed in his favor upon the assets of the insolvent corporation in the hands of the receiver.

Within the rule of these authorities it is therefore apparent that there was no abuse of discretion in denying the application of petitioner for leave to bring an independent suit. Under the procedure established by the superior court the petitioner upon intervening could allege the facts upon which his claim of relief was founded, and upon the answer of the receiver the court would proceed to determine the issues raised. If these were such as required a trial by jury, the superior court, as such, has power to call a jury and have the issues tried before it as in any other action. The trial of the issues proceeds as in any ordinary action, and findings of fact and conclusions of law are made and filed as required in other actions, and judgment entered allowing or denying the claim asserted. The proceeding, while in the nature of an intervention, is treated as substantially an independent action, from the judgment in which any party aggrieved may appeal. *Pacific Railway Company v. Wade*, 91 Cal. 456, 27 Pac. 768, 13 L. R. A. 754, 25 Am. St. Rep. 201; *First National Bank v. Barnum*, etc., 58 Mich. 124, 315, 24 N. W. 543, 25 N. W. 202, 55 Am. Rep. 660; *Porter v. Kingman*, 126 Mass. 141; *High on Receivers*, § 254c; *Anglo-Californian Bank v. Superior Court* (Cal.) 96 Pac. 803.

In fact, after the intervention, the court having jurisdiction in the original proceeding in which the receiver is appointed, can do as complete and exact justice as to the claim of petitioner as if he were asserting it in an independent action, at the same time the intervention affording all parties an opportunity for a more simple and expeditious determination of the controversy than an independent action would. In determining the right of the petitioner under the intervention, the court proceeds under the same rules and grants him the same relief as if he were the plaintiff in an independent suit, and the same right of appeal is preserved to him. He is deprived of no right in the intervention which he is guaranteed under the law in an independent action, should he have been permitted to bring one, and, this being so, there was no abuse of discretion in refusing to grant leave to bring such independent suit.

We are not cited by petitioner to any authority which supports his claim that it was the legal duty of the court to allow him by an independent action to assert the character of the claim against the receiver which his petition discloses. None are cited from other jurisdictions, and the cases of *Tapscott v. Lyon*, 103 Cal. 297, 37 Pac. 225, and *Murray v. Etchepare*, 132 Cal. 286, 64 Pac. 282, cited from this court, involve no question of the exercise of discretion upon an application for leave to bring an independent action. All they declare is that leave to sue a receiver will never be refused by the court in a proper case, which is, undoubtedly, true. The discretion which is vested in the court on the subject is a discretion which is regulated by fixed rules of law. It is not an absolute or arbitrary discretion. If a petition for leave to bring an independent suit discloses a case where it should be granted, it is the duty of the court to do so, and it doubtless would. If it does not, it will be compelled by mandamus to do it. But the petition here does not disclose such a case. Under the authorities, as we have seen, it was discretionary with the court to either grant or refuse his application, and hence there was no proper case requiring leave to be granted.

The case of *Petaluma Bank v. Superior Court*, 111 Cal. 488, 44 Pac. 177, cited by petitioner, has no bearing on the matter involved here. It appears from that case that in a divorce action a receiver had been appointed to take charge of the property of the husband in order to secure the payment of alimony which had been decreed the wife. Prior to the appointment of the receiver, the Petaluma Bank had obtained judgment against the husband defendant in the divorce suit which became a lien upon the lands owned by him and of which the receiver in the divorce action was directed to take possession. The bank, being about to have said lands sold to enforce the lien of its judgment, applied to the superior court in the divorce suit for an order directing its receiver not to interfere with the officers of the superior court in which its judgment had been obtained in the lawful execution of said judgment. The order was refused. It will be observed that the application was not for permission to sue the receiver; it was simply for permission to the bank to take such steps as the law afforded to enforce the lien of its judgment against property, the possession of which the receiver was ordered to take. On application to this court for mandamus to compel the superior court to make the order the writ was denied, this court holding that the Petaluma Bank had an absolute legal right to enforce its lien against the property without at all applying to the superior court

for permission to do so. It is obvious that there is a radical difference in the case cited and the matter at bar. A receiver in a divorce case only conserves the property of the husband for the purpose of securing the wife in her claim to alimony. He has nothing to do with claims of the creditors of the husband. In the case cited no question of permission to sue the receiver was involved. No such application could have been made, as there was no suit to be brought against him, and the enforcement of the lien of the judgment obtained by the bank could not at all physically disturb the possession of the receiver. The bank was enforcing a pure, fixed, legal right, the exercise of which, it was held, the court appointing the receiver could not control. But in an insolvency proceeding the court sequesters the estate of the insolvent, and its receiver holds it for the benefit of all the creditors. It has plenary power over the assets of the estate, and one who asserts a claim against them must not only apply for permission to do so, but under the authorities it is discretionary with the court to reserve to itself the determination of the validity of the claim or to permit it to be litigated in some other competent tribunal, and, as far as the nature of the claim asserted here is concerned, the opinion in the *Petaluma Bank Case* contains nothing contrary to the general rule as established by the authorities to which we have heretofore referred.

The superior court, therefore, was not guilty of any abuse of discretion in refusing to permit petitioner to bring an independent suit, and was entirely warranted in reserving to itself the determination of the validity of the claim made by petitioner against the receiver.

The alternative writ is discharged, and the petition dismissed.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

I dissent: BEATTY, C. J.

154 Cal. 341

HARLAN v. HARLAN. (Sac. 1500.)
(Supreme Court of California. Oct. 8, 1908.)

1. DIVORCE (§ 311*)—ORDER FOR SUPPORT OF CHILDREN—ENFORCEMENT—EXECUTION.

Under Code Civ. Proc. § 685, authorizing the enforcement of a judgment after the lapse of five years by leave of court on motion for that purpose, the court may direct execution for the amount unpaid on a valid order directing a divorced husband to pay a monthly sum for the future support of his children, and the mere fact that 10 years elapsed without making any effort to compel payment does not prevent the court, in its discretion, from ordering execution.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 311.*]

2. JUDGMENT (§ 518*)—COLLATERAL ATTACK—VALIDITY.

A motion to set aside an order directing a divorced husband to pay monthly a specified sum for the support of his children is a collateral attack on the order, and the only issue is whether the court in making it exceeded its jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. § 518.*]

3. DIVORCE (§ 254*)—PROPERTY RIGHTS OF PARTIES—ORDERS—JURISDICTION OF COURT.

Where the superior court has made a decree of divorce, which has by lapse of time become final, and has not in the decree itself reserved jurisdiction to make a supplementary decree, its only power to make a further order affecting the property rights of the parties is that granted by Civ. Code, §§ 138, 139, relating to orders respecting the support of a divorced wife and her children.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 254.*]

4. DIVORCE (§ 309*).

Where a divorce is granted for an offense of the husband, and the decree, as expressly authorized by Civ. Code, § 139, requires him to provide for the maintenance of the children or the support of the wife, the court may, at any time, modify the order making such provision, but when the decree is silent on the subject, the court cannot, under the section, thereafter enter any order relating thereto.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 803; Dec. Dig. § 309.*]

5. DIVORCE (§ 308*).

Civ. Code, § 138, authorizing the court, in an action for divorce, before and after judgment, to give directions for the custody, care, and education of the children, and at any time vacate or modify the same, authorizes such action by the court after judgment, whether or not the decree referred to the subject.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 308.*]

6. DIVORCE (§ 308*).

The power to give direction for the custody, care, and education of the children, vested in the court by Civ. Code, § 138, providing that the court in an action for divorce may, before or after judgment, give such directions for the custody, care, and education of the children as may seem proper, involves the right not merely to declare who shall have the custody and what shall be the nature of the care and education of the children, but also, by necessary implication, to require the payment by one of the parties of such sums as may be necessary to carry out the objects contemplated by the statute, and an order for the payment of money for any purpose embraced within the phrase, "custody, care, and education of the children," may be made after a judgment of divorce, whether or not the decree provided therefor.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 308.*]

7. DIVORCE (§ 308*)—"CARE"—MAINTENANCE.

The word "care" in Civ. Code, § 138, authorizing the court in an action for divorce, before or after judgment, to give such directions for the custody, care, and education of the children as may be proper, etc., is, if not synonymous with "maintenance," a broader term, and, when combined with "custody" and "education," it includes every element of provision for the physical, moral, and mental well-being of the children, and an order for the benefit of the children is within the jurisdiction of the court, whether it uses the term "maintenance and sup-

port" or the broader expression "custody, care and education."

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 308.*]

For other definitions, see Words and Phrases, vol. 1, pp. 971-973; vol. 8, p. 7596.]

8. DIVORCE (§ 308*).

Civ. Code, § 138, authorizing the court in an action for divorce to give, before or after judgment, such directions for the custody, care, and education of the children as may seem proper, is enacted for the protection of the children, and when the court orders that money be paid by the father for the custody, care, or education of his children, it gives directions for their custody, care, or education, and the court may order money to be thus paid without giving specific directions regarding the manner of such custody, care, or education.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 801; Dec. Dig. § 308.*]

9. DIVORCE (§ 308*).

An order entered subsequent to the granting of a divorce awarding the wife the custody of the children and a portion of the community property in lieu of any further provision for her personal support, which requires the husband to make payment for the future "support, education and maintenance" of the children, is within Civ. Code, § 138, authorizing the court, in an action for divorce, to give, before or after judgment, such directions for the custody, care and education of the children as may seem proper.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 801; Dec. Dig. § 308.*]

Appeal from Superior Court, Yolo County; E. E. Gaddis, Judge.

Action for divorce by Lena J. Harlan against W. C. Harlan. From an order denying a motion to set aside an order directing the issuance of an execution for the sums due on an order requiring defendant to pay to plaintiff, for the support of their children, a monthly sum and to set aside the order for such support, he appeals. Affirmed.

N. W. Hawkins and Charles W. Thomas, for appellant. Hurst & Hurst (White & Miller, of counsel), for respondent.

SLOSS, J. In May, 1891, the superior court of Yolo county entered a decree granting to Lena J. Harlan a divorce from W. C. Harlan. The decree awarded to the wife, plaintiff in the action, the custody of the three minor children of the parties, and awarded to her a portion of the community property. It was further decreed that "the property so awarded to plaintiff shall be in lieu of any further provision or alimony for her personal maintenance or support."

In April, 1895, Lena J. Harlan filed in the same action a petition for an order requiring the defendant to pay her the amount theretofore expended by her for the support, maintenance, and education of the children, "and a further periodical amount hereafter for the support and education of his said children." The defendant answered this petition, and, after a hearing, the court, in August, 1895, made an order that the plaintiff retain the custody of the children, and that defendant

pay to plaintiff "for their support, education and maintenance" the sum of \$16 per month for each child, or \$48 for the three, payments to commence on September 1, 1895. On September 11, 1895, the court made a modifying order directing the defendant to pay the plaintiff \$32 per month, instead of \$48.

Ten years later, in September, 1905, the plaintiff applied for an order directing that execution issue for an amount claimed to be due and unpaid under the order of September, 1895, and, upon an ex parte showing, the court ordered that execution issue against the defendant for \$4,096.55. Thereupon the defendant moved to set aside the order of September 11, 1895, and the order directing execution to issue thereon. The court, reducing the amount for which execution was to issue to \$4,078.30, denied the defendant's motion, and ordered execution to issue for the last-named sum. From this order the defendant has appealed.

If the order of September, 1895, requiring the defendant to pay \$32 monthly to the plaintiff, was valid, there can be no question that the court had power at any time after the entry of the order to direct execution to issue for the amount unpaid. Code Civ. Proc. § 685; *Harrier v. Bassford*, 145 Cal. 529, 78 Pac. 1038; *Doehla v. Phillips*, 151 Cal. 488, 91 Pac. 330. And the mere fact that plaintiff had allowed 10 years to elapse without making any effort to compel payment affords no ground for the contention that the court abused its discretion in ordering execution to issue. *Doehla v. Phillips*, supra.

The appellant must, therefore, succeed, if at all, by showing the invalidity of the order of 1895, which the plaintiff was seeking to enforce by means of an execution. In this proceeding, which is clearly a collateral attack upon that order, the appellant is limited to the single contention that the court, in making the order assailed, exceeded its jurisdiction, and that, in consequence, the order itself is void. In passing upon this contention, the question for decision is whether a court which had, in 1891, made a decree of divorce in favor of a wife, awarding to her the custody of the minor children, but making no provision for their support by the husband, retained power, after the time for appeal from the decree had passed, to make an order requiring the divorced husband to pay for the future "support, education and maintenance" of said children.

The answer to this question must be sought in sections 138 and 139 of the Civil Code. Section 138, at the time the judgment of divorce in this case was made and entered, read as follows: "In an action for divorce the court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same." The provision of section 139 is that, "where a divorce is granted for an offense of the husband, the

court may compel him to provide for the maintenance of the children of the marriage, and to make suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively, and the court may, from time to time, modify its orders in these respects." The proper construction of these sections has been the subject of consideration by this court in several cases.

Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70, was an action for divorce commenced by the wife. A decree was rendered, granting her a divorce, and awarding her certain community property. There was no provision for alimony. After the judgment had become final, the court, upon the petition of the plaintiff that the defendant be required to pay to her a certain monthly sum "to support herself, and support and educate her said minor children," made an order that defendant pay to plaintiff the sum of \$100 upon the 20th day of each month until the further order of the court. Upon appeal from this order it was held that the lower court was without jurisdiction to make the order appealed from. The court quotes the provisions of section 139 to the effect that the court may, under certain circumstances, compel the husband to provide for the maintenance of the children and to make a suitable allowance for the support of the wife, and that "the court may from time to time modify its orders in these respects." "But," it is said, "the latter section clearly contemplates that the right to alimony, as well as other financial and property rights, shall have been presented and litigated in the action for divorce and established by the judgment; and the provision is that where the right to alimony has been thus established, the amount may be changed by a modification of the order. But in the case at bar there is nothing to 'modify.' After the judgment granting the divorce the plaintiff was no longer the wife of the defendant, and he owed her no longer any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment." The case had to do with the construction of section 139 alone, and the court was careful to guard against the implication that it was intended to make any declaration regarding the extent of the power conferred by section 138. In this connection the opinion says: "It is not necessary here to determine what order the court might make 'after judgment,' under section 138 of the Civil Code, with respect to the 'custody, care, and education of the children of the marriage.' The order under review is for alimony for the wife, and for her support; and its character is not changed by the mention of the children."

McKay v. Superior Court, 120 Cal. 143, 52 Pac. 147, 40 L. R. A. 585, was an original application to this court for a writ of review.

In 1884, Emma J. McKay, then the wife of the petitioner, had obtained a decree of divorce from her husband. The decree awarded her the care, custody, and control of the minor children of the marriage, but contained no provision for alimony for their maintenance and support. In May, 1898, Emma J. McKay, who had since remarried, filed, in the action in which the decree of divorce had been granted, a petition praying an order to compel the defendant in that action to pay \$50 a month for the past support of each of the children and \$50 a month for the future support of each of them until the further order of the court. The order was made, and the defendant appealed therefrom, giving a bond to stay execution. Thereupon the wife obtained from the superior court an order directing the defendant to pay the sum of \$250 as attorney's fees to enable the minors to properly present their response to the appeal. The defendant applied to this court for a writ of review to annul the order last made. In passing upon his application this court deemed it necessary to consider the validity of the order requiring the payment of money for the support of the minor children, and determined that that order was not beyond the jurisdiction of the superior court. This conclusion was based upon the provisions of section 138 of the Civil Code, which was held to expressly vest in the superior court the power to make, before or after judgment, such order as might seem proper for the maintenance of minor children. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, and other cases are cited in support of this view. The court points out the distinction between the case before it and *Howell v. Howell*, supra, in which case, as was said, "section 138 of the Civil Code and the rights of minor children to maintenance and support under it were not before the court."

The order considered in *McKay v. Superior Court* was again the subject of consideration in *McKay v. McKay*, 125 Cal. 65, 57 Pac. 677. That was a direct appeal by the defendant from the order requiring him to pay to the plaintiff a certain sum for the past care, maintenance, education, and support of the children, and a further monthly sum for their future support, education, and maintenance. On such appeal the court was not limited to an examination of the power or jurisdiction of the lower court, but could and did determine whether that power had been rightly or erroneously exercised. It was held that the lower court erred in compelling the defendant to reimburse the plaintiff for expenses incurred in the maintenance, support, and education of the children prior to the time of her application, and the order was reversed with directions to the superior court to make such order as would be consistent with this view. In the opinion reference is made to *Howell v. Howell* and *McKay v. Superior*

Court, and it is pointed out that the *Howell* Case decides no more than that where no provision is made in the decree for the maintenance of the wife or the children the court has no authority under section 139 to subsequently make an order for such provision. Reference is again made to the *Erkenbrach* Case, which held that as the section of the revised statutes of New York, similar in its terms to section 138 of the Civil Code, authorized the court to make an order after judgment for the care, custody, and education of the children of the marriage, "it must be assumed that provision for the expenses reasonably to be incurred for the accomplishment of these objects was within the intention of the Legislature in framing the section."

Shattuck v. Shattuck, 135 Cal. 192, 67 Pac. 45, was an appeal by the defendant from an order made after judgment of divorce against him had become final, requiring him to contribute the sum of \$20 per month to the support of the minor child of himself and plaintiff. The decree of divorce had awarded the custody of the child to plaintiff (wife), but contained no provision in reference to the maintenance or support of the child. The opinion is very brief and is based entirely upon the decision in *McKay v. McKay*, supra. Of that case it is said that "it was there held that if the decree of divorce makes no provision for the maintenance of the children of the marriage, the court is without jurisdiction subsequently to make any order compelling either party to pay to the other for such maintenance; that the provision in section 138 of the Civil Code authorizing the court to vary or modify its decree 'after judgment' is limited to the directions therein for the 'custody, care and education' of the children, and that its power to provide for their 'maintenance' must be exercised at the time the decree of divorce is granted; that if it is not exercised at that time, and the decree is silent upon the subject, it can have no jurisdiction afterwards to make such provision." And upon the authority of *McKay v. McKay*, so construed, it was held that the superior court was without jurisdiction to render the judgment appealed from, and such judgment was reversed.

An endeavor to show a complete harmony and consistency in these various decisions would be a task of no little difficulty. This much, however, may be said to be the clear and unequivocal result of sections 138 and 139, together with the opinions of this court dealing with those sections. When the superior court has made a decree of divorce, which has, by lapse of time, become final, and has not, in the decree itself reserved jurisdiction to make a supplemental decree, its only power to make further orders affecting the property rights of the parties is that declared in sections 138 and 139 of the Civ-

11 Code. Where the divorce is granted for an offense of the husband and the decree requires him to provide for the maintenance of the children or the support of the wife, the court may at any time, under section 139, modify the order making provision for such maintenance or support. This section (139) does not, however, authorize the making of any order after final judgment where the decree itself contains nothing on the subject of maintenance of children or support of wife. Section 138, permitting the court to give directions for the custody, care, and education of the children, is not so limited. It authorizes action by the court before or after judgment, and where an order is made after judgment, the right to make it exists whether or not the subject of the additional order was touched upon in the decree. Section 138 does not assume to deal with allowances for the support of the wife, and it is clear, therefore, that such allowance cannot be made by order subsequent to the decree of divorce where the decree itself contains no provision regarding the wife's support. The power to give directions for the custody, care, and education of the children of the marriage, vested in the court by section 138, involves the right, not merely to declare who shall have the custody, and what shall be the nature of the care and education of the children, but also, by necessary implication, to require the payment, by one of the parties, of such sums as may be necessary in properly carrying out the objects contemplated by the statute.

There is nothing in any of the cases cited which conflicts with what we have so far said. And it would seem to follow that an order for the payment of money to be applied to any purpose which may fairly be said to be embraced within the phrase "custody, care and education of the children" may be made after a judgment of divorce, whether or not the decree has provided for these objects. But the Shattuck Case holds that an order for the "maintenance" of the children, subsequent to a decree which makes no provision for their maintenance, is not within the power of the court. If this conclusion be sound, it must be because "maintenance" is not included within "care and education." We are unable to see any force in this position. The word "care," as used in the statute, is, if not synonymous with maintenance, a broader term. *Kelly v. Jeffers*, 3 Del. 286, 50 Atl. 215; *Christy v. Pulliam*, 17 Ill. 59. Combined with "custody" and "education," it includes every element of provision for the physical, moral, and mental well-being of the child. That the duty of "caring" for a child can be properly discharged without furnishing to it adequate shelter, clothing, and food would hardly be contended. How, then, can it be said that the court, under its power to

give directions for the care, custody, and education of the children, has not the power to require money to be paid for their maintenance? If the order in the Shattuck Case had directed the husband to pay \$20 per month for the "care and education" of the minor child there would, in view of the rulings in the McKay Cases, have been no ground for contending that the court had exceeded its jurisdiction. In holding the contrary merely because, in seeking to accomplish substantially the same result, the court used the word "support" or "maintenance," we think too much stress was laid on a mere verbal distinction. Furthermore, we can find in *McKay v. McKay*, which is the sole authority relied on in the Shattuck Case, no warrant for the conclusion that an order for "support" or "maintenance" of minor children may not be made notwithstanding the fact that a preceding decree of divorce is silent on the subject of such support. All that was held in *McKay v. McKay* was that the court should not, by an order made in such a case, compel the husband to reimburse the wife or a third party for past expenditures incurred for the benefit of the children. The decision, read in connection with *McKay v. Superior Court*, fully supports the right of the court to make an order for future provision. The order there reviewed required payments for the "support, education and maintenance" of the children. It is not suggested in the opinion in 120 Cal. (52 Pac., 40 L. R. A.) or in that in 125 Cal. (57 Pac.) that the jurisdiction of the court was to be upheld because the order happened to contain the word "education," one of the terms employed in section 138. The reasoning of the decision is that all of the purposes declared in the order were within the scope of this section.

The order here in question directs payments for "support, education and maintenance" of the children of the marriage. The language is precisely the same as that used in *McKay v. McKay*, and, if there be any valid ground of distinction between that case and *Shattuck v. Shattuck*, the jurisdiction of the trial court in this case may well be sustained on the authority of the *McKay Case*. We believe, however, that there is no such ground, and that an order for the benefit of the children is equally within the jurisdiction of the court under section 138, whether it uses the terms "maintenance and support" or the broader and more inclusive expression "custody, care and education."

We have already pointed out that the power to give "directions" for the custody, care, and education of children carries with it the power to require payments of money for these purposes. It is contended that, if this be so, the court can order money to be paid only where it has given some separ-

ate specific direction regarding the manner of such custody, care, or education, and the payment is necessary to carry out such direction. But we see no reason for giving this, or any, narrow interpretation to section 138. It is a statute enacted for the protection of the children. Whatever may be the effect of a decree of divorce as between husband and wife, it does not destroy the obligation of either parent toward the children. A law intended to make it possible to enforce this obligation should be liberally construed. When the court orders that money be paid by the father for the custody, care, or education of his children, it is, according to the ordinary sense of the words, and certainly within the meaning of the statute, giving "directions" for their custody, care, or education. An order that money be paid for certain purposes implies a direction to the recipient that it be used for those purposes.

For these reasons, it must be held that the order of 1895, requiring the defendant to make payments for the future "support, education and maintenance" of his children, was within the jurisdiction of the court. It may be added that, with respect to decrees of divorce granted after May 2, 1905, the Legislature has, by an amendment to section 138, taking effect on that date, expressly included "maintenance and support" of children among the enumeration of the objects to be provided for by order made at, before, or after the hearing of an action for divorce. It is probable that the decision in *Shattuck v. Shattuck* was thought to make this change necessary in order to give effect to the real intention of the Legislature. We are satisfied, however, that the same intention had been declared by the prior enactment.

The order appealed from is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

9 Cal. App. 23

PATTEN & DAVIES LUMBER CO. v. GIBSON et al. (Civ. 508.)

(Court of Appeal, Second District, California. Sept. 14, 1908.)

1. MECHANICS' LIENS (§ 136*)—NOTICE—DESCRIPTION OF PROPERTY.

If the description in a mechanic's lien notice identifies the property by reference to facts, and clearly points to a piece of property and there is no other that will answer the description, it is sufficient.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 214; Dec. Dig. § 136.*]

2. MECHANICS' LIENS (§ 290*)—NOTICE—DESCRIPTION—IDENTITY—QUESTION OF FACT.

Whether the description of property in a mechanic's lien notice is sufficient to enable a

party to identify the property is a question of fact.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 290.*]

3. MECHANICS' LIENS (§ 290*)—FORECLOSURE—NOTICE—DESCRIPTION—ISSUES.

Where the description in a mechanic's lien notice was alleged to be sufficient for identification in a suit to foreclose which was not denied and there was no finding that the description was insufficient for identification, there was no issue on such question, and it was error to find as a matter of law that the notice was insufficient because of a misstatement of the block of the tract in which the property lay.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 290.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Patten & Davies Lumber Company against Dora May Gibson and others to foreclose a mechanic's lien. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Jones & Weller, for appellant. George L. Keefer and Walter L. Bowers, for respondents.

ALLEN, P. J. This is an action to foreclose a mechanic's lien by a materialman. The contract was admitted to be void for failure to record.

The court finds that the material was furnished and used for the construction of the building, and the only reason the judgment was given for respondents was on account of an error of description in the notice of lien. It appears from the complaint filed, and is not denied by the answer, that the defendant Dora May Gibson was the owner of lot 4, in block C, of the Pellissier tract, in the city of Los Angeles; that on the 29th day of September, 1905, she, as such owner, entered into a contract for the erection and construction of a dwelling house upon the property above described for an agreed price of \$2,000; that this contract was subscribed by the parties thereto and filed for record, but no plans and specifications referred to in said contract as being attached thereto were in fact attached to said contract or filed; that the contractor entered upon the performance of his contract and completed the same according to the terms thereof; that during the progress of the work the contractor purchased of plaintiff material of the value of \$477.63, which was in fact used in the construction of said house, and the same has not been paid for; that within due time plaintiff filed its notice of lien, which, among other things, contained "a description of the property sought to be charged with its lien sufficient for identification, to wit, the real property and building hereinbefore described; that said property was erroneously described in said claim of lien as lot 4, blk. 6, of the Pellissier tract, but that there is no block 6 in said Pellissier tract, and said defendant

Dora May Gibson does not own any other property in said Pellissier tract," except lot 4 in block C. The court finds that there are buildings other than the building belonging to said Dora May Gibson located on block C of the Pellissier tract, and, further, that the sum of \$500 was in the hands of defendant Gibson, due the contractor, at the time of the filing of the complaint in this proceeding, but which subsequent thereto she paid to the contractor.

The only question involved upon the appeal, therefore, is as to the sufficiency of the identification of the property contained in the notice of lien. "If the description (in the notice of lien) identifies the property by reference to the facts, that is, if it points clearly to a piece of property and there is no other one that will answer the description, it is sufficient." *Union Lumber Co. v. Simon*, 150 Cal. 758, 89 Pac. 1077, 1081. Mr. Phillips, in his work on Liens, lays down a test which is approved by our Supreme Court in *Union Lumber Co. v. Simon*, supra, namely: "If there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others, it will be sufficient." In commenting upon this, rule, our Supreme Court in the case last cited says: "Among the identifying facts which are held competent to be considered for determining its sufficiency are references to adjoining properties, a description of the building which has been constructed, the fact that the land upon which it is erected is the only property of the owner in that locality." The question of ability to identify, then, by reason of the description given, is a question of fact. It will be observed that the plaintiff avers as a fact that the description in the notice of lien was sufficient for identification, and it is not denied by the answer. Had an issue been raised with reference to this fact, it would have been competent for plaintiff to introduce evidence in support thereof. There is no finding that the description was insufficient in fact for identification, and the failure to raise an issue obviated the necessity therefor. The only finding of the court is as to the incorrectness of the description, but nothing therein to indicate that such incorrect description failed to properly identify the property. The finding that there is no block 6 in said tract eliminates the block description therefrom, and the description in the notice of lien stands as "lot 4 of the Pellissier tract." There is nothing in the record from which it can be inferred that any other lot in the tract has a similar numerical designation; in fact, nothing to indicate that the Pellissier tract contains any other block than C. The sufficiency of the description for identification being averred and not denied, we think the court erred in holding that as a matter of law the misstatement of the block

was insufficient for the purposes of identification.

Judgment reversed and cause remanded, with directions to enter a judgment and appropriate decree of foreclosure in plaintiff's favor and against defendant Gibson for the amount found due and unpaid on account of the material so furnished by plaintiff and used in the construction of said building.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 38

DUFFY LUMBER CO. v. STANTON et al.
(Civ. 480.)

(Court of Appeal, Second District, California.
Sept. 14, 1908.)

MECHANICS' LIENS (§ 111*)—RIGHT TO LIEN
—ABANDONMENT BY CONTRACTOR.

Under Code Civ. Proc. § 1200, providing that, where a contractor abandons the contract, the portion of the contract price applicable to liens shall be fixed by deducting from the value of the work and materials then done and furnished, the payments then made upon the contract, where, at the time the contractor abandoned the contract, the value of the work already done and materials furnished, including that on the ground, was \$46 in excess of the amount paid the contractor under the contract, a materialman could only have a lien for that sum, and was not entitled to judgment for 25 per cent. of the estimated value of labor done and materials furnished up to the time of abandonment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 144, 145; Dec. Dig. § 111.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the Duffy Lumber Company against Crissie M. Stanton and others. From a judgment in part for plaintiff, it appealed. Affirmed.

Schweitzer & Hutton, for appellant. Bernard Potter, for respondents.

SHAW, J. Plaintiff appeals upon the judgment roll. The court found that defendant entered into a valid contract in writing with one Cropper, whereby the latter for a specified sum agreed to furnish the labor and materials necessary to build and complete for defendant, as owner, a certain house upon the lot designated in said contract, which contract was duly filed in the office of the recorder of the county wherein said lot was situated; that after receiving from defendant the sum of \$1,000, paid pursuant to the terms of the contract, the contractor ceased work upon the building and abandoned his contract; that at the time of abandonment the value of the work already performed upon and materials furnished for said building by the contractor, pursuant to the terms of the contract, including materials upon the ground, estimated by the standard of the whole contract price, was the sum of \$46 in excess of that already paid to the contractor in accordance with

the terms of the contract. Thereupon the court rendered judgment, decreeing a lien upon the premises for the sum of \$46 in favor of plaintiff, who had furnished to the contractor materials of the value of \$732.79 for the construction of the building.

Appellant's contention that it is entitled to judgment for 25 per cent. of the estimated value of labor expended upon and materials furnished in the construction of the building up to the time of abandonment is fully answered by the opinion of the Supreme Court in the case of Hoffman-Marks Co. v. Spires et al. (Cal.) 97 Pac. 152, where it is held that in such cases section 1200 of the Code of Civil Procedure furnishes the rule for determining the extent to which the property shall be liable for liens of persons supplying materials. Measured by this rule, the judgment appealed from is correct.

It is therefore affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 9

TILDEN v. GOLDY MACH. CO. (Civ. 505.)
(Court of Appeal, Third District, California.
Sept. 10, 1908.)

1. **BILLS AND NOTES (§ 395*)—NONNEGOTIABLE NOTE—BLANK INDORSEMENT—DEMAND—NOTICE.**

One who writes his name on the back of a nonnegotiable note to give credit thereto is a guarantor, and is prima facie bound to pay the note on the principal's default, without demand or notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1008; Dec. Dig. § 395.*]

2. **CORPORATIONS (§ 414*)—OFFICERS—POWERS—EXECUTIVE COMMITTEE.**

Where a corporation's charter and by-laws authorized the appointment of an executive committee by the board of directors with all the powers of the board which might be lawfully delegated in the management of the company's business, and to affix the company's seal to all papers requiring it, a resolution designating certain persons as the executive committee, with authority to exercise all the powers of the board in the current business of the company while the board was not in session, conferred authority on the committee to indorse a note for a loan for the corporation's current business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640-1646; Dec. Dig. § 414.*]

3. **CORPORATIONS (§ 425*)—AUTHORITY OF OFFICERS—DENIAL—ESTOPPEL.**

Where a corporation's executive committee indorsed a note for a loan, and the corporation received the money and knowingly used it in its business, it was estopped to thereafter question the committee's authority to make such indorsement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1705; Dec. Dig. § 425.*]

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by B. B. Tilden against the Goldy Machine Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

William A. Bowden, Beasley & Fry, and Elmo Lasleretto, for appellant. Jordan & Rowe, Jordan, Brann & Rowe, and E. M. Rea, for respondent.

CHIPMAN, P. J. Plaintiff recovered judgment, from which and from the order denying its motion for a new trial, defendant appeals.

Defendant was sued as guarantor of the following nonnegotiable promissory note: "15,000.00. San Francisco, Cal. March 24, 1905. On demand, for value received, I promise to pay B. B. Tilden, the sum of fifteen thousand dollars (\$15,000.00) with interest at the rate of three per cent (3%) per annum. William T. Garrett. Witness: H. H. Benedict." Endorsed: "The Goldy Machine Company, per S. N. Goldy, H. F. Emme, Executive Committee." The court found that the defendant is a corporation duly organized and existing under the laws of New Jersey, doing business at Sunnyvale, Santa Clara county, Cal.; that said Garrett executed and delivered to plaintiff said note, and "that at the time and place of its execution, and as a part of the same transaction, and prior to the delivery thereof," defendant, "by its writing on the back of said note, guaranteed the payment of the same and undertook and promised to pay to said plaintiff the principal sum and interest thereon therein mentioned," and "that said defendant received from plaintiff as a consideration for said indorsement of said note the sum of \$10,000, gold coin of the United States, then and there loaned by said plaintiff to said defendant"; that demand for payment had been made upon said Garrett, and refused, and the same is now due and owing from defendant to plaintiff.

The principal point made by defendant is that the evidence fails to show that defendant executed the indorsement on the note, and hence the findings are not supported. A preliminary point is made, to wit, that, as the note is not negotiable, "the mere indorsement of the name of the company on the back thereof was not in any sense a guaranty that the company would pay the same." The Supreme Court has decided otherwise. First National Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94, where it was said: "One who writes his name upon the back of a nonnegotiable promissory note to give it credit is a guarantor, and is liable prima facie for the payment of the note upon default of the principal, without any previous demand or notice." Briefly stated, the note in question was executed and delivered under the following circumstances: Defendant had agreed to purchase certain land at Sunnyvale, Santa Clara county, on which to erect a manufacturing plant, the title to the land depending upon the completion of certain buildings and the

operation of an engine thereon. S. N. Goldy was a director, vice president, and general manager of the company. He and H. F. Emme had been appointed the executive committee of the company. C. H. Geldert was its secretary and also a director. He was also the attorney in fact of B. B. Tilden, payee of the note. W. T. Garrett, its maker, was the agent of the company for the sale of its stock, and actively engaged in promoting the enterprise chiefly by the sale of stock. The company was pressed for money to pay its employes and to meet its engagements, and its stock did not find ready sale. Under these circumstances Goldy persuaded Geldert to make a loan of \$10,000 to the company for Tilden, plaintiff here. It was agreed that Garrett should make a note for \$15,000, and that the company would indorse it; the avowed object being to avoid a note by the company which might affect its credit when appearing on the books, and injuriously affect the sale of stock. Garrett accordingly executed the note in this non-negotiable form and the executive committee of the company indorsed it as shown. It was delivered to Geldert as Tilden's attorney in fact, who hypothecated securities belonging to Tilden with the Garden City Bank & Trust Company of San Jose, obtained \$10,000 thereon, and paid this money directly to the Goldy Machine Company which used it in its business. At the time of the execution of the note Garrett entered into an agreement with the company by which he subscribed for \$15,000 of its stock, the proceeds of the sale of which were to go, first, to pay the \$10,000 furnished the company and take up the Tilden note, and \$5,000 was to go to Garrett as commissions for the sale of the stock—a hard bargain for the company, but advisedly entered into under stress of circumstances. Some importance is attached to this latter agreement by defendant, and it is claimed that it was part of the transaction for the loan, but the evidence was that neither Tilden nor his attorney in fact was a party to it and never assented to it, but refused to have anything to do with it. The trial court doubtless so considered the fact to be, and so also must we. Demand of payment of the note was made upon Garrett and refused, and hence this suit.

By subdivision 1, § 22, of the company's by-laws, certain powers were conferred upon the board of directors: "(1) To delegate any of the powers of the board in the course of the current business of the company to any standing or special committee, or to any officer or agent, and to appoint any persons to be the agents of the company, with such powers (including the power to subdelegate) and upon such terms as they think fit." It thus appears that the directors were authorized to delegate "any of the powers of the board in the course of the current business of the company." Article 5 of the charter

of the company is as follows: "The board of directors are expressly authorized by a resolution passed by a majority vote of the whole board, under suitable provision of the by-laws, to designate two or more of their number to constitute an executive committee, which committee shall for the time being, as provided in said resolution, or in the by-laws, have and exercise all the powers of the board of directors which may be lawfully delegated in the management of the business and affairs of the company, and shall have power to authorize the sale of the company to be affixed to all papers which may require it." Pursuant to the foregoing provisions of the charter and by-laws, the board of directors on January 16, 1905, duly passed the following resolution: "Resolved: That Messrs. S. N. Goldy and H. F. Emme be and hereby are designated as members of the executive committee with authority to exercise all the powers of the board in the current business of the company while the board is not in session." Acting under its appointment, the executive committee on March 24, 1905, passed the following resolution, as appears from its minutes: "Whereas, in order for the said William T. Garrett to secure the said sum of ten thousand dollars for investment in this company it is necessary for him to draw a note for fifteen thousand dollars in favor of B. B. Tilden, the same to be endorsed by the Goldy Machine Company: Therefore, be it resolved; that considering the necessity of securing this investment the Executive Committee endorses said note in the name of the Company. Upon motion the meeting adjourned. [Signed] S. N. Goldy, H. F. Emme, Executive Committee." The execution of the guaranty indorsement by the executive committee is fully proved, and also that the company received the money paid by Tilden. We do not entertain any doubt but that the authority to indorse the note was conferred upon the executive committee. It seems to us that it was entered into in the course of the current business and in reality it was the obligation of the company as fully appears from the evidence, and not Garrett's, who was but an accommodation maker. Besides, if this be not so, still, under the circumstances attending the transaction, showing among other things that the company received the money and knowingly used it in its business, it is not in a position now to question the authority under which it obtained the money. It is estopped to set up such defense. 10 Cyc. 1067, 1068; Lake-street Electrical Railroad Company v. Carmichael, 184 Ill. 348, 56 N. E. 373; Main v. Casserly, 67 Cal. 127, 7 Pac. 426; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

^a Cal. App. 20

VANCE v. ATCHISON, T. & S. F. RY. CO.
(Civ. 488.)

(Court of Appeal, Second District, California.
Sept. 11, 1908. Rehearing Denied Oct.
10, 1908.)

1. RAILROADS (§ 327*)—ACCIDENTS AT CROSSINGS—DUTY TO LOOK AND LISTEN.

It is the duty of a driver in approaching a railroad crossing to look and listen before entering a place of danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

2. RAILROADS (§ 327*)—ACCIDENTS AT CROSSINGS—DUTY TO LOOK.

It is only where, if a driver approaching a railroad crossing had looked, he could have seen the approaching train, that he can be held to have been negligent in omitting to do so.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1044; Dec. Dig. § 327.*]

3. RAILROADS (§ 350*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

A driver of a six-horse team who, in approaching a railroad track, where the view was obstructed, stopped and listened, was not guilty of contributory negligence as a matter of law because he did not leave his team unattended and proceed to a point where a view of the track could be had.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1179; Dec. Dig. § 350.*]

4. RAILROADS (§ 312*)—ACCIDENTS AT CROSSINGS—SIGNALS—"ROAD."

A road intended for use in connection with a limekiln, and used mostly by those having business there, is, nevertheless, a road within Civ. Code, § 486, requiring signals where a railroad crosses any street, road, or highway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 993, 994; Dec. Dig. § 312.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6250-6254.]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by A. Vance against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

E. W. Camp and U. T. Clotfelter, for appellant. W. W. Kaye, for respondent.

ALLEN, P. J. Appeal by defendant from a judgment based upon the verdict of a jury and from an order denying a new trial in an action brought to recover damages occasioned by defendant's negligence in the operation of its trains.

The proposition is not, and cannot well be, questioned that there is evidence in the record warranting the implied finding of negligence upon the defendant's part. Appellant, however, contends that the record discloses such contributory negligence upon the part of plaintiff's servant in charge of the property injured as to preclude recovery.

Upon the trial there was evidence offered by plaintiff tending to show that the servant of plaintiff, standing upon the front end of a wagon, was driving a six-horse team by means of a check line. The road upon which

he was traveling was intended for use in connection with a limekiln, and was mostly used by those having business at such kiln. It crossed the defendant's main and side tracks, intersecting the main road which paralleled such tracks. The driver was proceeding with his team from the kiln toward the railroad track, the view along which to the east was entirely obstructed between the kiln and side track. When the lead horses were about 20 feet from the nearest side track, upon which a box car was standing, which was one of the obstructions to the view eastwardly, one of the tugs became disarranged, and the driver left his place on the wagon and rearranged the tug. While on the ground he listened for the approach of a train, and heard none. He could not from this point see eastwardly up the track any distance on account of this box car. Hearing no approaching train, the driver resumed his place on the front end of the wagon and started to drive across the track. When he was at a point where he could obtain a view along the track to the east, the leaders were within three or four feet of the main track. At this point he saw the train, and was for the first time in a position where it was possible for him to see an approaching train from the east. The train was then only about 50 feet away, and was running at a high rate of speed. Here, for the first time, the men in charge of the train employed the whistle. Danger being imminent, the driver applied the brakes and jumped from the wagon, but the collision was inevitable.

It cannot be questioned that it was the duty of the driver in approaching the railroad track to look and listen before entering upon a place of danger. The duty of looking, however, is enjoined only when by its exercise he could have discovered the approach of the train. "It is only when, if he had made the observation, he could have seen the coming of the train, that he can be said to have been negligent in omitting to do so." *Martin v. Southern Pacific Co.*, 150 Cal. 128, 88 Pac. 701. That by reason of obstructions the approach of the train could not be discovered by sight until the lead horses were within three or four feet of the track is in evidence; that he listened carefully before starting to drive across the track, and that he continued so to do, is not disputed; that he made every effort to avoid the collision after discovery of the train is established. "Negligence is a question of fact for the jury, and the law has fixed no exact standard of care other than the general one that it must be such as a reasonably prudent man would exercise in the particular circumstances. Hence in ordinary cases it is peculiarly a question for the jury or court trying the cause to decide as a matter of fact whether or not the person was culpably negligent." *Scott et al. v. San Bernardino Val. Tr. Co.* (Cal.) 93 Pac. 677.

The jury by its verdict determined that the conduct of the driver was not culpably negligent, and we cannot, considering the circumstances under which he was placed, say that as a matter of law its determination was improper. To say that the driver did not act as a reasonably prudent man would act under like circumstances, and that as a matter of law he was culpably negligent, would be to say that one alone in charge of a team of this character, when approaching a railroad track where the view is obstructed, is negligent, notwithstanding he has stopped and listened, unless he leaves his team unattended upon the road and proceeds on foot to a point where a view of the track could be had. We do not believe that the law enjoins such duty upon one under those circumstances. The road upon which the team was traveling, although used mostly by those having business at the limekiln, is, nevertheless, one of the roads comprehended within the provisions of section 486 of the Civil Code (Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291, 24 Pac. 661), and the precautions required upon the part of those in charge of trains in that section prescribed apply to the crossing of a road so used.

The charge of the court excepted to was not improper, wherein the duty of defendant with respect to public crossings was stated. The uncontradicted evidence appearing in the record was such as to render inapplicable charges offered by the defendant and refused which related to the duty of one approaching the track when the view is unobstructed.

We perceive no error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 52

JOHNSON et al. v. WITHERS et al. (Civ. 525.)

(Court of Appeal, Second District, California. September 16, 1908. Rehearing Denied by Supreme Court Nov. 13, 1908.)

1. FRAUD (§ 11*)—REPRESENTATION OF FACT.

A representation by a vendor to a purchaser of the amount of mineral in place in the premises as disclosed by the report of an expert is a representation of fact, and is not an expression of opinion as to the character of the premises or as to the future profits that might be realized from a purchase.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12; Dec. Dig. § 11.*]

2. FRAUD (§ 11*)—REPRESENTATION OF FACT.

An expert opinion cannot be misstated knowingly without incurring legal liability for the fraud, the same as for the willful misstatement of any other fact.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12; Dec. Dig. § 11.*]

3. FRAUD (§ 11*)—CANCELLATION OF INSTRUMENTS—REPRESENTATION OF FACT—MISTAKE.

Where a representation is a representation of a fact for the purpose of declaring a fraud, it is also a representation of a fact when con-

sidered in connection with a mistake, justifying a rescission of a contract.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 11.*]

4. VENDOR AND PURCHASER (§ 31*)—CONTRACT—CANCELLATION—GROUNDS—MISTAKE.

A vendor of mining property represented to the purchaser that in the opinion of an expert there were 50,000 tons of mineral in place. The report of the expert showed on its face that the amount of mineral was but 5,000 tons. The vendor relied on the express misstatement of the results of expert's examination and of the contents of his report. The purchaser relied on the mistake and contracted to purchase the property. Held, that the mistake was a mutual mistake, and equity would relieve the purchaser from his contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 36; Dec. Dig. § 31.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by L. M. Johnson and another against W. S. Withers and another. From a judgment for plaintiff and from an order denying a motion for new trial, defendants appeal. Affirmed.

Conkling & Bretherton, for appellants. Cryer & Tuttle, for respondents.

TAGGART, J. Action for return of a \$1,000 cash deposit made on a contract to purchase an interest in mining property, and for the rescission of the contract. Judgment for plaintiffs. Appeals from judgment and from order denying defendants' motion for a new trial.

The rescission of contract was made and the judgment of the court based upon the ground of a mutual mistake of facts relating to the subject-matter. The complaint states two causes of action: The first alleges the purchase by plaintiffs from defendant Withers of a two-thirds interest in a half section of land in Riverside county for \$20,000; \$1,000 cash, balance in two deferred payments, and the placing of the deed of the property and the cash payment or deposit in escrow with the defendant corporation to be held until the purchase price should be fully paid up. As an inducement to plaintiffs to purchase the property, defendant Withers represented it to be of peculiar value by reason of the presence of "magnesite"; that at a particular point on the property there was a large deposit of said mineral; that said deposit had been uncovered and disclosed by means of certain discovery shafts, and that defendant Withers had caused said property to be carefully examined and inspected by a competent engineer and mineralogist, and the quantity of magnesite so discovered and in place in said portion of the property amounted to 50,000 tons. That plaintiffs were ignorant of mines and minerals and the methods of measuring and estimating the quantity of mineral in place, and relied wholly and entirely upon the representations made by Withers and the estimates of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

expert as represented to them by Withers, and were induced thereby to enter into the contract of purchase. Subsequent to the making of the contract and the deposit of the \$1,000 in the bank, plaintiffs procured a copy of the report of the expert, from which they discovered that the expert had made a mathematical error in his computation, and that instead of there being 50,000 tons of magnesite in the portion of the property experted there were only 5,000 tons. Plaintiffs immediately served notice of rescission, released the deed in escrow, and demanded the return of the cash payment, which return was refused. The second cause of action is for money had and received.

The court finds the allegations of the complaint in the above respects to be true, and that the representation that in the opinion of the expert there were 50,000 tons of magnesite in place in the cone of a certain hill on said property was a material inducement to plaintiffs to enter into said contract, and that such representation was made by said defendant Withers, but that he made the same in good faith and in reliance upon the report which was actually made by Dr. Koebig, the expert.

There is no merit in appellants' contention that the complaint does not state a cause of action. No demurrer to the complaint was interposed, and, if it be conceded that the objections made to the statement of the first cause of action are good, the second cause of action stated is sufficient to support the judgment and decision of the court.

There is evidence to support the findings attacked. The representation of the amount of mineral in place, as disclosed by the expert's report, was a matter of fact. It was a statement of what had been discovered by the expert's examination. It is clearly distinguishable from the representations under consideration in the cases cited by appellants. It was not the opinion of the seller of a thing as to its value or quality (*Taylor v. Ford*, 131 Cal. 440, 445, 63 Pac. 770), or an expression of opinion by the vendor of lands as to the character of the lands or the future profits that might be realized from the investment (*Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Nounnan v. Sutter Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219).

The mistaken representation consisted in a misstatement of the real estimate of the expert. An expert opinion cannot be misstated knowingly without incurring legal liability for the fraud or deceit, the same as by the willful misstatement of any other fact. *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858; *Kost v. Bender*, 25 Mich. 515. If such opinion be a fact for the purpose of declaring a fraud, it must also be a fact when considered in connection with a mistake. The mistake here is not in relation to the elements

upon which the expert opinion was based. When the report was found it showed upon its face that the amount of mineral disclosed by the examination of the premises was 5,000 and not 50,000 tons. The difference between the two amounts was not referable to any question of speculative opinion as to the value of the mines, and therefore the authorities cited upon this theory have no application here. Defendants' reliance upon the expert's misstatement of the result of the examination and of the contents, or the effect of the contents of the report, does not change the character of the transaction. This showing amounts to simply an explanation of how the mistake occurred, and relieves defendant from a charge of intentional misrepresentation or deceit.

The expert was mistaken, the defendant was mistaken, and the plaintiffs were mistaken. The matter about which they were mistaken was the quantity of mineral disclosed by the expert's report of his examination. Plaintiffs dealt with defendants upon the truth of this statement, and it was incorrect. It was the one estimate of quantity, the one concrete fact, upon which they relied in making the purchase. It was such a mutual mistake as courts of equity will relieve from. We see no error in the trial court's conclusions.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 13

GISSKE v. SANDERS. (Civ. 484.)
(Court of Appeal, Second District, California.
Sept. 10, 1908. Rehearing Denied by
Supreme Court Nov. 9, 1908.)

1. ARREST (§ 71*) — SEARCH FOR CONCEALED WEAPONS.

Where a police officer went to a place where a crime had been committed and found plaintiff there on the street late at night, upon plaintiff's refusal to answer questions as to his name and business, the officer could search him for concealed weapons prior to taking him to the police station, whether plaintiff was then under arrest or not.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. § 174; Dec. Dig. § 71.*]

2. FALSE IMPRISONMENT (§ 7*)—CIVIL LIABILITY—ILLEGALITY OF ARREST.

It is a citizen's duty, when requested by a proper officer, to give information of a personal nature when the circumstances warrant the request, and where a police officer found plaintiff late at night, in a locality where a crime had been committed, and requested plaintiff's name and his business in the locality, which plaintiff refused to give, the officer was justified in taking him to the police station for examination without rendering himself liable for false imprisonment.

[Ed. Note.—For other cases, see *False Imprisonment*, Cent. Dig. §§ 30, 31; Dec. Dig. § 7.*]

3. FALSE IMPRISONMENT (§ 8*)—ILLEGALITY OF DETENTION AFTER ARREST.

A police officer having no authority over a prisoner after taking him to the police sta-

tion, the regulations requiring the sergeant then to take charge of the prisoner and examine him, the arresting officer is not liable for false imprisonment for the detention of the prisoner after delivering him to the police station.

[Ed. Note.—For other cases, see *False Imprisonment*, Dec. Dig. § 8.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by W. P. Gisske against Erastus Sanders. From a judgment for plaintiff, defendant appealed. Reversed and remanded.

Leslie R. Hewitt, City Atty., and John W. Shenk, Deputy City Atty., for appellant. Wm. T. Blakely, for respondent.

ALLEN, P. J. Action for false imprisonment. Trial by the court without a jury. Findings and judgment for plaintiff. Defendant appeals therefrom, and from an order denying a new trial.

The primary question for determination upon this appeal is whether or not there is any evidence in the record to support the finding that plaintiff was in fact unlawfully restrained of his liberty by defendant. The uncontradicted evidence is that, shortly before September 24, 1906, both a burglary and a highway robbery had been committed in the vicinity of Figueroa street and Sunset boulevard in the city of Los Angeles; that on that date, about 11 o'clock p. m., defendant, a regular police officer, was notified that a suspicious character was in that vicinity, and was directed to repair to that point and investigate, which he did, and there found plaintiff, who was quietly walking along the street on his way home from a public entertainment. Defendant, who was in uniform and known by the plaintiff to be an officer, accosted plaintiff with an inquiry as to where he was going and where he lived, which questions plaintiff answered, and, in addition, questioned the right of the officer to make such inquiry. The officer then asked him: "Why are you hanging around here? What is your business anyway?" The plaintiff replied: "I don't know if you got a right to question me that way for walking on the street—for walking home." The officer replied: "If you don't want to answer I will take you down to the station." The plaintiff then said: "All right; just go down there; I like to find out down there if you got a right to talk to me this way." The officer again asked him: "Don't you want to answer me any more?" Plaintiff said: "No; let's go down to the station"; and thereupon plaintiff and defendant walked to the police station. On the way down defendant searched plaintiff to see if he had any concealed weapons on his person. The conversation heretofore given is that narrated by plaintiff. Defendant, however, testified, and it is not denied, that the officer asked plaintiff to give his name, which he refused to do, and plain-

tiff, when asked by the court to state why he did not tell the officer who he was, evaded the question; and, further, that defendant offered to walk with plaintiff to the place given as his residence, which offer he declined, saying that he could go home alone. Upon the arrival at the station defendant said to the sergeant in charge of the station: "Here is a man I took on Sunset boulevard. He refuses to answer me." The sergeant thereupon took plaintiff's name and searched his person; took from him his money and personal property, and confined him in jail with other prisoners until the following morning, when he was released. The sergeant refused plaintiff's request that his wife be notified, and the jailer refused a like request and threatened him if he did not keep quiet.

One of the regulations of the police department, adopted by authority of the city charter, and which was in evidence, provides:

"When a prisoner is brought to the station the officer in charge will inquire into the particulars of the case, and if, after consultation with the officer making the arrest, he is satisfied there is not sufficient cause for arrest, he may allow the prisoner to go, and shall report the same, with the facts in the case, to his captain."

"Sec. 4. When a prisoner is brought to the station and the officer in charge is satisfied there is sufficient cause to hold him, the desk sergeant shall make the proper entry on the blotter, search the prisoner, take charge of any money or valuables found on his person, together with any weapons or dangerous instruments, carefully marking such property with the prisoner's name and the date," etc.

While it is evident that the officer intended to arrest and deprive plaintiff of his liberty in the event that his answers proved unsatisfactory, still the action and requests of the plaintiff obviated the necessity of a formal arrest. He urged the officer to accompany him to the station, and the officer did nothing which the plaintiff did not desire, except the examination of his person to see if he carried concealed weapons. This, however, was a precaution which the officer might well take under the circumstances of the meeting and the conduct of the plaintiff, whether plaintiff was under arrest or not. In addition to this, were a formal arrest established, yet its unlawful character is not disclosed. If it be the law that a police officer acting upon reasonable grounds in making an arrest, even without a warrant, is liable should the arrest be subsequently shown to be improper, it were idle to maintain a police force in the large cities. The duty of every good citizen is, when called upon, to give all information in his power to the proper officers of the law as to persons connected with crime (*Miller v. Fano*, 134 Cal. 106, 66 Pac. 183); and this should be held to require that all proper in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

formation be given upon request of a personal nature, as affecting the one of whom inquiry is made, when the circumstances are such as to warrant an officer in making inquiry. A police officer has a right to make inquiry in a proper manner of any one upon the public streets at a late hour as to his identity and the occasion of his presence, if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification. The fact that crimes had recently been committed in that neighborhood, that plaintiff at a late hour was found in the locality, that he refused to answer proper questions establishing his identity, were circumstances which should lead a reasonable officer to require his presence at the station, where the sergeant in charge might make more minute and careful inquiry. The plaintiff having volunteered to accompany the officer to the station, the subsequent acts of that officer's superior in and about the incarceration of plaintiff were matters over which the defendant had no control. Under the regulations, when an officer presents a prisoner at the station his authority and control of such prisoner there ends. The officer can neither incarcerate him nor discharge him, and the mere fact of his bringing a person to the station is not of itself sufficient excuse for incarceration. The regulation requires the sergeant then to assume the responsibility and to make an independent investigation, and to determine whether or not the person so presented should be confined or released. The rule as to the responsibility of the arresting officer is otherwise where he has authority to and does direct the confinement of the prisoner, or where confinement is the direct result of the arrest. We are of opinion, therefore, that the uncontradicted evidence in this case shows that defendant did not unlawfully deprive plaintiff of his liberty, but, on the contrary, all that he did was in the lawful exercise of the authority conferred upon him as such officer; and that there is no evidence in the record to support the finding referred to. Judgment and order reversed, and cause remanded.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 18

JENSEN v. DORR et al. (Civ. 493.)

(Court of Appeal, Second District, California.
Sept. 10, 1908.)

1. VENUE (§ 67*) — CHANGE — AFFIDAVIT FOR CHANGE—SUFFICIENCY.

A statement in the affidavit by defendant on a motion for a change of venue to the county of his residence that on a designated date, "being the day of the beginning of these proceedings, the affiant had his place of residence in" such county, is a sufficient averment of the

fact that at the time of the commencement of the action he resided in such county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 115; Dec. Dig. § 67.*]

2. VENUE (§ 66*)—CHANGE OF PLACE OF TRIAL —AFFIDAVIT OF MERITS.

An affidavit of merits on a motion for a change of venue which avers that affiant has "stated all the facts to his counsel of record herein" is insufficient for failing to aver that the facts of the case were stated to counsel.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 113; Dec. Dig. § 66.*]

3. VENUE (§ 66*)—CHANGE OF PLACE OF TRIAL —AFFIDAVIT OF MERITS.

An affidavit of merits on a motion for a change of venue which avers that affiant has stated all the facts to his "counsel of record herein, and is advised and believes" that he has a valid defense, is insufficient for failing to aver that he is advised by such counsel.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 113; Dec. Dig. § 66.*]

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

Action by Lawrence Jensen against Fred Dorr and others. From an order granting the demand of defendant Fred Dorr for a change of place of trial, plaintiff appeals. Reversed.

Patterson Sprigg, for appellant. Lynn Helm and Wilbur Bassett, for respondents.

SHAW, J. This is an appeal from an order granting defendants' demand for a change of place of trial.

At the time of the commencement of the action in the superior court of San Diego county, the respondent Fred Dorr was a resident of Los Angeles county. With his demurrer to the complaint he filed what purported to be an affidavit of merits, together with a demand in writing that a trial be had in the county wherein he resided. Whereupon the court made an order transferring the case for trial to Los Angeles county. Plaintiff appeals from this order, the ground therefor being the insufficiency of the affidavit made by respondent Dorr.

The statement in the affidavit that on "the 2d day of December, 1907, being the day of the beginning of these proceedings, the affiant had his place of residence in Los Angeles county," is a sufficient averment of the fact that at the time of the commencement of the action he resided in Los Angeles county.

The averment constituting the affidavit of merits is as follows: "That affiant has filed his demurrer herein, and has fairly and fully stated all the facts to his counsel of record herein, and is advised and believes that he has a good and valid defense to said action and to all of it on the merits." It does not appear from the affidavit that the "facts of the case" were fully and fairly stated, or stated at all, to affiant's counsel. So far as disclosed by the affidavit, the facts stated to counsel might have been wholly foreign to the case, or confined to the facts constituting

affiant's defense. *People v. Larue*, 66 Cal. 235, 5 Pac. 157; *Palmer v. Barclay*, 92 Cal. 201, 28 Pac. 226; *Nickerson v. California Raisin Co.*, 61 Cal. 268. Assuming, however, that affiant did fully and fairly state all the facts of the case to his counsel, the affidavit is, nevertheless, defective in not stating, in substance at least, that he is advised by such counsel that he has a good and substantial defense upon the merits. *State Bank v. Gill*, 23 Hun (N. Y.) 406; *Ency. of Plead. & Prac.* vol. 1, p. 360. As shown by the affidavit, the advice referred to might have been obtained from a nonprofessional source. We cannot assume that, by reason of his stating the facts to his counsel, such counsel advised him that he had a meritorious defense. Non constat counsel, for all that appears in the averment, may have advised him there was no merit in his case, and yet, by reason of other advice, the averment be strictly true.

The order appealed from is reversed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 56

PEOPLE v. LAPIQUE. (Civ. 576.)†

(Court of Appeal, Second District, California. Sept. 16, 1908.)

CRIMINAL LAW (§ 1092*) — BILL OF EXCEPTIONS—COMPELLING SETTLEMENT—MANDAMUS—GROUNDS.

The trial court alone having jurisdiction respecting the matters which should be settled in a bill of exceptions, the appellate court will not by writ of mandate direct the settlement of any particular bill; the trial court not having refused to settle any bill.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2843; Dec. Dig. § 1092.*]

Petition by John Lapique for writ of mandate. Writ denied.

J. Lapique, in pro. per.

PER CURIAM. Petition for writ of mandate. It affirmatively appears from the petition presented herein that a bill of exceptions was presented for allowance by the defendant, that within the time allowed by law and the order of the court the district attorney presented amendments thereto, that the time within which the trial judge may settle and allow a bill of exceptions has not elapsed, and, in fact, no notice for the final settlement of a bill has been given. The petitioner is evidently laboring under the impression that it is the duty of this court to direct the trial court as to the matters and things which should be settled in this bill and in respect of which the trial court alone has jurisdiction. It does not appear that the trial court has refused to settle any bill; but, on the contrary, it has refused to settle the particular bill presented by petitioner. This court has no jurisdiction or authority,

under this statement of facts, to interfere with the settlement and allowance of the bill. The writ is denied.

8 Cal. App. 773

In re RIVIERE'S ESTATE. (Civ. 489.)

(Court of Appeal, Second District, California. Sept. 10, 1908. Rehearing Denied by Supreme Court Nov. 9, 1908.)

1. MOTIONS (§ 42*)—RENEWAL—DENIAL OF ATTORNEY'S FEE.

An order denying an attorney an allowance for services to an executor rendered before probate of the will, made before contestants moved for a new trial and perfected an appeal, was an order made in a pending action, and under Code Civ. Proc. § 182, liberty to renew having been granted when the application was denied, the order did not preclude a subsequent application.

[Ed. Note.—For other cases, see Motions, Dec. Dig. § 42.*]

2. APPEAL AND ERROR (§ 920*)—REVIEW—DISCRETION OF TRIAL COURT—MOTIONS.

The granting of a motion after it has been once denied is within a court's discretion, which will be presumed to have been properly exercised, if renewal of the motion is permitted.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 920.*]

3. WILLS (§ 211*)—EXECUTOR'S DUTIES—PROBATE OF WILL.

It was as much an executor's duty to follow testator's implied direction to take all necessary steps to procure probate of the will as to perform any other direction thereunder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 518; Dec. Dig. § 211.*]

4. EXECUTORS AND ADMINISTRATORS (§ 97*)—COUNSEL—RIGHT TO EMPLOY.

An executor's right to employ counsel depends upon the right to litigate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 411½; Dec. Dig. § 97.*]

5. WILLS (§ 448*)—TESTACY—FAVOR.

The law favors testacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 964; Dec. Dig. § 448.*]

6. EXECUTORS AND ADMINISTRATORS (§ 485*)—ALLOWANCES TO ATTORNEYS—SERVICES.

Code Civ. Proc. § 1616, authorizing allowances for legal services to an executor, comprehends services in performing any duty devolving upon him under the will, including the duty to prosecute necessary and proper proceedings to establish the will.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 485.*]

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Louis Riviere, deceased. Appeal from an order allowing an attorney's fee for services to the executor. Affirmed.

Edgar E. Lefebvre, McNutt & Hannon, Edward G. Kuster, and Edward L. Hutchinson, for appellants. Charles H. Mattingly, for respondent.

ALLEN, P. J. Appeal from an order allowing respondent an attorney's fee for certain services rendered the executor before and after appointment.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

†For opinions on motions to prove exceptions, see 98 Pac. 256, 257, 863.

One Louis Riviere died in 1905, leaving an estate exceeding \$50,000 in value, before which time he had executed a paper writing purporting to be his last will and testament, in which one Bachmann was named as executor. This will was offered for probate by the executor, who employed respondent, an attorney, for that purpose. A contest was filed by parties interested in the estate, and upon a hearing the will was admitted to probate and letters testamentary issued to Bachmann. Thereupon respondent, upon an affidavit and showing as to services rendered in the proceedings connected with the probate of the will and their value, moved the court in which such proceedings were pending for an order under section 1616, Code Civ. Proc., as amended, and section 1619, Code Civ. Proc., for an allowance to himself of a just and reasonable compensation for extraordinary services rendered as attorney to said executor in the defense of the contests so instituted. This application, on June 5, 1906, the court denied, giving respondent, however, the privilege of renewing the same. Thereafter the contestants served upon respondent, as counsel for the executor, a notice of intention to move for a new trial, and likewise served a statement of the case, to which statement respondent, as such counsel, submitted amendments, which were in part adopted by the court, and the statement, with its amendments, was settled. Upon hearing of the motion for a new trial the same was denied, and contestants took an appeal from the judgment and order. Respondent, after such appeal was perfected, made preparation for argument and hearing in the Supreme Court, but before final submission the contestants dismissed the appeal. After the judgment so admitting the will to probate had become final, respondent renewed his motion for an allowance for services set forth in the original motion, as well as for services thereafter rendered the executor upon the appeal; and the court, upon the hearing thereof, made its order allowing him for services before the admission of the will to probate the sum of \$1,000, and for services upon the appeal \$500, and ordered the executor to pay such sums to respondent. From this last order the contestants to the probate of the will and those otherwise interested in the estate take the appeal now under consideration.

The first point made by appellants is, that the order of the court made in 1906, denying the application of respondent for an allowance for services rendered before the will was admitted to probate, was a complete adjudication of his rights in relation thereto, and no appeal being had therefrom he is concluded thereby, and the court was consequently without jurisdiction to hear and determine the subsequent motion upon which the order appealed from is based. The record disclosing, as it does, that the order of 1906 was made before the motion for a new

trial and the perfecting of the appeal, it was therefore an order made in a pending action, and under section 182, Code Civ. Proc., a second application could be made when liberty to renew the same was granted at the time of the denial. The granting of a motion after the same has once been denied is a matter addressed to the discretion of the court, and it will be presumed to have properly exercised this discretion if it permits the motion to be presented the second time. *Johnston v. Brown*, 115 Cal. 696, 47 Pac. 686.

As to the sum of \$500 allowed for services upon the appeal, the subject thereof was not included within the original motion, and under no circumstances could it be said that there was any prior adjudication with reference to such subsequent services, even though the appeal was from a judgment rendered before letters issued.

The second and principal point raised by appellants is that, under the laws of this state, no attorney's fee can be allowed against an estate for services rendered before the will is admitted to probate, and this upon the authority of *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485, which declares that "counsel fees are not recoverable by a successful party in an action either at law or equity, except in the enumerated instances where they are expressly allowed by statute"; and this principle is applied to matters in probate. *Estate of Olmstead*, 120 Cal. 454, 52 Pac. 804. The case last cited does not, in our opinion, determine the question here involved. In that case the contestants were successful, and the will was not admitted to probate because it had been revoked. Consequently, there was no executor for whom services could be rendered, and section 1616 does not warrant payment except for services rendered an executor or administrator. In this case, the will which appointed Bachmann executor was admitted to probate and letters testamentary issued to him. The acts of the executor named in procuring the probate of the will are comprehended within the general services rendered the estate, and it was as much Bachmann's duty to present the will for probate and take all necessary steps looking thereto as it was to perform any other directions thereunder. When one executes a will and appoints an executor, there is an implied direction by the testator that such person shall take all steps necessary to carry into effect the intent and object of the testator. The confidence reposed in such executor by the testator would be abused and he would prove recreant to his trust did he not, even in the face of contests, diligently endeavor to establish the will and in all respects to carry out the wishes of the testator. The right to employ counsel depends upon the right to litigate. *Estate of Jessup*, 80 Cal. 626, 22 Pac. 260. Having, as we believe, the right to litigate, and for the successful conduct of which the employment of counsel became necessary, the ex-

penses of such counsel were a proper charge against the estate. Assuming that no power to charge the estate by a contract reposed in the executor until his due appointment, nevertheless when such appointment is made the liability of the estate to the executor would relate to the initiatory act necessarily performed in effecting the purposes of the testator by the due probate of his will. The law favors testacy, and section 1616, which provides: "Any attorney who has rendered services to an executor or administrator may, at any time during the administration, * * * apply to the court for an allowance to himself of compensation therefor"—should receive such construction as would include services rendered the executor in the performance of any duty devolving upon him by the terms of the will, including that duty of prosecuting necessary and proper proceedings toward the establishment of such will.

We find no error in the judgment and order appealed from, and the same are affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 50

SCHMIDT v. CHITTENDEN et al.
(Civ. 521.)

(Court of Appeal, Second District, California.
Sept. 16, 1903.)

BROKERS (§ 14*)—AUTHORITY TO SELL—CONSTRUCTION.

A broker, authorized to sell $8\frac{1}{2}$ acres for \$15,300, had no authority to sell at \$1,800 per acre according to measurement, which would result in a substantial diminution of the aggregate amount of the price the owner would receive.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 14.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Frederick Schmidt against A. B. Chittenden and another. From a judgment for plaintiff, and from an order denying motion of defendant Fox for a new trial, he appeals. Affirmed.

Edwin R. Fox, in pro. per. W. C. Batcheller, for respondent.

TAGGART, J. Action to quiet title. Defendant Fox filed a cross-complaint, alleging purchase of the property, which purchase was evidenced by a written contract signed by defendant Chittenden as the agent of plaintiff, and asked for damages in the sum of \$10,000 for breach of this contract by refusal of plaintiff to convey the premises in accordance therewith. Judgment was for plaintiff on both complaint and cross-complaint, and defendant Fox appeals from the judgment and from an order denying his motion for a new trial.

Plaintiff, who was the owner of a tract

of land in Vernon, Los Angeles county, containing about $8\frac{1}{2}$ acres, on February 7, 1906, signed a writing constituting the defendant Chittenden "sole and exclusive agent" for the sale of certain property situated "in city of and county of Los Angeles, state of California, described as follows, to wit: $8\frac{1}{2}$ acres fronting on Santa Fé ave. part of Chipley & Baker rancho, the said agency to continue for five days from date hereof." The terms fixed were: "Price, \$15,300. Terms, $\frac{1}{3}$ cash—bal. 1 & 2 yrs., 6% int., or upon such other terms as may be hereafter agreed upon in writing, between the said agent and myself." Authority is given to sign necessary contracts in accordance with above terms and to receipt for deposits of purchase money made. On February 10, 1906, Chittenden reported the receipt of \$300 cash from defendant Fox as deposit on purchase of the property. On the same day, the plaintiff and defendants coming together for negotiations, the defendants Chittenden and Fox withdrew from the negotiations, and defendant Fox refused to purchase said property, owing to a disagreement as to terms. Thereafter, and on the same day, the defendants Chittenden and Fox, the former assuming to act for plaintiff under the authorization mentioned, entered into a contract in writing wherein and whereby plaintiff agreed to sell and defendant agreed to purchase certain property situated in the county of Los Angeles (without mention of either Vernon or Los Angeles city), described by metes and bounds, "said to contain $8\frac{1}{2}$ acres, at the rate of \$1,800 per acre, which amounts to \$15,300." "The party of the second part agrees to purchase the said $8\frac{1}{2}$ acres at the said rate of \$1,800 per acre." The terms named were \$300 cash, \$5,000 on transfer of deed, and mortgage to secure the balance, one-half due one year, the other in two years, interest 6 per cent., payable semi-annually. Defendant to have right to cancel mortgage at any time.

The court finds the facts substantially as above stated, and also that defendant Fox is not damaged in any sum by the refusal of plaintiff to convey. There is sufficient evidence in the record to support the findings made. It clearly appears from the testimony, at the interview between plaintiff and Fox, that Fox maintained the right to purchase the lands mentioned at \$1,800 per acre according to measurement, and that plaintiff declined to sell in this way, and that after the negotiations between them failed Fox procured the writing to be executed by Chittenden as plaintiff's agent. The grant of agency from plaintiff to Chittenden does not authorize the making of a contract such as the one executed by him in the name of plaintiff, and no change was made in the terms upon which Chittenden was authorized to sell. The testimony shows that purchase by measurement would result in a substan-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tial diminution of the aggregate amount of the purchase price that plaintiff would receive. An authorization to sell for a gross sum is not authority to sell at a price per acre. It is apparent that the defendant Fox sought to obtain through this contract with the agent that to which the principal refused to agree and that which the plaintiff had never given Chittenden authority to do.

It is not necessary to consider the other objections as to variance in, or failure of description, etc., urged by plaintiff against defendant Fox's claim for damages. There is testimony as to value of the property which supports the finding of damages by the court. We do not pass upon the ruling reserved by the trial court upon the question whether or not a cross-complaint for damages is proper in an action of this character. We see nothing in either appeal to justify us in disturbing the judgment.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 65

BAIRD v. LOESCHER. (Civ. 463.)

(Court of Appeal, First District, California. Sept. 21, 1908. Rehearing Denied by Supreme Court Nov. 19, 1908.)

1. BROKERS (§ 7*)—EMPLOYMENT—WRITTEN MEMORANDUM—SUFFICIENCY.

Under Civ. Code, § 1624, subd. 6, requiring only that a broker's authorization to sell shall be in writing, a memorandum of authority is not fatally defective because it did not recite the terms of sale and amount of payments.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 7.*]

2. BROKERS (§ 7*)—CONTRACT OF EMPLOYMENT—PERFORMANCE.

A broker wrote his client for written authority to sell, inclosing a proposed authorization giving authority for a specified time, with specifications as to price and commission. The owner did not sign the proposed authorization but wrote the broker that the letter was received, and that he might sell to any one he could except to an Armenian; that perhaps he might sell to an Armenian for all cash. *Held*, that as between the owner and the broker such correspondence established the broker's written authority to sell, especially where the broker procured a purchaser, not an Armenian, able, ready, and willing to pay the agreed price on any terms the owner might dictate.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 7.*]

3. BROKERS (§ 7*)—CONTRACT—OFFER AND ACCEPTANCE—ASSENT.

Defendant, having employed a broker to sell certain land, on being applied to for written authority, wrote plaintiff that he could sell to any one he pleased, except to an Armenian. *Held*, that the provision that plaintiff could not sell to an Armenian did not constitute a new offer which needed an express written acceptance, but was sufficiently complied with by plaintiff making a sale in fact, to a purchaser not an Armenian.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 7.*]

4. BROKERS (§ 7*)—CONTRACT OF EMPLOYMENT—ACCEPTANCE.

A broker mailed to his client a blank contract of employment for his signature containing the price, terms of sale, and a stipulation for 5 per cent. commission. The owner did not sign the contract, but wrote that the broker might sell to any person but an Armenian. *Held*, that the owner's reply was an express acceptance of each of the terms of the contract submitted, including the rate of commission.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 7.*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by J. R. Baird against Otto Loescher. From a judgment for plaintiff, and from an order denying defendant's motion for new trial, he appeals. Affirmed.

A. M. Drew and J. R. Webb, for appellant. G. W. Cartwright, for respondent.

KERRIGAN, J. This action is brought on an express contract to recover commissions alleged to be due plaintiff from defendant for the sale of certain real property in Fresno county. The plaintiff recovered judgment. This appeal is from that judgment, and from an order denying defendant's motion for a new trial.

At the trial certain letters and an unsigned agreement, inclosed in and referred to in one of the letters, were admitted in evidence, over the objection and exception of defendant. The sufficiency of these letters and of the unsigned agreement to constitute a contract is the subject of this controversy. The letters and agreement (unsigned) in question are as follows: "May 19, '06. Mr. Loescher, Fowler, Cal.—My dear Sir: The land matter seems to be progressing, but rather slowly. * * *

In order to be properly prepared to handle them promptly and securely, by being ready to take a deposit at once, if a favorable decision is made, I would request that you properly authorize me by filling out the little card agreement herewith inclosed, and send back by this evening's mail on the train coming north about 7:15 at Fowler. Very truly yours, J. R. Baird, for Fresno Land Company." The card agreement, inclosed and referred to in the above letter, reads as follows: "Fresno, Cal., May 19, 1906. Fresno Land Co. I hereby authorize you to sell for me, and to receive any deposit for the sale of, the following described property: * * * This authorization is exclusive, and is to remain in force, irrevocable, one month (10) days from date, and thereafter until ten days after receipt of notice in writing to cancel. Price of land to be \$10,000, or any less sum hereafter agreed to by me, on the following terms: \$4,500 cash on date of sale, and \$——, in —— equal annual payments, with interest at 8 per cent. per annum, for which I agree to pay five per cent. commission, and in event of a sale I bind myself to execute and deliver the necessary

conveyances of title, and to furnish abstract showing good title to said property to date of sale. ———. [Seal.]” In reply to the foregoing communications Mr. Loescher sent the following letter: “Fowler, May 19, 1906. Mr. J. R. Baird, Fresno—Dear Sir: Your letter received, and will say in regards to it that you can sell the place to any one you can, but not to an Armenian, as my wife says she will not sign a deed to an Armenian. If I can get all cash from them, I may sell, but not otherwise, as I have had dealings with them, and I don’t care to have any more. Yours truly, Otto Loescher.” After the receipt of this letter from the defendant plaintiff proceeded to effect a sale of the property, and thus to perform his part of the contract, with the result that by June 21st, and within the life of the contract, he had found a purchaser, and wrote the defendant as follows: “June 21, 1906. Mr. Otto Loescher, Fowler, Cal.—Dear Sir: Following the instructions contained in your letter of May 19, 1906, I have sold your 40-acre vineyard for \$10,000, and have a deposit of \$250 awaiting on an abstract. Please come to Fresno Monday, the 25th instant, and arrange details. Very truly yours, J. R. Baird, Agent, 1823 Tulare street.” The same day, June 21st, defendant by letter refused to sell the land, saying that he had changed his mind, and that the property was off the market. The uncontradicted testimony of the proposed buyer, one Droge, is that he was ready, able, and willing to pay the defendant the stipulated price for the property on any terms of payment which he (defendant) would insist upon; that he so informed defendant, who, making no objection to the offer, refused to consider the proposition, and rejected it.

Appellant’s (defendant’s) first proposition is that the contract sued upon is insufficient under the statute of frauds, because of the blank spaces therein with reference to the terms and amounts of payments. If this were an action between the owner and the buyer to compel a conveyance, it might be contended successfully that, the blank spaces not being filled in, it did not, as a memorandum, contain all the terms of the contract, and hence was void under the statute of frauds. But in this case, it being an action by the broker against the owner, and the statute of frauds requiring only that the authorization to sell shall be in writing (*Toomy v. Dunphy*, 86 Cal. 642, 25 Pac. 130; Civ. Code, § 1624, subd. 6), and as the proposed buyer was able and willing to pay the agreed price, and offered to do so on any terms the owner might dictate, under these circumstances it seems plain to us that the contention of appellant is wholly without merit.

If we understand him correctly, appellant next asserts that the letter of appellant of May 19th, stating that respondent might sell the property to any one except to an Armen-

ian, introduced a new term into the negotiations, which amounted to a rejection of respondent’s offer, and a counter proposition which required acceptance by the respondent in order to result in a binding contract between the parties. He further asserts that there was no acceptance of the counter offer, and that therefore no contract resulted. In this he is wrong. There was not, it is true, an acceptance in writing, nor was it necessary that there should have been. It might have been indicated by acts, as indeed it was in this case, for the respondent not only showed his assent to the new term by conduct, but actually complied with it by producing a purchaser not an Armenian. The rule controlling here is thus laid down in 9 Cyc. 270: “There is a radical distinction in regard to communication between offers which ask that the offeree shall do something, and offers which ask that the offeree shall promise something. In offers of the former kind communication of acceptance is ordinarily not required, * * * where the offer is to do something if the offeree will not merely promise to do, but do something, compliance with the condition of the offer by defendant by doing the act in the way prescribed is ordinarily sufficient evidence of the acceptor’s assent, and it is not necessary to show that he notified the offerer that he accepted the offer and would perform the conditions.” In *Veale v. Green*, 105 Mo. App. 182, 79 S. W. 731, it is said: “Evidence that P. continued, from time to time, to make efforts to sell defendant’s land after defendant offered him a commission for making the sale was sufficient to sustain a finding that he accepted the offer.”

There remains one other point to be considered. Appellant concedes that the letters constitute a sufficient statement of the facts of employment to satisfy the statute of frauds; and he also concedes that, if this were an action on an implied contract, respondent would have been entitled to recover the reasonable value of his services (*Toomy v. Dunphy*, supra), but he insists that the letters relied upon do not state the compensation to be paid the broker, and that therefore this action, being on express contract, no recovery can be had. Appellant had read and knew the terms of the proposed contract and the contents of the letter with which the contract was inclosed. In reply, referring to them, and having, of course, their contents in mind, he in effect said: “Proceed, but don’t sell to an Armenian.” With the exception just noted (not to sell to an Armenian) the reply of the defendant was, we think, tantamount to an express acceptance of each of the terms of the contract, including the rate of commission. “A contract is to be construed as a whole, [and] terms which can be inferred from a consideration of the entire instrument are as much a part of the con-

tract as if expressly set forth there." 2 Page on Contracts, § 1118, p. 1740.

The judgment and order appealed from are affirmed.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 101

H. C. CAPWELL CO. v. BLAKE. (Civ. 489.)

(Court of Appeal, Third District, California.
Sept. 23, 1908.)

1. LANDLORD AND TENANT (§ 169*)—INJURIES FROM DEFECTIVE CONDITION—ACTIONS.

Evidence in an action by a tenant of a ground floor for damages caused by the stoppage of a drain pipe leading from a skylight roof placed over a part of the premises, at the bottom of a light well, resulting in the flooding of the premises, considered, and held to show that the landlord had control of the skylight roof, and was liable for the damages caused by negligently allowing the drain pipe to become clogged.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 169.*]

2. APPEAL AND ERROR (§ 1078*)—REVIEW—QUESTIONS CONSIDERED.

Errors by the trial court in admitting and excluding testimony not being argued, and no reasons being given to support the objections, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256, 4259; Dec. Dig. § 1078.*]

Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by the H. C. Capwell Company against M. K. Blake. Judgment for plaintiff, and defendant appeals. Affirmed.

Hill & Ryker, for appellant. Snook & Church, for respondent.

CHIPMAN, P. J. Action for damages brought by plaintiff as tenant against defendant as landlord on account of damage to plaintiff's merchandise caused by flooding from a defective roof of the demised premises and from alleged negligent drainage of rainwater therefrom. The cause was tried by the court sitting without a jury, and plaintiff had judgment, from which, and from the order denying her motion for a new trial, defendant appeals.

The building in question is known as the "Blake Block," and is situated on the corner of Twelfth and Washington streets, Oakland, and consists of three stories and basement. Originally the ground floor space was divided into eight rooms used for stores, of which plaintiff occupied all, except one room at the south end of the building, under a lease for seven years and four months, made on May 4, 1903, executed by defendant through her attorney in fact, Mrs. E. H. Havens. The second and third stories were let to various persons for various purposes. Mrs. Havens had an office in the building and its janitor, in defendant's employment, resided there with his family. There was a light well extend-

ing from the basement up, open at the top, occupying a space 18 by 44 feet between the walls down to the ceiling of the first story, and thence down to the basement it was about half that size. The roof of the building drained into this space, and the water was carried down to the basement and thence into the sewer by a pipe which also served as a drain pipe for the toilets. It was proposed by the parties to convert the entire space occupied by plaintiff into one large store, which involved the removal of partitions, and the walls of the light well which extended across the rear of one of the stores. These changes also required some readjustment of drain pipes, remodeling of the roof in the light well and placing therein a skylight for the accommodation of the enlarged storeroom. The skylight, of dimensions 11 by 17 feet, rested on the subroof, 18 by 44 feet, which extended over the area of the light well, about level with the floor of the second story. A photographer's gallery and the toilet of the second story floor projected somewhat over this area, but not to interfere with the skylight. The only means of access to the subroof of this area were through windows in the second-story hall or of the abutting rooms occupied by tenants or the toilet. To reach this subroof by the hall windows it was necessary to crawl under the photographer's room, the floor of which was about two feet above the tin roof of this area. Originally the main roof was drained to a pipe, and thence down the light well to the basement and sewer; this pipe also being connected with the toilets. In the remodeling of the consolidated stores it became necessary to shift the location of this pipe, where it passed through the store, a few feet to a hollow column, supporting the roof, through which the drain pipe was carried, and the column was inclosed by woodwork. This pipe leading from the upper roof was cut at the subroof and an elbow placed on it, so that it discharged the rainwater falling on the main roof directly on this tinued subroof at a point eight or ten feet from the opening in the pipe that ran through this column and on down to the basement and sewer. At this opening in the subroof a screen or perforated hood was placed over the pipe to admit water, but exclude rubbish which might run into the pipe and stop the flow of water through it. The store below extended in all directions from a point under the skylight, and the goods and merchandise of plaintiff were displayed throughout the entire floor area and also in the basement under this skylight. The work of changing over these stores was completed some time in March, 1904, and, so far as appears, was done in a workmanlike manner and to the satisfaction of plaintiff. There seems to be no question but that the rearrangement of the drainage system of the building was adequate had

nothing happened to change it. But from some unknown cause the screen over the exit pipe of this subroof had been removed and obstructions had been allowed to accumulate in the pipe thus causing the water coming from the main roof and falling directly on this subroof to rise to the depth of several inches, and to escape over the top of the flashings of the tin roof built into the side walls and around the skylight, and thence down into the store below, causing the damage complained of. All the work done in remodeling the building was undertaken by defendant and at her expense and under the direction of her agents, and agreeably to plans satisfactory to plaintiff, except certain improvements to the store front which plaintiff agreed to make.

The court found, among other facts, that this subroof on which water accumulated, and from which it ran down into plaintiff's store, "was then and there in the possession and under the control of said defendant; and said defendant then and there carelessly and negligently allowed and permitted and caused said rainwater to accumulate in such large quantities upon said roof that by reason thereof said rainwater thereupon overflowed a certain skylight situated upon said roof, leaked through certain tin flashings next to the brick walls and said buildings surrounding said roof, and ran into, upon, and flooded said personal property so located in said store and basements aforesaid, and thereby and in consequence thereof damaged and injured said personal property of said plaintiff in the sum of \$3,673.25."

Appellant states in her brief that "the most important question to be considered here, in fact the only question, is who, under the terms of the lease, had control of the skylight roof." We quite agree with appellant that the question of defendant's liability hinges entirely upon the assumption that it was her duty, and not that of plaintiff, not only to provide adequate escape for rainwater falling upon the roofs of the building, but also to see that the means thus provided were kept free from obstruction. There is no provision of the lease in terms placing this duty upon either party. It purports to "let and demise" certain "stores," giving their numbers on the street, "including basements thereof under said stores, and all room or space available or that may be made available for use under the sidewalks in front of said stores, with the appurtenances." Other covenants relate to subletting and such as are usually found in leases, but nothing touching the care of the premises. The lease was entered into before the changes in the building were made, but in accordance with an agreement previously entered into or option given plaintiff to lease the premises by which, in the event that plaintiff exercised the option, defendant agreed "to remove walls and partitions between said stores as desired by the party of the second part, so far as the same may be

done without endangering the buildings; to provide proper and acceptable toilets (and to renew and place in good condition so far as may be required, all the premises included in this agreement)." The changes made were for the mutual benefit of the parties, and, so far as concerned plaintiff, related only to the several stores which he was given the option of leasing in consideration of which, if accepted, the changes were to be made.

Appellant refers to certain principles as established by the decisions of appellate courts, and to certain facts in the case from which it is argued that respondent had and took control of the skylight under its lease of the storeroom below. It is claimed that the rule is almost universal that a lease of a part of a building passes with it everything necessarily used with or necessary to the enjoyment of the demised premises (*Kitchen Bros. Hotel Co. v. Philipin*, 2 Neb. [Unof.] 340, 96 N. W. 487); that a description of premises by the street number includes so much of the lot upon which the building rests as is necessary to the enjoyment of the building (*Hosher v. Hestermann*, 58 Ill. App. 265); that a lease of the "first floor" in a building includes the use of the outside walls thereof in the absence of anything to the contrary in the lease (*Lowell v. Strahan*, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422); that in the lease of a building there is no implied warranty that it is safe, suitable for habitation, or properly adapted to the uses to which it is to be applied, nor that it shall continue fit for the purposes for which it was demised (*Davidson v. Fischer*, 11 Colo. 583, 19 Pac. 652, 7 Am. St. Rep. 269). It is hence argued that the skylight was a necessary part of the premises for the complete enjoyment of the part demised, that no reservation of this skylight was made by the lessor, and that under the terms of the lease and the option agreement the skylight necessarily became a part of the demised premises and its care and control passed to the lessee. Turning to the facts proven, it is claimed that they confirm this view. Attention is invited to the testimony showing that the alterations were made to the satisfaction of plaintiff and in accordance with plans agreed upon by it; that the skylight roof was tinned and cleaned and placed in a condition satisfactory to plaintiff; that plaintiff knew that the water coming from the upper roof had to be drained through a pipe coming from the skylight area, and was therefore fully apprised of the conditions and retained possession of the premises with this knowledge. Defendant's janitor, Albro, testified that after the completion of the work Mr. Capwell, president of plaintiff company, requested him to look after the skylight area, and that he would pay him for his services. Mr. Capwell denied this, and the learned trial judge, in referring to this testimony, recited facts and circumstances which led him to conclude that

Albro was mistaken and that Capwell did not make any such promise.

It appeared that the leak in the roof was first discovered during a rainstorm about 9 o'clock of the night of September 22, 1904. Plaintiff's watchman, Bostwick, notified defendant's janitor, Albro, and also called up by telephone plaintiff's bookkeeper, Furth, who came to the store and notified Capwell. Steps were taken to protect the goods from injury so far as presently possible and the three men went up to the roof through a second-story toilet window. Water was then standing on the subroof to some depth. Observing a break in the drain pipe on or near the upper roof from which water was flowing, Furth tied a cloth around this opening, forcing the water back into the pipe. He asked Albro where the opening was at the subroof, but was told that he did not know. Having no light, the party made no search at that time for this opening, but went below into the store and continued their efforts to protect the merchandise. The leak seemed to abate somewhat, and Furth went home. The next morning about 7 o'clock the water began coming down worse than before, and Furth was again called and promptly responded, and went about protecting the goods in every possible way. Bostwick testified that he notified the janitor, Albro, several times during the night; "that, when the main flood occurred about seven in the morning, he went upstairs and woke the janitor again, and then went out on the roof and found the outlet, and was standing in water ankle deep on the roof where the skylight was and he got some pieces of glass and shavings and pieces of gunny rope or bale rope out of the outlet. He notified the janitor three times that night; and that the janitor of the Blake Block telephoned for the plumber to come." Witness Maddern, a plumber, responded, as also did witness Rankin, another plumber. Maddern pulled some rubbish out of the pipe below the opening, and, finding no relief, went below to examine the sewer, and while he was gone witness Rankin succeeded in relieving the pipe of its obstructions with a force pump or plunger obtained from janitor Albro, "who was out there working it when he appeared." Albro testified that he had been on the skylight area 50 times or more and had always cleaned it before a rain, that he had charge of the rooms of the upper stories for defendant, and that it was his duty to keep the roofs clean. It is true that he testified that Capwell had requested this of him, suggesting the inference that this duty was put upon him by plaintiff, and not by defendant. But the court held otherwise upon the evidence. Albro was, however, reminded by Capwell several times to keep the area roof clean, and Albro told Capwell he had been told to do so, but "had been too busy to come to it." Capwell also testified that he saw Mrs. Havens, defendant's agent, the

morning of this occurrence, and was assured that the difficulty would be removed, "so that we would not sustain a flood in case it should rain again." Capwell also testified that plaintiff had nothing to do with the work above the ceiling of the store or with the care or control of the skylight area or light well. It appeared that this light well was built to give light and air to the upper stories as well as to the ground floor and basement. The area roof was in part built before the remodeling of the stores was begun and extended under the photograph gallery. The changes made required the closing of the light well at the floor of the second story, but the skylight became necessary, as a part of this subroof, to give light to the store below. Defendant, however, retained the use of the drainage system down through this well and through plaintiff's store, and this use was necessary to the drainage of the roof over the main building with no part of which latter plaintiff had anything to do or any control except the store and basement. Speaking of the situation as disclosed by the evidence, the court in its oral opinion at the close of the evidence said: "It seems that this pipe coming from the top of the building, down over the roof of the photographer's room, was an old pipe that had been in use for a long time. Originally it was conducted down through the light well to the sewer, and taken care of in that way. Now, of course, when these alterations were made, two things were necessary. One was that Mr. Capwell's store should be protected from the elements, and another was that there should be some provision still for carrying off the water from the top of the building. That was undertaken by Mr. Spence, employed by the owner of the building. And the largest function of this roof in the way of carrying water was to carry water from the upper roof, because there was a very much larger area of drainage there than there was on this lower roof. I think under all of the evidence in the case I am bound to hold that the owner of the building had appropriated that roof, or at least a portion of it, as if it were a pipe for the purpose of carrying off the water from the upper part of the building, as well as the small amount of water that might fall upon that roof."

If plaintiff had leased the entire building, the principle relied upon by defendant would have some application. But this is not such a case. In *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, speaking of the general rule that there is no implied warranty of the safety and adaptation of the building to the uses of the tenant, it was said: "A lease does not imply any particular state of the property let, or that it shall continue fit for the purpose for which it is let, nevertheless its application is limited to premises which by the terms of the lease pass out of the control of the landlord into the exclusive possession of the tenant." The cases relat-

ing to patent and latent defects have no application here for the court found on sufficient evidence that the responsibility for draining the upper roof was upon defendant who negligently performed this duty. In such case defendant became liable to plaintiff for damage thereby suffered. *Edwards v. N. Y. & H. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659. There were many tenants of the upper stories. The main roof of the building sheltered the rooms occupied by them quite as much as the store below. It would be unreasonable to presume that plaintiff impliedly assumed the care of this roof or undertook to provide means for the escape of water from it. The damage resulted, not from rain-water falling upon the skylight nor upon the subroof, but rather from the volume of water poured upon the latter from the upper roof which was provided with no means of escape except to run across the subroof to the pipe which had originally carried the water directly from the main roof. Had this pipe remained as first constructed, it is not likely that the damage would have followed. Nor does the fact that this change was for the better accommodation of plaintiff in rearranging the stores affect the question or relieve defendant from the duty of caring for the water that was to fall upon the roof. We think the trial court correctly interpreted this subroof as being in effect a continuation of the pipe from the main roof which could safely perform the function marked out for it only by keeping the pipe running down through the store free and open for the unobstructed passage of water coming to it across the subroof. As it was the duty of defendant to see to this, it is immaterial whence the obstruction came—whether by accident or design dropped or thrown upon the subroof by tenants of the upper stories, suggested by defendant as a possible cause for the stoppage of the pipe. The fact that plaintiff and its servants promptly endeavored to ascertain the cause of the trouble and to find a remedy is mentioned as a circumstance tending to show an acknowledgment of plaintiff's duty to care for this roof. To our mind it has no such significance. They would have been guilty of contributory negligence had they supinely sat down and allowed the work of destruction to go on, making no effort to avert it.

Much stress is placed by defendant upon the fact that Capwell took especial interest in the plans for the remodeling of the store-rooms, made suggestions as to changes, and was cognizant of the manner by which the water from the main as well as the subroof was to be cared for; and finally approved the work when completed. These circumstances are not necessarily inconsistent with the assumption by defendant of the care and control of the roofs of the building, nor do they impliedly or presumptively tend to charge plaintiff with such care and con-

trol. Plaintiff's interest in the building was in the rearrangement of the stores. Incidental to this arose the necessity for a skylight and to provide different means for conveying the water from the roofs to the sewer. Naturally plaintiff was concerned in knowing that these means were adequate and so they were had they been properly looked after; and here again we are confronted with the sole question of fact—upon whom rested the duty to care for the system of drainage adopted? With the exception of the testimony given by janitor Albro and his wife, which the court disbelieved and which was in conflict with the testimony of Capwell, there is no direct evidence that plaintiff ever assumed any control whatever of the skylight area. On the contrary, there was evidence that such control was assumed by defendant; and the conduct of the parties shows that from the time the work was commenced by the defendant, during its progress, after it was completed, and up to the time of the damage and in repairing the pipes after the disaster, the responsibility was assumed by defendant.

It was held in *Priest v. Nichols*, 116 Mass. 401, that, where a tenant occupying a portion of a building is damaged by the escape of water from pipes used by and under the control of the landlord who occupies the remainder of the building, the landlord will be held liable. The case of *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54, is cited by respondent, and we think states the law correctly in a similar case to the one here. The court said: "The plaintiff hired the lower portion of a building for a store, the upper portion remaining in the possession of the defendant and under his care and control. A rainstorm poured a great volume of water between the roof and the chimney down upon the plaintiff's goods, causing some injury. The charge is that defendant was guilty of negligence, either on account of the original construction of the roof or in the way and manner of maintaining it. The case both of law and fact is referred to the court. It is well settled that in a lease of real estate no covenant is implied that the lessor shall keep the premises in repair or otherwise fit for occupation. But that is not this case. Here the plaintiff had no care or control of the roof, and had no right to intermeddle with it. The defendant had such care and control for the benefit of himself and all his tenants. By implication he undertakes so to exercise his control as to inflict no injury upon his tenants. If he does not exercise common care and prudence in the management and oversight of that portion of the building which belongs to his especial supervision and care, and damages are sustained by a tenant on that account, he becomes liable to him. He is responsible for his negligence"—citing cases. See *Davis v. Pacific Power Co.*, 107 Cal.

563, 40 Pac. 950, 48 Am. St. Rep. 156, for a somewhat analogous case.

Some errors are claimed to have been made by the court in admitting and excluding testimony, but, as they are not argued and no reasons given in support of these specifications, we have not noticed them. We have addressed ourselves to what appellant stated in her brief as the only question in the case.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

9 Cal. App. 78

McKENZIE v. HILL.

In re SAN FRANCISCO STOCK & EXCHANGE BOARD et al. (Civ. 529.)

(Court of Appeal, First District, California. Sept. 22, 1908.)

1. APPEAL AND ERROR (§ 414*)—"ADVERSE PARTY"—NOTICE OF APPEAL.

The "adverse party" on whom a notice of appeal must be served is the party who appears by the record of the proceedings in which the appeal is taken to be adverse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2138; Dec. Dig. § 414.*]

For other definitions, see Words and Phrases, vol. 1, pp. 224-227; vol. 8, pp. 7567, 7568.]

2. EXECUTION (§ 385*)—SUPPLEMENTARY PROCEEDINGS—NATURE AND REQUISITE.

Supplementary proceedings so far as the garnishee is concerned are original proceedings, not against the debtor, but against his creditor, and are a substitute for a creditors' bill.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 385.*]

3. APPEAL AND ERROR (§ 414*)—NOTICE OF APPEAL—SERVICE—ADVERSE PARTY.

Where, after final judgment on which an execution had been issued, supplementary proceedings were instituted against garnishees in which the judgment debtor was not served, and did not participate, he was not an adverse party on whom a notice of appeal by the garnishees from an order requiring payment by them of a specified sum on the judgment should be served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2138; Dec. Dig. § 414.*]

4. EXECUTION (§ 358*)—SUPPLEMENTARY PROCEEDINGS.

Proceedings supplementary to execution are not a mere incident to the original action, but constitute a new proceeding involving new parties and issues.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 358.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by James A. McKenzie against J. B. Hill. From an order in supplementary proceedings directing the San Francisco Stock and Exchange Board and A. B. Ruggles to pay certain money on a judgment recovered by plaintiff against Hill, the garnishees appeal. On motion to dismiss. Denied.

Aitken & Aitken, for appellants. Edmund Tauszky and W. P. Hubbard, for respondent.

KERRIGAN, J. The appeal is from an order made in proceedings supplementary to execution, directing appellants, as garnishees, to apply \$876 toward the satisfaction of a judgment recovered by plaintiff McKenzie against defendant Hill. The ground of the motion to dismiss is that no notice of such appeal was served upon the defendant Hill.

The undisputed facts in the case are as follows: On the 17th day of January, 1907, respondent, McKenzie, recovered judgment against defendant, Hill, for the sum of \$3,805, and assigned the same to C. M. Craig. Craig prepared an affidavit as the basis for an order for the examination of appellants, the San Francisco Stock and Exchange Board and A. B. Ruggles, its president. Upon this affidavit the Honorable James M. Troutt, one of the judges of the superior court of the city and county of San Francisco, made an order, requiring the presence of said appellants before said judge to be examined concerning the possession of the sum of \$876, money belonging to defendant Hill not exempt from execution, and which money was subject to be applied toward the satisfaction of said judgment. After the examination of the president of said Stock and Exchange Board, the court ordered the application of the said \$876 toward the payment of said judgment. No notice of appeal was served upon defendant Hill. Under these circumstances appellants contend that defendant Hill would be affected by a reversal of the order appealed from, and hence is an adverse party as contemplated by section 940 of the Code of Civil Procedure; and, as no notice of appeal was served upon him, the appeal should be dismissed.

It is not at all clear to us in what manner Hill could be injuriously affected by a reversal or modification of the judgment appealed from; but in any event we are convinced that he was not a party to the proceeding, and therefore was not entitled to notice. "The adverse party upon whom the notice of appeal is to be served is the party who appears by the record to be adverse, and the record to be considered for that purpose is the record of the proceedings in which the appeal is taken." In re Ryer, 110 Cal. 560, 42 Pac. 1082. An examination of the record here shows that in an action against Hill a judgment had been obtained, which is now final and in full force and effect, and upon which judgment an execution had been issued; that in proceedings supplementary to execution the garnishees were examined, and the order appealed from was made. In that proceeding Hill was not served, nor did he in any way participate therein. It thus appears, to reiterate, that Hill was not before the court, and was not a party to that proceeding. Proceedings supplementary to execution, while collateral to an original action, are still quite independent of

it. Indeed, they embrace all the elements of an independent civil action. It has its own record, and only parties thereto need be served with notice of appeal. In *Wells v. Torrance*, 119 Cal. 441, 51 Pac. 626, these proceedings are called, so far as a garnishee is concerned, original proceedings. In *Coffee v. Haynes*, 124 Cal. 565, 57 Pac. 482, 71 Am. St. Rep. 99, they are said to be proceedings not against the judgment debtor, but against his creditor. They are a substitute for a creditors' bill. *Adams v. Hackett*, 7 Cal. 201; *Pacific Bank v. Robinson*, 57 Cal. 522, 40 Am. Rep. 120; *Herrlich v. Kauffman*, 99 Cal. 275, 33 Pac. 857, 37 Am. St. Rep. 50. "This [proceeding supplementary to execution] cannot be regarded as a mere incident to the original action. * * * In this proceeding, the merits of the original action are in no way involved. New issues are presented, new parties are brought in, and new rights are determined, the adjudication of which in no way alters the face of the original judgment." *Harper v. Behagg*, 14 Ind. App. 428, 42 N. E. 1115.

Our conclusion that Hill was not a party to the record, and consequently not entitled to notice of appeal, is supported by the cases in this state. In *Re Ryer*, supra, an heir interested in the estate of Ryer filed his petition for partial distribution. To this petition certain of the heirs and legatees of the deceased filed their answers. Others interested did not appear or object to the petition. On the issues framed the petition was denied. A motion for a new trial was refused, and, from the order denying this motion, an appeal was taken. A motion was made to dismiss the appeal, on the ground that the parties interested who did not appear at the hearing had not been served with notice of appeal. In denying the motion the court said: "Upon an appeal from an order denying a new trial, the parties to the motion in the court below are the only proper parties to the appeal; and the appellant is not required to give notice of appeal to others than those to whom the original motion was directed. The 'adverse party' upon whom a notice of appeal is to be served is the party who appears by the record to be adverse; and the record which is to be considered for that purpose is the record of the proceedings in which the appeal is taken. The rule that the notice of appeal must be served upon all parties that would be affected by a reversal of the order and judgment appealed from is to be construed with the other rule that only the record can be examined for the purpose of determining who are such adverse parties. * * * The proceeding instituted in the superior court by the appellant herein is in the nature of a collateral inquiry, or episode, interjected into the proceedings for the administration of the estate, in which there are pleadings, process, trial, findings, and a judgment, thus presenting all the elements of a civil action

instituted in an independent suit for the purpose of determining the right of the appellant to a share of the estate, and, in matters of procedure upon appeal, should receive the same consideration as upon an appeal in a civil action." In *Re Bullard*, 114 Cal. 462, 46 Pac. 297, the administrator of the estate rendered an account for settlement, and in connection therewith reported that he had allowed a claim in favor of the Hibernia Savings & Loan Society. One of the heirs of the decedent contested the allowance of this claim, and excepted to the account in this respect. From an order settling the account he appealed, and served notice thereof on the administrator alone, and not on the claimant, and for this failure a motion was made to dismiss the appeal. The Hibernia Savings & Loan Society did not in any way participate in the proceeding, and yet, notwithstanding that it was vitally interested in the matter, the court held that it did not appear from the record that it was in any respect a party to the proceedings, and that it was unnecessary to serve it with notice of appeal.

A late case on the subject is *Estate of McDougald*, 143 Cal. 476, 77 Pac. 443, where the cases just referred to are quoted from with approval, and the matter is fully discussed. There the administrator filed an account, to which a judgment creditor filed written objections. Upon the issues thus presented the account was surcharged \$5,500 and settled accordingly. In connection with the account the administratrix reported that she had allowed the claims of 16 creditors. In addition to the settlement of the account, the court ordered that a dividend be declared upon the claims reported, and paid out of the funds adjudged to be in the hands of the administratrix. From these orders the administratrix appealed, and served her notices of appeal on the contesting creditor, and on two others who appeared at the contest, but not upon any of the other creditors. The contesting creditor moved to dismiss the appeals for failure to serve the notices on the persons who did not appear at the hearing. There it was contended that the creditors who did not appear nor make any objection to the account were directly interested in the result of the appeal; that the dividend accruing to them under the order would be diminished if the appeal was successful; and, therefore, that they were adverse parties who must be served with notice of appeal to give the court jurisdiction. In denying the motion the court said: That a person interested in an estate, although his name and his interest are disclosed on the face of the record, is not necessarily a party to the cause or proceeding is manifest from a consideration of the different cases where persons interested may or may not appear, at their option. In a proceeding to probate a will any person interested, whether as devisee, legatee, or heir, may appear and con-

test the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet it would not be contended that an heir, devisee, or legatee who fails to appear at the time of the hearing of the petition is in any sense a party to such proceeding. So with the petitioner for administration there may be many persons who are entitled to letters and who are interested in the matter of the appointment. But, if they fail to appear or contest the right of the petitioner, it is manifest that they cannot be considered parties. Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and as such has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account or upon some of the documents referred to therein, but the giving of the notice and the statement of their rights or claims does not ipso facto make them parties to the proceeding. See, also, *Niles v. Gonzales* (Cal.) 92 Pac. 74; *O'Rourke v. Finch et al.* (Cal. App.) 96 Pac. 784.

The motion is denied.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 62

RICHMOND et al. v. SUPERIOR COURT
OF CALIFORNIA et al. (Civ. 567.)

(Court of Appeal, Second District, California.
Sept. 19, 1908.)

1. CERTIORARI (§ 10*)—PRIOR REVIEW—EFFECT OF DECISION.

Where a prior writ of certiorari was denied by the Supreme Court because the proceeding was directed to the judge of the superior court instead of the tribunal itself, language in the opinion inadvertently used, appearing to determine petitioner's right to the writ on the merits, did not foreclose them from presenting the question anew, or preclude the court from determining it without reference to the former decision.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 17; Dec. Dig. § 10.*]

2. LANDLORD AND TENANT (§ 291*)—POSSESSION—RELATION—COMPLAINT.

Where complaint by a landlord against a tenant to recover possession alleged a verbal lease, 30 days' notice to terminate the tenancy, and thereafter 3 days' notice to quit, claiming rent for one month and damages, it sufficiently showed the existence of the relation of landlord and tenant between the parties.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1239; Dec. Dig. § 291.*]

3. JUSTICES OF THE PEACE (§ 36*)—TITLE TO REALTY—EVIDENCE.

While justices' courts are prohibited from receiving evidence on any question involving the title or possession of real property, or to try any issue presenting such question, Code Civ. Proc. § 838, also declares that in forcible entry and detainer of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 91; Dec. Dig. § 36.*]

4. FORCIBLE ENTRY AND DETAINER (§ 2*)—STATUTES.

The statutory provisions relating to proceedings in forcible entry and detainer are to be construed to include proceedings in unlawful detainer.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 4; Dec. Dig. § 2.*]

5. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—EVIDENCE.

Proceedings in unlawful detainer, in which the rules of evidence relating to forcible entry and detainer are made applicable, are limited to those cases where the relation of landlord and tenant exists, and in which such defenses only can be recognized as are available to the tenant against the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 291.*]

6. LANDLORD AND TENANT (§ 290*)—UNLAWFUL DETAINER.

To sustain an action for unlawful detainer, proof of a mere quasi tenancy is not sufficient, but there must be either an express letting or proof showing, by implication, defendant's occupancy of the land as plaintiff's tenant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1208; Dec. Dig. § 290.*]

7. JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—ACTION FOR POSSESSION—UNLAWFUL DETAINER.

A complaint in unlawful detainer before a justice alleged a verbal lease, 30 days' notice to terminate the tenancy, and 3 days' notice to quit, 1 month's rent in arrear, and damages. Defendant's verified answer denied that they ever had been plaintiff's tenants, denied plaintiff's ownership and right of possession, and averred that defendants held possession under a contract of sale, the conditions of which had not yet been performed. *Held*, that the decisive question was whether the relation of landlord and tenant existed between the parties, which was within the jurisdiction of a justice of the peace, and that the action was therefore not transferable to the superior court as involving title to realty.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 91; Dec. Dig. § 36.*]

Action by Emma Agnes Richmond. Application for writ of certiorari by Emma Agnes Richmond and others against the Superior Court for Los Angeles County and Frederick W. Houser, Judge, etc. Writ dismissed, and application denied.

Wm. T. Blakely, for petitioners. Tipton & Cailor, for respondents.

PER CURIAM. Application for writ of certiorari to review order of superior court remanding to justice court a case of unlawful detainer which had been certified up by the justice court on the ground that title to real property was involved in the issues to be tried.

A former application was denied by this court because the proceeding was directed to the judge of the superior court, instead of to the tribunal itself. It was not intended by the opinion then filed to determine anything but who were the proper parties to the proceeding, but in assuming the position of the petitioners for the purpose of deciding this

matter language was used which appears to determine the right to the writ upon the merits. The language thus inadvertently used cannot prejudice the parties not then before the court, and cannot foreclose them from presenting the question anew, or preclude this court from determining it as if the former opinion had not been rendered. The complaint in the action before the justice court alleges facts showing the relation of landlord and tenant to exist between the plaintiff and defendants (petitioners here), a verbal lease, 30 days' notice to terminate the tenancy, and thereafter 3 days' notice to quit and surrender up possession of the premises. Rent for one month at \$20 and damages in the sum of \$100 are claimed. The verified answer denies that defendants are, or ever have been, tenants of plaintiff, denies the latter's ownership and right to possession of the premises, and avers that defendants hold possession under a contract of sale, the conditions of which have not yet been performed. While justices' courts are prohibited from receiving evidence upon any question which involves the title or possession of real property, or to try any issue presenting such a question, and, upon a verified showing being made that such a question is necessarily involved in the determination of the action, are required to certify the case to the superior court, the same section of the Code which requires this to be done contains a proviso "that in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined." Section 838, Code Civ. Proc. Statutory provisions relating to proceedings in forcible entry and detainer in this state are to be construed to include proceedings in "unlawful detainer." *Ivory v. Brown*, 137 Cal. 603, 70 Pac. 657. The proceedings in unlawful detainer, in which the rules of evidence relating to forcible entry and detainer are made applicable, are, and of necessity, must be, limited to those cases where the conventional relation of landlord and tenant subsists and in which such defenses only can be recognized as are available to a tenant against his landlord; in other words, to those cases in which the tenant is estopped to deny his landlord's title. To sustain the proceeding the facts must show an express letting of the lands, or show impliedly, at least, that the defendant occupies as a tenant of the plaintiff, and this must be something more than a mere quasi tenancy. *Jones on Landlord and Tenant*, § 563; *Taylor's Landlord and Tenant* (9th Ed.) § 720.

The ascertainment of what are "questions properly involved" in the action of unlawful detainer, what defenses may be interposed in such actions, and when a "tenant

can dispute his landlord's title depends upon a variety of circumstances." *Tewksbury v. Magraff*, 33 Cal. 244. Many instances are considered in the cases of *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111, and *Teich v. Arms*, 5 Cal. App. 475, 90 Pac. 962, which it is not necessary for us to review. Where the action is for unlawfully holding over after the lease has determined, the title may become involved in some cases, and where this is the case removal may be required, but each case is to be considered with relation to the issues necessarily involved in its determination. *Henderson v. Allen*, 23 Cal. 519. The decisive question in the case before the justice court here was: "Were the parties to the action landlord and tenant respectively?" Whatever the character of petitioners' holding, if it were not that of tenants of plaintiff, the action must fail. If the defendants prove their defense in this respect, it will defeat the action in the justice's court, because plaintiff can recover only by establishing such a relation. *Johnson v. Chely*, 43 Cal. 299, 306. If the justice court were without jurisdiction to determine whether or not the relation of landlord and tenant existed between the parties to an action in unlawful detainer, no summary proceeding of this character could ever be heard by that court, since this is the essential thing to the support of such an action. This being the issue raised, the justice court had jurisdiction to try it, and as that issue was determinative of the cause the question of title to the property will not necessarily arise on the trial. *Menomonee River Lumber Co. v. Philbrook*, 78 Wis. 142, 47 N. W. 188; *Johnson v. Chely*, 43 Cal. 306.

The justice court having jurisdiction, the case was improperly certified to the superior court, and the order of the latter court remanding it must be sustained.

Writ dismissed and application denied.

9 Cal. App. 57

LOS ANGELES NAT. BANK v. VANCE.
(Civ. 486.)

(Court of Appeal, Second District, California.
Sept. 18, 1908. Rehearing Denied by
Supreme Court Nov. 16, 1908.)

1. CONTRACTS (§ 280*)—JOINT AND SEVERAL OBLIGATION—PERFORMANCE.

Under Civ. Code, § 1474, performance of an obligation by one of several persons who are jointly liable extinguishes the liability of all.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1250; Dec. Dig. § 280.*]

2. CONTRIBUTION (§ 6*)—JOINT OBLIGORS—STATUTES.

Under Civ. Code, § 1432, a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

[Ed. Note.—For other cases, see *Contribution*, Cent. Dig. § 10; Dec. Dig. § 6.*]

3. SUBSCRIPTIONS (§ 12*)—NATURE OF LIABILITY.

A subscription, reciting that the signers, in consideration of the benefits resulting from the location of a federal building on certain property, agreed to pay the sum set opposite their respective names to a certain bank on the acceptance by the United States government of the property in question, on which a federal building was to be erected, obligated each signer individually, and did not constitute a joint, or joint and several obligation.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. § 11; Dec. Dig. § 12.*]

4. SUBSCRIPTIONS (§ 10*)—EXTENT OF LIABILITY.

Where it was sought to raise \$205,000 to purchase certain real estate to be conveyed to the government for the erection of a federal building, and each subscriber agreed to pay, on demand, the amount set opposite his name, etc., the liability of each subscriber could not exceed the amount of his subscription; but, the total sum subscribed being in excess of that required, each subscription was correspondingly reduced to a sum sufficient to make the required amount.

[Ed. Note.—For other cases, see Subscriptions, Dec. Dig. § 10.*]

5. CONTRIBUTION (§ 6*)—SUBSCRIBERS' LIABILITY.

Where each subscriber's liability on a subscription contract was several, payment of the sum subscribed by others did not constitute payment of the amount subscribed by testator, under Civ. Code, § 1473, so that testator's subscription was not extinguished so as to make it enforceable by other subscribers in an action for contribution.

[Ed. Note.—For other cases, see Contribution, Dec. Dig. § 6.*]

6. PARTIES (§ 7*)—PLAINTIFFS—TRUSTEE OF EXPRESS TRUST.

A subscription contract provided that the signers agreed to pay the sum set opposite their names to a bank on the acceptance by the proper officers of the United States of an offer to convey to the United States certain land to be purchased with the subscription for federal use. *Held*, that the bank was thereby made a trustee of an express trust to collect from each subscriber the amount of his subscription, and was therefore the only person entitled to sue.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 9-11; Dec. Dig. § 7.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Los Angeles National Bank against Marie H. Vance, as executrix of the will of Silas A. Vance, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Forgy, for appellant. Barker & Bowen and Gray, Barker & Bowen, for respondent.

SHAW, J. Appeal on the judgment roll from a judgment rendered against defendant upon a stipulation of the facts; defendant's sole contention being that the facts stipulated do not support the judgment. For the purpose of securing the location of a federal building upon certain lots of land in the city of Los Angeles, bounded by Main, Temple, and New High streets, and consisting of 293 feet frontage on Main street, extending through to New High street, Silas A. Vance,

defendant's testator, with others, signed an agreement, which, after reciting that they would be mutually benefited by the location of such building upon said lands, and that Frank P. Flint, Joseph Mesmer, and A. C. Harper had undertaken to procure the conveyance of said property to the United States government free of all incumbrances, in consideration of the sum of \$1 and the construction thereon by said United States government of a federal building, and also reciting that the sum of \$205,000 would be required to purchase said property, they contracted as follows: "We, the undersigned, in consideration of the benefits resulting from the location of a federal building upon said property, and for value received, hereby subscribe, undertake, and agree to pay, upon demand, the sum set opposite our respective names, in lawful money of the United States government, to the Los Angeles National Bank, at its banking house in the city of Los Angeles, state of California, upon the acceptance by the proper officers of the United States government of the hereinbefore referred to offer, to be made by said Frank P. Flint, Joseph Mesmer, and A. C. Harper; it being understood that, when the full amount of the purchase price of all of said real property has been paid by the subscribers hereto unto said bank, the same shall be paid on the order of Frank P. Flint, Joseph Mesmer, and A. C. Harper to the owners of said real property in consideration of deeds thereto to the United States government." The amount set opposite the name, and for which Vance subscribed the document, was the sum of \$1,480. The total amount subscribed toward securing the location was in excess of that required. The amount collected from subscribers, other than said Vance, was approximately 90 per cent. of each subscription, which sum, if paid by all the subscribers, left in the hands of the plaintiff, after payment of the purchase price of the property and the incidental expenses connected therewith, a sum equal to 9 per cent. of each subscription to be refunded to the subscriber. In other words, the object stated, namely, the location of a federal building, was accomplished by the expenditure of 81 per cent. of the amount subscribed. A claim duly verified for the full amount of the subscription was presented to the executrix of the deceased, who refused to allow all or any part thereof, but wholly disallowed the entire claim. Whereupon plaintiff instituted this action, wherein judgment was rendered, upon the facts stipulated, for plaintiff, for the sum of 90 per cent. of the subscription of \$1,480, further reduced by rebate of 9 per cent., representing the sum in excess of that required by the collection of 90 per cent. on all the subscriptions.

Appellant contends that, inasmuch as the sum required to purchase the land had been

secured by collecting from other subscribers sums in excess of their proportional part of the contribution and the location of the building thereby secured, the estate of testator was therefore absolved from liability to pay anything to plaintiff, conceding, however, that an action for contribution might lie on behalf of the subscribers who had voluntarily paid. This contention is based upon the claim made by appellant that the action is joint and several. There is no question but that "performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all" (Civ. Code, § 1474), and it is likewise statutory law that "a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him" (Civ. Code, § 1432). To apply this law, however, we must first determine that the obligation of Vance was joint, or joint and several. The contract in question contained by way of recital a statement to the effect that to secure such location of a federal building would require \$205,000. The contract of Vance did not depend for its validity, however, upon securing subscriptions for this or any other sum. His contract was distinct and separate, whereby, "in consideration of the benefits resulting from the location of a federal building upon said property," he obligated himself individually and alone to pay to plaintiff the sum of \$1,480. No other subscriber was in any way liable for the payment of this particular sum. The subscribers did not, as contended by appellant, agree to pay \$205,000, but, each for himself alone, agreed to pay the amount set opposite his name and for which no other subscriber was liable. Failure of any one to pay could not enlarge the liability incurred by another. There can be no doubt that the contract of Vance was several. See *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888, where it is said: "There can be no doubt but that the contract is several where the obligation is: 'We, the undersigned, promise to pay the following subscriptions set opposite our names.'" In *Thomas v. Anderson*, 58 Cal. 99, the contract was: "We, the undersigned, promise and agree to pay the sum set opposite our names." And the court held that the obligations were separate and distinct. See, also, *Moss v. Wilson*, 40 Cal. 159. While the liability of Vance could not exceed the amount of his subscription, it might be less, for, if the total sum subscribed in such cases is in excess of that required, then the amount collected from each subscriber should be proportionately less. *Am. & Eng. Ency. of Law*, vol. 27, p. 285; *Hodges v. Nalty*, 104 Wis.

464, 80 N. W. 726; *Miller v. Ballard*, 46 Ill. 377. The total sum subscribed being in excess of that required, it follows that each subscription was correspondingly reduced in amount.

Appellant next contends that, conceding the existence of the liability, it could only be enforced by other subscribers in an action for contribution. This position is likewise untenable. As we have seen, the contract being several, no other subscriber owed the duty of performing it, and the payment of the sums subscribed by the others could not be regarded as a payment of the amount subscribed by Vance (Civ. Code, § 1473), and hence his obligation was not extinguished, a prerequisite absolutely necessary to entitle any one to maintain a suit for contribution. Had the subscribers agreed jointly to pay to plaintiff, for the common benefit resulting from the location of a federal building upon said property, the sum required to secure such location, and the payments made by all except Vance had equaled the required sum, then the subscribers so paying would have, to the extent of paying his pro rata part, performed a duty devolving upon him for which, in case of his default, they were jointly liable and suit for contribution would lie. *Grand Lodge v. Farnham*, 70 Cal. 158, 11 Pac. 592. By the terms of the contract plaintiff was made trustee of an express trust to collect from each subscriber the amount of his subscription and pay it over for the purpose and in accordance with the terms of the contract. There was no privity between the appellant's testator and the owners of the real estate. Under the provisions of the agreement, plaintiff was the only party authorized to make the collection. As said in *Swain v. Hill*, 30 Mo. App. 436, plaintiff "became a trustee or agent for the entire body of subscribers to carry out the object of the subscription." In *Miller v. Ballard*, supra, it is said: "The persons named in the subscription paper as payees are, in such cases, considered merely as a committee, or as trustees, to whom the promise is made for the benefit of any one who may act upon its faith, and a suit may be maintained in their name." See, also, *Christian College v. Hendley*, 49 Cal. 347, where it was held: "The promise to pay being to the finance committee, the plaintiff could not sue, in the absence of a proper allegation showing the right of action had passed, by operation of law, to the plaintiff." To the same effect, see *Lasar v. Johnson*, 125 Cal. 549, 58 Pac. 161.

Upon every principle of right and justice, as well as upon authority, the judgment should be, and is, affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 70

TOWN OF SELMA v. BREWER. (Civ. 485.)
(Court of Appeal, Third District, California.
Sept. 21, 1908. Rehearing Denied by
Supreme Court Nov. 19, 1908.)

1. INTOXICATING LIQUORS (§ 10*)—REGULATIONS—POLICE POWER.

Under Const. art. 11, § 11, authorizing any city to make and enforce police regulations not in conflict with general laws, a city, in the exercise of police power, may suppress the retail sale of intoxicating liquors, as beverages, within its limits.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. § 10.*]

2. INTOXICATING LIQUORS (§ 10*)—PROHIBITION—POLICE ORDINANCE—VALIDITY.

A town ordinance, in its title and provisions, indicated a purpose to suppress the sale of intoxicating liquors of any kind within the town, except where they were used at private residences, or were required for medicinal, mechanical, or scientific purposes. One section prohibited any person, etc., to have, keep, possess, provide, or store liquors in the town, and other sections prohibited the sale thereof, except by pharmacists duly licensed to sell the same, and declared that for violation thereof a penalty of \$40 should be imposed, recoverable in a civil action by the town, and that each day's violation should be a separate offense. *Held*, that the ordinance was not a revenue measure, but was a valid exercise of the city's police power.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 8-12; Dec. Dig. § 10.*]

3. INTOXICATING LIQUORS (§ 139*)—PROHIBITION—ORDINANCES—CONSTRUCTION.

A town ordinance prohibited any person to keep, possess, or store spirituous liquors in the town, except that a duly registered pharmacist, having an established pharmacy business in the town, and holding a druggist's permit, might "sell" any of such liquors, for certain specified purposes only, in accordance with specified conditions. *Held* that, since a registered pharmacist was permitted to sell liquors, he was necessarily authorized to possess the same, so that no action could be maintained against him for keeping or storing liquors in his possession, in violation of such ordinance, unless it was alleged and proved that he sold, or was engaged in the business of selling, such liquors in violation of the ordinance.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 139.*]

4. INTOXICATING LIQUORS (§ 139*)—SALE BY DRUGGIST—"DRUGS."

Intoxicating liquors, kept for medicinal purposes, being within the general term "drugs," a druggist or pharmacist, legitimately engaged in that business, has a right, without express authority of law, to have, keep, possess, and store intoxicating liquors as a part of his necessary drug stock to be sold by him, subject to the conditions, limitations, and restrictions prescribed by an ordinance regulating the sale of intoxicating liquors for medicinal purposes, and could only be subjected to the penalties prescribed therein, on proof that the liquors were dispensed in violation of the prescribed conditions, restrictions, and limitations.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 139.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2205, 2206; vol. 8, p. 7643.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the town of Selma against T. R. Brewer. Judgment for defendant, and plaintiff appeals. Affirmed.

Joel H. Smith and Graham & Wallace, for appellant. Everts & Ewing, for respondent.

HART, J. The object of this action is to recover from the defendant penalties aggregating the sum of \$3,360 for the alleged violations of the provisions of ordinance No. 98 of the town of Selma, entitled "An ordinance for police regulation, relating to and making unlawful the keeping of places where intoxicating liquors are sold; the sale of intoxicating liquors, the storing, providing and having intoxicating liquors to be sold or at all, except in certain cases, in the town of Selma, county of Fresno, state of California, and within the corporate limits of said town; providing penalties for breaches thereof and for the recovery of said penalties," etc. A general and special demurrer was sustained to the complaint, without leave to amend, and judgment thereupon entered in favor of defendant. From said judgment this appeal is taken.

The purpose of the ordinance upon which this action is founded is, as is obvious from its title, to suppress the sale of intoxicating liquors of any kind or character within the corporate limits of the town of Selma, except in cases where the same may be used at private residences or required for "medicinal, mechanical or scientific" purposes. Section 4 of said ordinance provides: "From and after the passage, publication and taking effect of this ordinance as hereinbefore provided, it shall be and hereby is declared to be unlawful for any person, firm, corporation, company, club, or association to have, keep, possess, provide or store any spirituous, malt, vinous, mixed, fermented, distilled, alcoholic or intoxicating liquors in the town of Selma," etc. Section 6 reads: "Any pharmacist, duly registered as such under the laws of the state of California, and having an established business as a pharmacist or druggist in the town of Selma, and holding a druggist's permit obtained from the board of trustees of said town of Selma, as hereinafter provided, may sell any of the liquors enumerated in the foregoing section of this ordinance for the following purposes only and subject to the provisions, restrictions and limitations hereinafter in this ordinance provided"—and thence follows a specification of the "restrictions and limitations" upon which a pharmacist may dispense intoxicating liquors. Section 8 provides in detail in what manner a pharmacist or druggist may proceed to obtain a permit to sell alcoholic and intoxicating liquors. By this section an application in writing for such permit, sworn to by the applicant, and setting forth certain facts, is required. Section 12 provides that any person, firm, corporation, club, or association who violates any of the provisions of the ordinance shall be subject to and liable for a penalty in the sum of \$40, "which

said penalty, together with costs, shall be recoverable in a civil action by the town of Selma." Section 14 provides, among other things, that, if the judgment in any such action "direct that the defendant therein be arrested, execution may issue against the person of such judgment debtor, after the return of execution against his property unsatisfied in whole or in part, and require the officer to whom the same is directed to arrest such judgment debtor and commit him to the county jail of Fresno county until he pay such judgment, according to the terms hereof, or be discharged by law." It is provided by section 15 that "every breach of this ordinance or of any of the terms, conditions, provisions, requirements, restrictions or limitations thereof, as the same are hereinbefore established, created, declared, defined and set forth shall, separately, or for each day of its continuance, be deemed to be and be a separate breach thereof. * * *

It is alleged by plaintiff that the defendant was at all the times mentioned in the complaint a pharmacist and druggist, and that from and including the 20th day of September, 1905, and on each and every day successively thereafter until and including the 12th day of December, 1905, in the building in which he conducted his business as pharmacist and druggist, within the corporate limits of plaintiff, and without any legal license or permit to do so, "have, keep, and store intoxicating liquors, and thereby became and is indebted to and liable to pay to plaintiff the sum of \$40 for each and every of said unlawful acts, in having, keeping, and storing intoxicating liquors, as aforesaid, for the days aforesaid, and for each and every of said days, amounting to the total sum of \$3,660." The complaint was, obviously, drafted under the provisions of section 4 of the ordinance, which, as seen, makes it unlawful for any person, firm, association, etc., "to have, keep, possess, or store any spirituous, malt, vinous, mixed, fermented, distilled, alcoholic or intoxicating liquors in the town of Selma." Under said section, it will be observed, the mere having, keeping, possessing, or storing such liquors, without reference to the disposition which may be made of them by the keeper or possessor, is made unlawful.

The language of the section is quite sweeping, and even those having the lawful right to keep and store such liquors—for instance, manufacturers thereof—might be said to come within the purview of the prohibition but for the fact that it may clearly be gathered from the other provisions of the ordinance and from the general purpose the measure is manifestly designed to accomplish, that section 4 of the ordinance has reference and application only to such persons, associations, etc., as might violate its provisions with a view of engaging in the retail traffic in the liquors mentioned in said ordinance. We are of the opinion, however, that the complaint does not state a cause of ac-

tion against the defendant, even under the theory upon which the case is argued in the briefs. There is no doubt that the plaintiff has, in the exercise of the power of police, the right and power to suppress the retail sale of alcoholic and intoxicating liquors, as beverages, within its limits. It is not necessary to specifically refer to the many cases affirming this proposition, for it is so well settled and understood as a part of American law that the citation of authorities is not required. And we are further of the opinion that the ordinance here, taken as a whole, is consistent with the provisions of the Constitution and represents only a proper exercise of the power expressly vested by that instrument in the cities, counties, towns, and townships of the state. Const. art. 11, § 11. The case of *Merced County v. Helm*, 102 Cal. 161 et seq., 36 Pac. 399, involved an ordinance adopted by the county supervisors, the purpose of which was altogether different from that designed to be achieved by the present ordinance. The ordinance in that case was unquestionably, as plainly indicated by its provisions, a revenue measure. The action was inaugurated for the purpose of recovering the sum of \$3,000 claimed to be a debt due to the county from the defendants by virtue of their having sold intoxicating liquors within the county without having first paid the license tax required by said ordinance "for the quarter commencing March 1, 1903." The Supreme Court, in its analysis of said ordinance and the suit thereunder, says: "By its very terms the ordinance is a revenue measure, and this suit is simply a civil action to recover a liability alleged to have been incurred by the defendants by virtue of the provisions of the ordinance, and the collection of a tax does not come within the exercise of police power as a prohibitory measure. That power is exercised in the enforcement of a penalty prescribed for a noncompliance with the law, or for the doing of some prohibited act. *San Luis Obispo County v. Hendricks*, 71 Cal. 245, 11 Pac. 682. As the county has chosen by this ordinance to require a license tax for engaging in certain kinds of business, and that this tax shall be collected by a suit, and has fixed no penalty for engaging in the business, the ordinance is not to be regarded as the exercise of its police power, but rather as its desire to regulate the business and derive a revenue therefrom."

Upon the slightest reflection it is at once apparent that the ordinance involved here is not a revenue measure, but is the result, as we have declared, of the exercise of the police power. Its object is, in other words, to entirely suppress the retail sale of intoxicating liquors, to be used as beverages, within the corporate limits of Selma, and for the violation of its provisions a certain penalty is attached. The suit in the *Merced Case* was for an alleged debt, in an action indebi-

tatus assumpsit in form. Here the action is to enforce the payment of a penalty for non-compliance with the terms of the ordinance. But, as before stated, we nevertheless think the general demurrer was properly sustained, even if it could be held that the provision as to the keeping, possessing, and storing of alcoholic and intoxicating liquors applies to regularly registered druggists and pharmacists. The complaint charges the defendant with having, keeping, possessing, and storing the contraband liquors, "without any legal license or permit so to do." Section 6 of said ordinance provides, as observed, that certain pharmacists or druggists may sell the interdicted liquors upon and under certain specified conditions, limitations, and restrictions, among which is, as a prerequisite to so engaging in such sale, the procuring of a permit from the board of trustees of plaintiff. We think that, in order to have stated a cause of action against the defendant, the complaint should contain a direct averment that he sold or was engaged in the business of selling such liquors contrary to the provisions of the ordinance or without having first obtained the permit so to do from the governing body of plaintiff. It does not necessarily follow from the averment that he has and possesses and stores such liquors that he is selling or intends to sell them. There is no permit required for the mere keeping and storing the liquors. In fact, such a permit would be inconsistent, except in the case of those expressly excepted from the operation of the ordinance, with the provisions and the general purpose thereof; but necessarily the defendant, as a pharmacist within the description of the ordinance, would be entitled to keep, possess, and store the prohibited liquors. The very fact that the ordinance declares that he may sell such liquors invests him, *ex necessitate*, with the indispensable right to have and possess the same. His offense, if any at all, would be in dispensing or selling the same contrary to the conditions imposed by the ordinance or without the required permit, or for both reasons, assuming for the present that a permit to sell such liquors by a pharmacist or druggist may be required. This is neither an ultra-technical nor a metaphysical analysis of the complaint, for the very first and cardinal rules of pleading demand that the averments of the gist or gravamen of a complaint shall be clear and direct. Particularly should this be true where, as here, the recovery sought is upon a liability in the nature of a penalty or forfeiture, the right to sue for which is purely of statutory origin. The complaint here, in undertaking to state a case against the defendant under the ordinance under consideration, is obviously lacking in those elements of good pleading. In our opinion, as observed, it states nothing that the defendant has not the right to do

even under the terms of the ordinance, and therefore cannot resist the force of the general demurrer; but, as already intimated, we do not hesitate to take a step farther.

We are familiar with no principle of law from which authority may be deduced for prohibiting a pharmacist or druggist, regularly engaged in the business of compounding prescriptions and selling drugs, from having and possessing and selling intoxicating liquors for the legitimate purposes of his business, and from storing or keeping in stock such quantities of the same as the exigencies of his trade may require. It is, we think, a matter of common knowledge, as much so as are the uses to which quinine is medicinally put, that many, if not all, of the liquors mentioned in this ordinance are often deemed to be necessary to be used for medicinal purposes. Of course, as in the case of certain poisons ordinarily sold at drug stores, the sale of liquors for medicinal purposes by pharmacists or druggists may be, by the public authorities, confined to such purposes and otherwise subjected to proper and reasonable regulation, or to the imposition of such conditions and restrictions as will safeguard, protect, and preserve the rights of the public. It is well known that the fundamental property of nearly all bitters, a legitimate subject of traffic by all druggists, is alcohol, and that the excessive use of them by an individual will produce intoxication, and there is no doubt that many prescriptions contain as an essential element, according to the judgment of physicians, some character of intoxicating liquors, and no doubt there are cases of physical illness which require liquor of some kind in its unmixed and unadulterated form. The medical doctor's prescription for *spiritus frumenti* (whisky) or *aqua vitæ* (brandy), when given for a legitimate medicinal purpose, is not uncommon, and certainly cannot be unlawful *per se*, and surely it could make no difference whether the whisky or the brandy were dispensed by the pharmacist and used by the purchaser, in Latin or in plain English, if the purpose of such sale and use were purely medicinal. The sale of opiates and other more drastic poisons by regularly licensed druggists is hedged about by restrictions which, as a protection to the public, the law has an unchallengeable right to impose; but it has never been supposed for an instant that the sale of such "drugs" could be entirely prevented, any more than that the sale of the thousands of different kinds of specifics and patent medicines and nostrums could be stopped, where it could not be established that, even when used for the particular medicinal purpose which it is claimed and advertised they will subserve, they would produce positive harm to such as might so use them.

The Legislature may and does (section 307, Pen. Code) prohibit the sale of opium for certain designated purposes, and under certain

indicated circumstances; but it would not be contended that that narcotic may not be kept and sold by a druggist as one of the essential elements of his business, for it is, as we know, as a matter of common knowledge, a substance necessary to be used in the compounding by a pharmacist of medicines and prescriptions. So, as to liquors. It is known, as before observed, that they are frequently found necessary to be used in the compounding of physician's prescriptions, and often found absolutely necessary in cases where the particular disease to be treated peculiarly affects the heart action. Liquors therefore, when kept for medicinal purposes, come as clearly within the generic term "drugs" as any other animal, vegetable, or mineral substance comprising the elements of which medicines and prescriptions are ordinarily compounded.

Our conclusion is, as must be obvious from the foregoing views, that a druggist or pharmacist, engaged legitimately in that business, has the right, without express authority of law, to have, keep, possess, and store certain of the liquors mentioned in the ordinance under review, as a part of the necessary "drugs" or stock in trade of his business, to be sold by him, subject to the conditions, limitations, and restrictions prescribed by said ordinance, for medicinal purposes; that the defendant can therefore be subjected to the penalty or penalties therein prescribed only where it may be shown that he has dispensed or is dispensing such liquors in violation of said conditions, restrictions and limitations.

We do not deem it necessary, in view of the conclusion here reached, to notice the point raised by the special demurrer that several causes of action have been improperly united.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

9 Cal. App. 111

NATIONAL CYCLE MFG. CO. v. SAN DIEGO CYCLE CO. et al. (Civ. 515.)

(Court of Appeal, Second District, California. Sept. 25, 1908.)

1. LIMITATION OF ACTIONS (§ 27*)—ACCOUNTS.

An action on an account for goods sold and delivered in 1894, in the absence of an acknowledgment of the indebtedness in writing, was barred in 1896 by the two-year limitations. Code Civ. Proc. § 339.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 133; Dec. Dig. § 27.*]

2. LIMITATION OF ACTIONS (§ 151*) — ACKNOWLEDGMENT—EFFECT.

An acknowledgment in writing of a debt by the debtor before it is barred raises an implied promise to pay within the statutory period from the time of acknowledgment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 617; Dec. Dig. § 151.*]

3. LIMITATION OF ACTIONS (§ 151*) — ACKNOWLEDGMENT—EFFECT—REVERSAL OF ACTION.

Goods were sold to defendant in 1894, and prior to 1896 it acknowledged the indebtedness in writing as required by Code, § 360, and an action was brought on account for the goods in April, 1899. Held, that the acknowledgment only extended defendant's liability for the period of limitations after the acknowledgment, so that the action was barred by the two-year limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 617; Dec. Dig. § 151.*]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by the National Cycle Manufacturing Company against the San Diego Cycle Company and others. From a judgment for part of defendants, and from an order denying a new trial, plaintiff appealed. Affirmed.

Cassius Carter and Fred O'Farrell, for appellant. Wright, Schoonover & Winnek, for respondents.

ALLEN, P. J. Appeal by plaintiff from a judgment in favor of defendants other than Easton, and from an order denying a new trial.

This appeal presents various interesting questions, all of which are ably presented and insisted upon by counsel for appellant. An examination of the record, however, discloses that, were the correctness of appellant's position conceded as to all of the questions involved other than that of the statute of limitations, nevertheless the finding of the court in relation to such bar of the statute is sufficient to defeat plaintiff's recovery, if the finding in relation thereto has support from the evidence. With this in view no good result would follow a detailed investigation into and determination of the other questions presented.

The action is based upon an account for goods sold and delivered during the year 1894. Assuming, as before stated, that appellant is warranted in its contention that a partnership existed between the defendants and the liability for the price and value of the goods sold attached jointly to all the defendants, nevertheless the two-year bar of section 339 of the Code of Civil Procedure, in the absence of any acknowledgment in writing of the indebtedness, attached in the year 1896. There is, however, in the record certain letters signed by the San Diego Cycle Company, claimed by plaintiff to be the co-partnership, which may fairly be construed as acknowledgments upon the part of the San Diego Cycle Company of its liability. All of these written acknowledgments, however, are of date preceding January 1, 1896. This action was commenced in April, 1899. The court finds all of the accounts barred by the provisions of section 339, and the question presented is as to the effect of such acknowledgment in writing so made by the

debtor as affecting his continuing liability on account of the indebtedness. It is established that from such an acknowledgment an implied promise to pay arises. Section 360 of the Code of Civil Procedure provides: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." In *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170, our Supreme Court, in construing this section, says: "The acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract; and, when made after the bar of the statute, a new contract"—while in *Southern Pacific Co. v. Prosser*, 122 Cal. 417, 52 Pac. 836, 55 Pac. 145, Mr. Chief Justice Beatty, in speaking for the court, says: "When a debtor makes a new promise before an action is barred upon the original contract, he does not make himself liable a second time for the same debt, and the old promise is not merged in the new. He merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor." In our opinion these cases determine that the effect of the acknowledgments upon the part of the San Diego Cycle Company was but to continue their liability from the date of the last acknowledgment until the expiration of two years therefrom; and, it affirmatively appearing that such period expired before the commencement of the action, all of the causes of action set out in the complaint were barred, and the trial court did not err in so finding.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 31

POHEIM v. MEYERS. (Civ. 501.)

(Court of Appeal, First District, California.
Sept. 14, 1908.)

1. VENDOR AND PURCHASER (§ 123*)—CONTRACT OF SALE—RESCISSION BY VENDEE—FAILURE OF TITLE—PLEADINGS.

Where a contract for the sale of land provided for an examination of title by a title insurance company, and that the issuance of a policy by the company without objection should be conclusive of the validity of the title, a complaint in an action by the purchaser to rescind the contract, and to recover the deposit for failure of title, which did not allege that the company examined the title or objected thereto, or that the title was such that the company would not issue a policy thereon without objection, was defective.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 224; Dec. Dig. § 123.*]

2. EVIDENCE (§ 46*)—JUDICIAL NOTICE.

Under Code Civ. Proc. § 1875, providing that courts take judicial notice of public and private official acts of the legislative, executive,

and judicial departments of the state, courts take judicial notice of the existence and effect of holidays declared by the Governor following the earthquake and conflagration of April 18, 1906.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 68; Dec. Dig. § 46.*]

3. CONTRACTS (§ 346*)—WAIVER—PLEADINGS AND PROOF.

A plaintiff relying on a waiver of conditions of his contract must both plead and prove such waiver.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1732; Dec. Dig. § 346.*]

4. VENDOR AND PURCHASER (§ 123*)—CONTRACT OF SALE—RESCISSION BY VENDEE.

A vendee in default in the performance of the conditions of a contract for the sale of land, whereof time is of the essence, and who has not tendered the balance of the money payable under the contract, cannot on the ground of failure of title recover a payment made thereunder.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 123.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Joseph F. Poheim against R. C. Meyers. Judgment for defendant, and plaintiff appeals. Affirmed.

Maddox & Loessel, for appellant. Charles W. Slack and Perry Evans, for respondent.

HALL, J. Plaintiff brought this action to recover the sum of \$500, paid by his assignor to defendant, as a deposit or first payment on a contract to buy a certain piece of land for the total sum of \$14,625. Judgment went for defendant, and this appeal is by plaintiff from such judgment, and was taken within 60 days from the entry thereof.

The complaint is in two counts, each of which was demurred to as not stating a cause of action. The demurrer was sustained as to the second count, and appellant claims that the court erred in so doing.

The second count of the complaint is framed upon the theory that the plaintiff, as the assignee of the vendee, had rescinded the contract because of a failure of consideration, in that the title of plaintiff was not a merchantable title, in that it was not ascertainable from the public records of the city and county of San Francisco. Attached to the complaint, and made a part of the second count thereof, is the written contract entered into between plaintiff's assignor and defendant. This contract provides that "thirty days from date are allowed to examine title to said property, which examination is to be made by the California Title Insurance & Trust Company, and the issuing of a policy by the said company without objection shall be conclusive of the validity of the title. If such policy be issued without objection, the balance of the said purchase price shall thereupon be paid to the said owner, who shall deliver to the purchaser a sufficient grant, bargain and sale deed for the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said property, at the sole cost and expense of the purchaser." Other provisions relate to the removal of objections if any should be reported, but from the foregoing provisions of the contract it is apparent that the title agreed to be conveyed was such as the designated company would be willing to insure without objection. It is nowhere alleged in the second count of the complaint that said company ever examined said title, or was ever requested so to do, or made any report thereon, or any objection thereto, or that the title was in fact such that said company would not issue a policy thereon without objection. The parties have a right to contract for such title as they see fit, and, when they have made such a contract, the vendee may not rescind for failure of title without alleging a failure of such title as he contracted for. His attempt in the case at bar by certain allegations which he has made as to the meaning of the contract as it concerns the title cannot strengthen his case. The contract is a part of his complaint, and is plain and unambiguous. It speaks for itself. He has not alleged that the title was not such as is called for by the contract. The court did not err in sustaining the demurrer to the second count of the complaint.

By the first count plaintiff seeks to recover the same \$500, and makes the contract a part also of this count. The contract is dated April 4, 1906, and besides the provision allowing 30 days for examination of title, and making the action of the designated company thereon conclusive as to the validity of the title, hereinbefore set forth, it provides: "If any objections are reported, said owner shall remove the same within thirty days thereafter, and, when so removed, the balance of the said purchase price shall be paid to said owner and said deed delivered as aforesaid. If such objections be removable and are not so removed within said last-mentioned time, said deposit shall at the option of the purchaser be returned to said purchaser, and all rights and obligations hereunder shall be at an end. If such objections be of a character that cannot be removed within 30 days, this agreement shall be at an end, anything herein contained to the contrary notwithstanding. If said purchaser shall fail to comply with any condition at the time and in the manner herein provided for, said owner shall be released from all obligations hereunder and all rights hereunder, legal and equitable, of said purchaser, shall be forfeited as liquidated and agreed damages and not as a penalty for such default. Time is of the essence of this contract."

Plaintiff does not in his complaint allege that he or his assignor complied with the requirements of the contract as to searching title and reporting any objection thereto within the time allowed by the contract, but alleges that by reason of the act of God it was impossible for the vendee (Katherine D.

Poheim) to procure an examination of said title, and to report the result thereof to defendant, at any time prior to July 3, 1906, but that on said day she did procure from the California Title Insurance & Trust Company a report of their examination of said title, and forthwith reported to defendant a valid objection thereto, and demanded that he remove the same within 30 days. She further alleged that he did not remove said objection within 30 days. The only excuse pleaded by plaintiff for not making objection to the title within the time allowed by the contract is prevention of performance by reason of the act of God. The court, however, found that it was not impossible by the act of God, or for any cause, for said Katherine D. Poheim to procure from said California Title Insurance & Trust Company an examination of said title, or to report the result of such examination to the defendant, within the time specified in the contract, and that her failure to obtain such report and to report the result of such examination to defendant within the required time was the result of her own neglect. The court further found that the vendee reported the objection to the title to defendant on July 7, 1906, and that he removed the same on July 11, 1906. Appellant challenges both of these findings as not supported by the evidence, but we think that both are fully supported by evidence in the record. By the terms of the contract 30 days from April 4, 1906, were allowed for examination of title. By the successive holidays declared by the Governor of the state, following the earthquake and conflagration of April 18, 1906, her time for the examination of and report on the title was extended to and included the 4th day of June, 1906, under the terms of the contract. Of the existence and effect of these holidays the court must take judicial notice. Code Civ. Proc. § 1875; *Mullan v. State*, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262; *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556. Plaintiff, acting for his mother, the vendee, made application to the California Title Insurance & Trust Company for an examination of and policy on the title to the property, according to his own testimony on April 6, 1906, though his written application bears date April 11, 1906. While the evidence shows that the said company ceased business for a while after April 18, 1906, it also shows that it resumed business on May 28, 1906, and that it had completed its examination of said title and had its report completed and ready for delivery on June 4, 1906. But neither the vendee nor plaintiff applied to said company for a report thereon until July following. It is thus clear that the vendee was not prevented by any act of God from getting her report on June 4, 1906. It was then ready and in the hands of her own agent, the California Title Insurance & Trust Company, employed by her to make such examination and report. Further,

though there is evidence that said company ceased doing business for a time after April 18, 1906, there is not one word of evidence in the record that it was compelled to do so, or that its plant was in any way injured or disturbed by any act of God, or by any earthquake or fire. If plaintiff relied on the earthquake as the act of God, he has not shown that such earthquake interfered with the work of the Title Insurance Company in examining this title. For aught that appears in the record, the examination may in fact have been made before April 18th. But, however this may be, the Title Insurance & Trust Company was itself employed by the vendee, and was her agent for the purpose of examining and reporting on the title. That it was not prevented by any act of God from making such examination and report on or before the 4th day of June, 1906, which was the last day for making such report, is conclusively shown by the fact that the examination had been made and the report was prepared and ready on that day.

As to the finding to the effect that the objection was removed within 30 days from notice thereof, the evidence shows that the objection was that no "city deed" had ever been given for the property. Notice of the objection was given July 7, 1906, and on the 11th day of the same month defendant deposited with the California Title Insurance & Trust Company \$100 to remove such objection. The representative of the California Title Insurance & Trust Company testified to the effect that on the payment of this \$100 the company would itself get the deed from the city, and would issue the policy without objection. As we understand the evidence of this witness, it was to the effect that immediately on the payment of the \$100 the company was willing to issue its policy on the title to the property without exception or objection for want of the city deed. On this point defendant testified that, when he made the deposit of the \$100 with the company, "they" stated that "they" were then willing to issue the policy without an exception on account of the city deed. This removed the only objection made to the title. Of this, of course, the California Title Insurance & Trust Company had notice. It was employed by the vendee to examine and report on the title, and was her agent for that purpose, and its knowledge was her knowledge. All uncertainty as to the effect of the clause in the contract, "the issuing of a policy by the said company without objection shall be conclusive of the validity of the title," was removed by a stipulation that it meant "the willingness of the company to issue a policy without objection upon the receipt of an appropriate deed from the seller shall be conclusive of the validity of the title."

Appellant further urges that the finding

as to the removal of the objection to the title is contrary to the admission in the answer. This we think is without merit. The contention is based on the answer as originally filed, but at the trial defendant was permitted to amend his answer by adding at the end of paragraph VI thereof the following: "And the defendant further alleges that, if the said objection had any validity, the said objection was removed by defendant within thirty days after the receipt by him of said alleged objection." Appellant suggests that the evidence shows that defendant waived the default of plaintiff, but no such issue is raised by the pleadings. When a plaintiff relies on a waiver of conditions of his contract, such waiver must be both pleaded and proved. *Lanitz v. King*, 93 Mo. 513, 6 S. W. 263.

Plaintiff does not claim to have ever tendered the balance of the money payable under the contract, and, being in default in the performance of conditions upon a contract in which time is of the essence of the contract, he cannot recover the payment made to defendant. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *Bradford v. Parkhurst*, 96 Cal. 102, 30 Pac. 1106, 31 Am. St. Rep. 189; *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 130

PEOPLE v. SHEFFIELD. (Cr. 95.)

(Court of Appeal, Second District, California: Sept. 28, 1908.)

1. INDICTMENT AND INFORMATION (§ 87*)—TIME OF OFFENSE—SUFFICIENCY OF ALLEGATION.

An information charging rape of a child "on or about" a specified date within the statute of limitations was sufficient, since under Pen. Code, § 955, the precise time of an offense need only be stated, where time is a material ingredient of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 244-255; Dec. Dig. § 87.*]

2. RAPE (§ 4*)—RAPE OF CHILD—MARRIAGE OF CHILD—MATERIALITY.

In a prosecution for rape upon a child, it is immaterial whether she had been married; it being sufficient that she was under the age of consent, and not accused's wife.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 4.*]

3. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES—INTEREST—INSTRUCTIONS.

An instruction that the presumption that a witness speaks the truth may be repelled by any interest, bias, or prejudice, while going beyond Code Civ. Proc. § 1847, providing that the presumption may be repelled by the manner in which he testifies, the character of his testimony or evidence affecting his character for

truth, honesty, or integrity, or his motives, or by contradictory evidence, and that the jury are the exclusive judges of his credibility, was not error, since it merely amounts to instructing that the jury may consider interest and bias in weighing the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1780, 1891; Dec. Dig. § 785.*]

4. CRIMINAL LAW (§ 782*)—INSTRUCTIONS—WEIGHT OF EVIDENCE—RAPE.

It was not error in a trial for rape of a child to instruct that, if the jury believed prosecutrix and was satisfied from all the evidence beyond reasonable doubt of accused's guilt, they should so find.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1877, 1878; Dec. Dig. § 782.*]

5. RAPE (§ 7*)—STATUTES—APPLICABILITY.

Pen. Code, § 263, making sexual penetration, however slight, sufficient to complete rape, is applicable to all the subdivisions of section 261, defining the offense.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 7; Dec. Dig. § 7.*]

6. RAPE (§ 59*)—INSTRUCTIONS.

In a rape trial, an instruction that proof of any penetration, however slight, was sufficient, was not prejudicial error for omitting the word "sexual" before "penetration."

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 95; Dec. Dig. § 59.*]

7. RAPE (§ 2*)—CONSTITUTIONAL LAW—ELEMENTS OF CRIME—KNOWLEDGE OF FACTS.

Pen. Code, § 261, defining "rape," is not unconstitutional in making the act a felony, regardless of whether accused intended a crime or knew of any facts which would constitute his acts a crime.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 2.*]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

John H. Sheffield was convicted of rape, and he appeals from the judgment and an order denying a new trial. Affirmed.

H. H. Appel and J. C. Crouch, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Defendant was convicted of rape committed upon a female child under the age of 16 years. He appeals from the judgment and order denying a new trial.

The information filed, and upon which defendant was tried, charged that the offense was committed "on or about the 12th day of October, 1907." It is insisted that the information is defective because the precise time was not stated. This is not necessary under section 955 of the Penal Code, except where the time is a material ingredient in the offense. That it is not such an ingredient, where rape by means of force is charged, is determined in the case of *People v. Dinsmore*, 102 Cal. 382, 36 Pac. 661. No convincing reason is suggested why a different rule should apply where the female is by statute rendered incapable of consent. The information charges that at the time of the commission of the act the female was under

the age of consent, and it clearly appears that the offense was committed within the three years immediately preceding the filing of the information. This is sufficient. It is unnecessary to allege that the female had never been married to any one before the commission of the act. It is sufficient to aver and prove that she was under the age of consent and not at the time the wife of the one having sexual intercourse with her. The offense is complete under the statute, even though the female may have been at the time the wife of another.

The charge of the court "that the presumption that a witness speaks the truth may be repelled by his interest in the case, if any, or his bias or prejudice, if any," while it goes beyond section 1847, Code Civ. Proc., is not therefore error. "It amounts only to telling them [the jury] that interest and bias may be considered by them in weighing the testimony, as undoubtedly may be done." *People v. Amaya*, 134 Cal. 540, 66 Pac. 794.

We see no error in the charge which instructed, "if you believe the prosecutrix, and are satisfied from all of the evidence in the case, beyond a reasonable doubt, of the defendant's guilt, then you should so find"; nor in that other charge, "that proof of any penetration, however slight, is sufficient in a case of rape." With reference to the latter charge, it may be said the crime of rape is defined by section 261 of the Penal Code, and that part of section 263 embodied in the charge last referred to is applicable alike when the crime is committed under any of the circumstances set forth in section 261.

The omission of the word "sexual" as preceding the word "penetration" could not have been prejudicial. As said in *People v. Rangod*, 112 Cal. 673, 44 Pac. 1071: "We do not regard the omission as material, in view of the other instructions defining the offense, and which, read in connection with the one under consideration, very clearly disclosed to the jury that it was sexual penetration which was referred to in the latter." The proposition advanced, that section 261 of the Penal Code is unconstitutional, in that it makes the act a felony independent of whether or not the accused intended any crime, or had any notice or knowledge of any fact or facts which would constitute his acts a crime, is met and determined adversely to appellant in *People v. Ratz*, 115 Cal. 132, 46 Pac. 915, and *People v. Griffin*, 117 Cal. 586, 49 Pac. 712, 59 Am. St. Rep. 216, wherein it is held that in cases like this and of kindred character "the illegal motive is present, and that illegal motive becomes a criminal intent when the facts, at whose peril he acts, are shown to exist." "The protection of society, of the family, and of the infant demand that one who has carnal intercourse under such circumstances shall do so in peril

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

of the fact, and he will not be heard against the evidence to urge his belief that the victim of his outrage had passed the period which would make his act a crime."

An examination of the record discloses no prejudicial error therein, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 136

SHOPBELL v. BOYD et al. (Civ. 513.)

(Court of Appeal, Second District, California.
Sept. 30, 1908.)

1. PLEADING (§ 214*)—GENERAL DEMURRER—ADMISSION OF FACTS.

In determining the sufficiency of a complaint as against a general demurrer the truth of the facts alleged therein is admitted for the purposes of the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

2. CANCELLATION OF INSTRUMENTS (§ 37*)—PLEADING—COMPLAINT.

In a suit to compel a rescission of an exchange of real property for fraud, the complaint *held* not subject to general demurrer.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-81; Dec. Dig. § 37.*]

3. PRINCIPAL AND AGENT (§ 171*)—ACTS OF AGENT—FRAUD—AFFIRMANCE.

Where a complaint to compel a rescission of an exchange of property alleged that B., in making certain false representations on the faith which plaintiff consented to the exchange, acted as defendant's agent, and defendant accepted and retained the property, conveyed to her in the exchange, the complaint was not objectionable because the false representations were made by B., and not by defendant.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 648; Dec. Dig. § 171.*]

4. CONTRACTS (§ 259*)—RESCISSION—GROUNDS.

Civ. Code, § 1639, provides that a party to a contract may rescind if his consent was obtained through fraud exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with him. *Held*, not to limit the right of rescission to cases where the insolvency of the defendant is alleged, but that, if the party defrauded acts promptly on obtaining knowledge of the fraud, he may, in the absence of a waiver, either rescind or complete the contract and sue for damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1160-1167; Dec. Dig. § 259.*]

5. EXCHANGE OF PROPERTY (§ 3*)—RESCISSION—FRAUD.

Where defendants misrepresented property conveyed to plaintiff in exchange, as free from incumbrances except as stated, when, in fact, it was subject to other liens to the extent of \$100, which defendants fraudulently concealed, such fraud was ground for rescission.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 5; Dec. Dig. § 3.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Suit by Martha A. Shopbell against Mattie H. Boyd and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Daniel M. Hammack, for appellants. Davis, Kemp & Post, for respondent.

SHAW, J. This is an action to rescind a contract for the exchange of real estate and compel a reconveyance of property granted pursuant to the terms of said contract. The defendants appeal upon the judgment roll from a judgment rendered in favor of plaintiff.

It appears from the complaint that defendant Boyd was the owner of certain property situated in Los Angeles, subject to a deed of trust held by the Continental Building & Loan Association. The defendant Bunch, who was the agent of Boyd in the transaction, represented to plaintiff that Boyd's property was of the value of \$4,000, that it was leased to a good responsible tenant for a term of one year at a monthly rental of \$25, that her title to said property was free and clear of all incumbrances except the deed of trust, and that plaintiff believed said representations to be true, and relied upon the same, and was by reason thereof induced to enter into an agreement to exchange certain property situated in Chicago, Ill., and then owned by plaintiff, for the real estate of Boyd. The agreement provided that plaintiff and defendant Boyd should execute deeds to their respective properties, which should be delivered to and held by defendant Bunch, as per terms of the agreement. At the request of Bunch, plaintiff executed and left with him her deed to be by him held until the titles to the said properties were examined. Plaintiff then caused an examination of Boyd's title to be made, and thereby learned that the property had been sold for taxes, and also sold under an assessment levied for street improvement. It is also alleged that the property was not leased as represented, and that the only rental obtainable for the property was \$15 per month, and that instead of the value of the property being \$4,000, as represented to her by Bunch, its value was \$2,500. Plaintiff alleges that she depended wholly upon the representations made by Bunch, and, believing them to be true, was thereby induced to enter into said agreement and execute and deliver to Bunch the said deed whereby she conveyed her property to defendant Boyd; that defendants made the representations with the purpose and intent to cheat and defraud her; that, upon the discovery that said representations were false, she tendered to defendants a deed reconveying the property deeded to her by defendant Boyd, together with \$15 alleged to be the rental value of the property for the time she had held the same, together with notice of rescission, and demanded a return of her deed placed with defendant Bunch; and that defendants refused to accept such tender and refused to return her deed, but

caused the same to be filed for record in the recorder's office of the county wherein the property described is located. The court found the allegation as to the misrepresentation of the value of the property to be true, but also found that plaintiff at the time she placed her executed deed in the hands of Bunch was aware of the true value of said property. For this reason it found, as a conclusion of law, that plaintiff waived the alleged fraud due to false representation as to the value of the property.

Appellants insist that by reason of this finding the allegation of misrepresentation as to the value of the property must be disregarded and the sufficiency of the complaint considered as based upon the allegations with reference to the false statements as to title and lease. Upon this and other grounds hereinafter noticed they urge that their general demurrer interposed should have been sustained. The sufficiency of a complaint tested by a general demurrer must be determined by the alleged facts contained therein, the truth of which, for the purposes of the demurrer, is admitted. Whether an alleged fact be true or false is immaterial in the determination of the question raised by the demurrer. Hence, if it be assumed that the allegations regarding misrepresentation as to the lease and title are, standing alone, insufficient to constitute a good complaint, we must, nevertheless, hold the complaint not obnoxious to a general demurrer, for the reason that it stated a cause of action by reason of the allegation as to false representation as to value of the property.

It is further urged that the demurrer should have been sustained as to defendant Boyd for the reason that it appears from the complaint that the false representations upon which plaintiff relied were made by defendant Bunch, and hence, there was no cause of action stated against the defendant Boyd. It clearly appears from the complaint that Bunch acted in the transaction as the agent of Boyd, and she will not be heard to disclaim responsibility for his acts and at the same time retain the benefits accruing therefrom. It is fundamental law that a principal is bound by the acts of his agent so far as he acts within the scope of the agency.

Boyd's deed of conveyance passed to plaintiff, and it is claimed by reason thereof plaintiff's cause of action was on the deed covenants for damages, unless the insolvency of defendants be alleged; in other words, that by successfully perpetrating the fraud to the extent of delivering a deed to plaintiff she was thereby deprived of maintaining an action for fraud, but must rely upon the covenants contained in the contract fraudulently imposed upon her. Conceding, however, that plaintiff had an adequate remedy at law, such fact does not deprive her of the remedy afforded by rescission. Section 1689 of the Civil Code provides that: "A party to a

contract may rescind the same * * * (1) if the consent of the party rescinding * * * was * * * obtained through * * * fraud * * * exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." This section does not limit the right to maintain such action to cases where the insolvency of the defendant is alleged. Where the assent of a party to a contract has been procured by means of fraud, such party, acting promptly upon obtaining knowledge thereof, and in the absence of any acts constituting a waiver of such fraud, may either rescind or complete the contract on his part and sue upon the covenants for damages. *Fountain v. Semi-Tropic Land & Water Co.*, 99 Cal. 677, 34 Pac. 497; *Schmidt v. Mesmer*, 116 Cal. 267, 48 Pac. 54.

It is unnecessary to discuss other points urged in support of appellants' claim that the complaint fails to state a cause of action. Suffice it to say that, while it may be objectionable in form, it is not subject to the general demurrer interposed.

It is contended that the findings do not support the judgment. As to the lease, the court finds the representations were made as alleged, and that they were knowingly false and were intended to deceive plaintiff and induced her to make the exchange and were the procuring causes of the transaction. It is also found that the property was misrepresented as being free and clear of incumbrances, except as stated; whereas, in fact, there were other incumbrances against the property to the extent of \$100, which fact was known by defendants, but they fraudulently, with intent to deceive, concealed from plaintiff the fact that said property was subject to an additional incumbrance of \$100. Counsel insists that these findings show the breach to be one of minor importance and such as can be readily compensated in damages. In support of this position he cites *Fountain v. Semi-Tropic L. & W. Co.*, supra. That case bears no analogy to this. It was there sought to rescind for failure, in part, of the consideration due to a breach of covenant on the part of the defendant to pipe water to land. There was no element of fraud in the case at all. The action at bar is not one for breach of covenant, but one whereby plaintiff seeks to be freed from the obligation of covenants obtained from her by means of fraud. Counsel's argument is based upon an erroneous theory that the action should be upon the covenants contained in the deed, which plaintiff seeks to have canceled. "The fraud is the essential thing, and while it must be coupled with loss, injury, damage, the precise amount of such damage is of secondary importance." *Wainscott v. Occidental, etc., Association*, 98 Cal. 253, 33 Pac. 88.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 83

BACON v. DAVIS et al. (Civ. 491.)

(Court of Appeal, Third District, California.
Sept. 22, 1908. Rehearing Denied by
Supreme Court Nov. 19, 1908.)

1. FRAUDS, STATUTE OF (§ 115*) — CONVEYANCES OF REAL ESTATE—SUFFICIENCY OF INSTRUMENT—"THEREUNTO."

Civ. Code, § 1741, provides that no agreement for the sale of real estate is valid unless in writing, subscribed by the party to be charged, "or his agent thereunto authorized in writing," and validates any agreement for the sale of real estate which is either subscribed by the owner or his agent, authorized in writing; the word "thereunto" being an elliptical form of expression for the phrase "to do that."

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 242; Dec. Dig. § 115.*]

2. BROKERS (§ 14*) — CONTRACT OF EMPLOYMENT—CONSTRUCTION.

To determine the extent of the authority of an agent employed to procure a purchaser of real estate, the court must look to the terms of the instrument evidencing the employment as they have been employed by the parties thereto.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig. § 13; Dec. Dig. § 14.**]

3. BROKERS (§ 14*) — CONTRACT OF EMPLOYMENT—CONSTRUCTION.

The fair import of the terms, in a contract employing an agent to procure a purchaser, must clearly reveal the intent of the owner to specifically empower the agent to contract for the sale of the property, in the ordinary acceptance of that term.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig. § 13; Dec. Dig. § 14.**]

4. BROKERS (§ 14*) — CONTRACT OF EMPLOYMENT—CONSTRUCTION.

To reach the intent of the parties to a contract for the employment of a broker to procure a purchaser of real estate, the court must invoke the ordinary rules of interpretation of the contract, as established by Civ. Code, §§ 1638, 1641, 1644.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig. § 13; Dec. Dig. § 14.**]

5. BROKERS (§ 14*) — CONTRACT OF EMPLOYMENT—CONSTRUCTION—"TO SELL."

Though the expression "to sell" is sometimes used in the sense of an executed contract of sale, or an agreement to sell as defined by Civ. Code, § 1727, the expression, when used in a contract giving a real estate broker the exclusive right "to sell" real estate, has acquired a restrictive meaning, and standing alone the word "to sell" are not sufficient to authorize the broker to enter into a contract of sale binding the owner.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig. § 13; Dec. Dig. § 14.**]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6406, 6407.]

6. BROKERS (§ 14*)—EMPLOYMENT—AUTHORITY OF BROKER.

The ordinary authority of a real estate broker deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale, unless it was intended to confer such additional authority.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig. § 13; Dec. Dig. § 14.**]

7. BROKERS (§ 14*)—EMPLOYMENT—AUTHORITY OF BROKER—"SALE."

Under Code, §§ 1721, 1727, defining a "sale" as a contract by which one engages for a price to transfer to another a certain thing, etc., an instrument executed by an owner employing a

broker to procure a purchaser of real estate, which recites that, in consideration of the services of the broker, the owner authorizes him "to sell for me in my name and receipt for deposit thereon," for a specified time, the property described, for a price fixed, and agrees "to sell and convey by a good * * * grant," etc., gives the broker authority to contract for the sale to a purchaser procured by him.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig. § 13; Dec. Dig. § 14.**]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

8. BROKERS (§ 14*) — EMPLOYMENT—AUTHORITY.

An agent authorized to sell real estate may enter into a contract, within the terms of his authority, which will bind his principal.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig. § 13; Dec. Dig. § 14.**]

9. BROKERS (§ 106*) — CONTRACTS — ENFORCEMENT.

Where an owner contracted to convey to any purchaser secured by a broker employed to procure a purchaser, the contract was for the benefit of a purchaser procured by the broker, within Civ. Code, § 1559, providing that a contract, made for the benefit of a third person, may be enforced by him.

[Ed. Note.—For other cases, see *Brokers, Cent. Dig. § 149; Dec. Dig. § 106.**]

10. CONTRACTS (§ 187*) — RIGHTS OF THIRD PERSONS.

It is not necessary that the parties for whose benefit a contract has been made should be named therein. It must appear by direct terms of the contract that it was made for their benefit.

[Ed. Note.—For other cases, see *Contracts, Cent. Dig. § 798; Dec. Dig. § 187.**]

Appeal from Superior Court, Alameda County; W. H. Waste, Judge.

Action by F. P. Bacon against E. B. Davis and others. From a judgment for plaintiff, defendant E. B. Davis appeals. Reversed.

A. A. Sanderson and Reid, Black & Reid (John Garber, of counsel), for appellant Powell & Dow (Snook & Church, of counsel), for respondent.

BURNETT, J. The importance of the principle and the value of the property involved justify a somewhat extended consideration of the transaction out of which has grown this litigation. The action was brought to determine the validity of an adverse claim, made by the appellant, defendant Davis, to certain real property on Broadway street, in the city of Oakland. Davis claims to have purchased the property, and in his amended answer and cross-complaint he sets forth the basis of this claim as resting in: First, a contract between plaintiff and the Laymance Real Estate Company, by which the said company was authorized to sell the property; and, secondly, a contract of sale made by said company with the defendant. The prayer is that plaintiff take nothing by the action, and that defendant have a decree of specific performance of said contract, and for general relief. The plaintiff interposed a general demurrer to the

amended answer and the amended cross-complaint. Each demurrer was sustained, and thereupon, in due time, a judgment was entered for plaintiff as prayed for in the complaint, quieting his title as against any claim of said defendant. From this judgment the appeal is taken.

The said contract between the plaintiff and the Laymance Real Estate Company, as far as material to the present inquiry, is as follows: "Oakland, Cal., March 31, 1905. In consideration of securing the services of Laymance Real Estate Company, a corporation, and efforts on its part, and at its expense to obtain for me a purchaser for the property hereinbelow described, I hereby authorize said Laymance Real Estate Company exclusive right to sell for me, in my name and receipt for deposit thereon, for a term of sixty days from date hereof and until I give said corporation ten days' notice in writing to cancel this authorization, the following described property,—[describing it] for the sum of \$135,000.00 net to me on the following terms, to wit, 20 per cent. cash on the delivery by me of a good and sufficient deed; balance to be paid as follows: one note for \$72,000.00 payable in one year after date, with interest at 7% per annum secured by a trust deed to the 151 feet on Broadway by uniform depth of 100 feet; one note for \$36,000, payable one year after date with interest at 7% per annum, secured by a trust deed to all the balance of the land in said block 261 above described in the name of the Bacon Land and Loan Company. And I hereby agree to sell and convey by a good and sufficient grant, bargain and sale deed of conveyance and give the usual covenants therein to any purchaser obtained by said Laymance Real Estate Company, a corporation, and if sale is made, 15 days to be allowed to search title to said property. And I hereby agree that said Laymance Real Estate Company, a corporation, may retain all over said net sum for which they may sell said property as its expenses and said commission for services rendered. [Signed] F. P. Bacon. Witnessed by M. J. Laymance." The contract between the Laymance Real Estate Company and defendant Davis provided as follows: "Know all men by these presents: For a valuable consideration the receipt of which is hereby acknowledged by the Laymance Real Estate Company, a corporation, the duly accredited agent and on behalf of F. P. Bacon, the owner of the property hereinafter described, Elliott B. Davis hereby buys and the said F. P. Bacon by his duly accredited agent, the said Laymance Real Estate Company, hereby sells to said Davis, the said real property for the sum of \$135,000.00, and the said Davis hereby deposits on account of said purchase price the sum of \$5,000.00; the said sum of \$135,000 to be paid as follows: [The terms here set out are the same as in the said contract between Bacon and the Laymance Real Es-

tate Company.] This agreement of sale is made in accordance with that certain written authorization dated Oakland, California, March 31, 1905, and signed and executed by said F. P. Bacon, authorizing the said Laymance Real Estate Company, a corporation, to sell said land for and in the name of said Bacon and to receipt for a deposit thereon and which said written authorization is recorded this first day of December, 1905, in the office of the county recorder of the county of Alameda, and to which said authorization and the record thereof in said recorder's office reference is hereby made for a more particular statement of the matters and things set forth therein." Then follow the description of the property and the signature of the parties. There is no claim by appellant of ratification of said sale by plaintiff. On the contrary, it is alleged in the answer that, when said plaintiff was informed of said sale, he repudiated it, "and still repudiates the said contract and agreement for the sale and purchase of said property, and has ever declined, and still declines, to perform the covenants and provisions of said contract for the purchase and sale of said property, or any of them."

The whole case, it will be seen, therefore, virtually hinges upon the construction of the terms of the said contract between Bacon and the Laymance Real Estate Company. It is not disputed that the agent had no authority to sell the property so as to bind the owner, unless the authority is found in the terms of said written authorization. Indeed both parties cite and rely upon section 1971, Code Civ. Proc., and section 1741, Civ. Code, to fortify their claims. It is sufficient to quote the latter, which provides that: "No agreement for the sale of real property, or of any interest therein, is valid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent thereunto authorized in writing." Some verbal criticism of the word "thereunto" is indulged by counsel, but its meaning seems altogether free from doubt. In simple language the section provides substantially that any agreement for the sale of real property to be valid and binding must be subscribed, either by the owner of the property, or by his agent who has been authorized in writing by said owner to enter into such an agreement. The word "thereunto" has its ordinary signification of "to that," and is obviously an elliptical form of expression for the phrase "to do that." Hence, as far as the agent is concerned, he must be authorized in writing "to do that," in other words, to execute an agreement of sale, to make it binding and operative. There is no escape from the proposition that, in order to determine the extent of the agent's authority, we must look to the terms of the instrument as they have been employed by the parties thereunto. Unless the Laymance Real Estate Company, by said agree-

ment of March 31, 1905, was expressly authorized to enter into a contract of sale of said property, then the owner had the right to repudiate as unwarranted the contract between said agent and the defendant Davis of December 1, 1905. It is not a question of express or implied authority. The fair import of the terms used, measured according to the established rules of interpretation, must clearly reveal the intention of the owner specifically to empower the agent to enter into a contract of sale of the property, in the ordinary acceptance of that term, or else the case of the defendant must fail. Of course no one could reasonably contend that any particular formula of words is required to convey such authority—that the owner must say, for instance, in *hæc verba*, "I authorize you as my agent to enter into an executory contract of sale"—but the language used must reach the same measure of potency when tried by the recognized standards, and must positively authorize that very act.

It is not denied that, in our efforts to reach the intention of the parties to said instrument, we must invoke the ordinary rules for the interpretation of contracts. For instance, "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." Section 1638, Civ. Code. "The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Section 1641, Civ. Code. "The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." Section 1644, Civ. Code. Taking up, then, the contract in question "by the four corners," and viewing it in the light of these familiar rules of interpretation, what authority is conferred upon the Laymance Real Estate Company in relation to the property therein described? In the first place, it must be obvious that, if the words are to be understood in their ordinary and popular sense, and if effect is to be given to all of them, the said realty company did not exceed its authority in entering into a contract of sale. There can be no doubt what the average man would understand from this language: "I hereby authorize said Laymance Real Estate Company exclusive right to sell for me in my name, * * * and I hereby agree to sell and convey by a good and sufficient grant, bargain and sale deed of conveyance and give the usual covenants therein to any purchaser obtained by said Laymance Real Estate Company." It would be difficult to select more apt words, if their ordinary signification is to be regarded, to clothe the agent with ample authority to do what was done here. This is apparent from the definition in the Civil Code of the term "to sell." Its corres-

ponding noun "sale" is defined in section 1721 as follows: "Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property"—and what is meant by the verb is disclosed in section 1727, wherein it is provided that: "An agreement to sell is a contract by which one engages for a price to transfer to another the title to a certain thing." Therefore, in the code sense, it is clear that Mr. Bacon's language imports this: I hereby authorize said Laymance Real Estate Company exclusive right "to transfer to another the title" to said property. But the expression "to sell" is sometimes used in the sense of an executed contract of sale, or an agreement to sell as defined by the Code. *Barber Asphalt Paving Co. v. Standard Co.*, 39 App. Div. 617, 58 N. Y. Supp. 408; *Rice v. Mayo*, 107 Mass. 550. It has also a peculiar and restricted meaning acquired by usage, wherein it signifies to obtain a purchaser ready, willing, and able to buy, and it is the contention of respondent that in this last sense the term was used by the parties to said contract of March 31, 1905. It is urged that "the language is that usually found in contracts between owners of property and real estate agents, when the former list property with the latter for sale, and there is nothing to indicate that the parties to the contract in question intended anything further than that the real estate broker was given the exclusive privilege, for a limited period, of finding for plaintiff a purchaser. At the very outset of the authorization it is stated that the broker is to make efforts 'to obtain for me [plaintiff] a purchaser'; that is to say, the service of the broker was to consist in obtaining a purchaser, not in disposing of the property. * * * When the defendant contends that the broker's authority 'to sell' carries with it the power of making a contract of sale enforceable by a proposed purchaser, he overlooks the code provisions of this state, and 'also decisions of the courts of last resort, not only in California, but also in other states.'"

We have already noted the code provisions to which he refers. We proceed to the consideration of some of the cases, as typical of the long list which is cited, illustrating this special and restricted use of the term "sale."

In *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453, the court said: "The trial court held that, as a matter of law, the real estate brokers had not authority to sign the contract of sale, and that the defendant [owner of the property] is not bound thereby. This conclusion is sound, and must be sustained. In this state it is essential to the validity of a written contract for the real of real property signed by an agent that the authority of the agent to sign the same shall be embodied in a writing subscribed by the principal"—citing, as said by respondent, section 3887, Rev. Code, which is the same as subdivision 5, § 1624, Civ. Code, and said section 3960, Rev. Code, which is the same as our said

section 1741, Civ. Code. "It is well settled that the agency of such persons is limited to finding purchasers who are acceptable to vendors, * * * and in the absence of express authority does not extend to signing contracts of sale * * * in behalf of the principals. * * * A real estate broker may be given authority to execute contracts for his principal, but it is an additional authority. The instrument under consideration does not confer any such additional authority. It merely grants to the real estate broker 'the sale' or the selling of the land for a limited period, and for the guidance of such brokers it states the total net sum which the principal will accept, and the amount of cash payment which he will exact in case of a sale. As will be seen by an examination of the instrument, the details essential to the consummation of a sale are omitted. It does not provide the length of time the deferred payments are to run, or how they are to be divided, or as to the rate of interest to be charged, or as to whether a deed shall be given to the purchaser and a mortgage to secure the deferred payments, or as to whether any deed shall be executed prior to the full payment of the purchase price. These omissions tend strongly to show that it was the intention of the parties to the instrument that the sale was to be approved, and the contract of sale executed, by the principal, and not by the broker."

A leading case upon the question, cited with approval by many courts, is *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617. It appears that the contract of sale there was executed by one Atkins as agent of Hobson, and in the name of the latter, the owner of the property. The only testimony as to the authority of the agent was his testimony that Hobson had told him to sell the lots for \$2,000. He accordingly sold them to plaintiff for that price, and executed in the name of Hobson a contract in writing to convey. The agent then set a telegram to Hobson informing him of what he (the agent) had done. Hobson disavowed the transaction, and suit was brought for specific performance. The court held that the authority of Atkins to sell the property was not sufficient to authorize him to execute the contract of sale to Duffy, but was a mere authority from Hobson to obtain a purchaser at the price of \$2,000. At that time the present statute of frauds was not in force, and hence the verbal authority was of equal force to a similar written one now. In the discussion it is said: "This is the settled construction put upon employment of professional brokers 'to sell' or 'to close a bargain' concerning real estate, and we know of no reason why the same language employed to express the authority of any other agent 'to sell' should have a more extended meaning. Besides, a sale of real estate involves the adjustment of many matters in addition to fixing the price at which the property is to be sold. The vendor may be un-

willing to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract, even if the title prove satisfactory, and he may decline to bind himself to convey to such purchaser at the end of the time necessary to examine the title, because he might thereby in the meantime lose an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these and many other like considerations might, and usually do, arise in the mind of the vendor. Now a mere authority to sell can hardly confer power upon the agent to determine all these matters for his principal, so as to bind him by his determination." The court concludes that "while it is true that a power to sign the name of a principal to the contract may be given verbally, we think that the words used for the purpose should be distinct and clear in their meaning and import, and should, with a requisite degree of certainty, manifest the intention of the principal to do something more than merely to employ a broker."

In *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758, the language used was: "You are hereby authorized to sell my property and receive deposit on same [describing it] for the sum of \$200.00 per acre cash. I hereby agree to pay you the sum of 5 per cent. for your services in case you effect a sale, or find a purchaser for same, or will pay you 2½ per cent. of above commission should I sell the same myself, or through any other agent." The court said: "The sole question in this case is whether the real estate brokers whom the defendant employed 'to sell' certain real property had authority to execute a contract to convey. We think that, upon the authority of *Duffy v. Hobson*, 40 Cal. 244, 6 Am. Rep. 617, it must be held that they had not, and that the case of *Rutenberg v. Main*, 47 Cal. 219, is not in point."

In *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237, the authority of the agent was contained in the following entry: "San Francisco, Aug. 3, 1877. Mr. Wheeler Martin: As you stated you could get \$30,000.00 for the place you occupy on Market street, if you can, we will sell at that price any time before the first day of September, 1887, and allow you 2½ per cent. on said price, and if no sale is made no expense is made to us. Yours truly, William Ede." Martin sold the property to the plaintiff Grant for the sum of \$30,000, and took a deposit from the purchaser of \$500. The owner, Ede, refused to make a conveyance, and the action was brought to enforce specific performance. The court decided against plaintiff, and held that Martin was simply authorized to find a purchaser who would pay \$30,000, and if he did so, he was entitled to the commission, and that there was nothing in the writing indicating any other intention. It was said that: "The object of the writing, doubtless,

was to fix the price which the defendant was willing to take for the land and the compensation he was willing to allow Martin for making the sale." The court calls attention to the fact as significant that there was nothing in the contract specifying the form of deed or time of payment. The question of the sufficiency of the agent's authority was discussed in *Delano v. Jacoby*, 96 Cal. 273, 31 Pac. 290, 31 Am. St. Rep. 201, and it is there said: "There is an apparent conflict of authority on the question of what is necessary, in a power of attorney for the sale of land, to authorize the attorney to execute and deliver a deed to the purchaser. Each case must be decided upon its own peculiar circumstances." *McNeil v. Shirley*, 33 Cal. 206; *Rutenberg v. Main*, 47 Cal. 220; *Hemstreet v. Burdick*, 90 Ill. 444. "As between parties to the transaction, it is proper to consider the situation at the time of the execution of the letter, and their intention is to be gathered from the words of the instrument, by all the circumstances under which it was written and acted upon. * * * So the general rule is that a mere authority 'to sell,' in the absence of any other words or circumstances qualifying the language, would not confer upon the agent the power to determine these matters for his principal."

In *Stomler v. Bass* (Cal.) 96 Pac. 809, it is said: "The ordinary authority of a real estate agent deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale, unless it appears that it was intended to confer such additional authority. * * * Whether or not it was intended to confer such additional authority is to be determined from the language used, regarded in the light of the surrounding circumstances. * * * The case at bar is very different in its facts from *Rutenberg v. Main*, supra, relied on by plaintiff, where it clearly appeared that it was intended by the owner to clothe the agent with authority to do generally whatever was necessary to make the proposed sale binding upon the principal."

These quotations disclose clearly that by usage the phrase "to sell" has acquired this restricted and conventional meaning—that is, to secure a purchaser—and that, standing alone, it is not sufficient to authorize the agent to enter into a contract of sale binding the principal. They also reveal and illustrate the reason for the rule and the importance, in case additional words are used, of examining with care the whole instrument to determine the intention of the parties. On the other hand, it is appellant's contention: "That the only construction of the contract under discussion which is at all reconcilable with the wording of its various provisions is one in accordance with which the language of the contract is recognized as authorizing, not only 'by fair implication,' but also 'in terms,' the making of a contract of sale 'in the owner's name.'" Thus only, it is claim-

ed, can effect be given to the whole instrument. It is urged that there are three portions of the contract, each indicating, and all together conclusively revealing, the intention of the owner of the property to clothe the agent with this additional authority to enter into an executory contract of sale. These are: (1) The authorization to sell for me in my name; (2) the stipulation to convey to any purchaser obtained by said company; and (3) the elaborate provisions made for the terms of sale. Appellant declares: "Interpret the contract as we advocate, and you find that these stipulations harmonize and form an intelligible combination. You find that every word and phrase is accounted for, and accorded some significance, and that there is no necessity for ignoring any part of the language employed, nor of virtually striking out words inserted by the parties, and substituting for them words of a totally different signification. Interpret the contract as respondent would have it interpreted, and you find it impossible to avoid attributing to the parties a use of language so strange and improbable that you make a new agreement for them, on the theory that they did not mean what they said."

The leading case in this state cited by appellant, and in line with his contention, is *Rutenberg v. Main*, 47 Cal. 213. *Rutenberg* was the owner of property in San Francisco, and through his agent he sold the same to the defendant, but the latter refused to make payment when the deed was tendered. The action was for specific performance. The defense was that the agent was not authorized to sell the premises; the contention being that he had authority simply to find a purchaser. It is said in the opinion that: "It is true that the power of a mere broker is thus limited, although he be employed to sell real estate, because these words are construed with reference to the actual purpose of his employment. But if the language used, regarded in the light of surrounding circumstances, clearly shows that the agency is intended to be more extensive than that of a mere broker, the court will so find. * * * That the plaintiff intended, and clearly expressed his intention, that *Meinecke* should do more than discharge the functions of a broker is apparent from the evidence." The court then sets out the evidence as follows: "In the month of July the plaintiff, who was at Bremen, wrote to *Meinecke*, in respect to the property in the controversy: 'If you can get a binding offer of over \$50,000, I may conclude to sell at once. In this case, please telegraph. * * * If you have a good offer, I can simply confirm it by telegraph. You have a deposit made, and I will then send power of attorney.' Upon the receipt of this *Meinecke* placed the lot with *Maurice Dore & Co.*, brokers, for sale at \$50,000, and about the 5th of September was informed by them that they had a customer who was willing to pay the price demanded. Subsequently

Meinecke received a letter from the plaintiff, dated August 26th, which contained the following passage: 'You valued Market street property at \$50,000. Can the price be got, you can close the sale. I should confirm per telegraph, and then send power of attorney as soon as a guaranty deposit would have been made.' September 11th the plaintiff again writes, acknowledging the receipt of a telegraphic dispatch from Meinecke, and adds: 'I at once sent you the following telegram: "At \$50,000.00 the lowest, sale confirmed."'"

In the case of *Lyon v. Pollock*, 99 U. S. 668, 25 L. Ed. 265, the plaintiff authorized his attorney in fact, B., to sell his property in Texas. B. did not make the transfer, but placed the property in charge of C., of which Lyon was notified. Thereupon Lyon wrote C. as follows: "I wish you to manage my property as you would with your own, and, if a good opportunity offers, to sell everything I have. I would be glad to sell," etc. C. made a deed of the property. The court, through Mr. Justice Field, says: "The deed executed by C. in the name of Lyon, though invalid as a conveyance, was good as a contract for the sale of the property described in it, and was sufficient, therefore, to sustain the bill for a decree directing Lyon to make conveyance to the grantee therein." It was held, further, that the letter to Lyon was sufficient to authorize C. to enter into a contract for the sale of the property. The court, moreover, declares that the surrounding circumstances of that case were strongly corroborative of the view taken of the written instrument.

Many other cases and authorities are cited by appellant, but we shall refer to only two or three additional ones, in an examination of the peculiar phraseology of the instrument before us. Indeed, as the intention of the parties is to be determined by the language used and the surrounding circumstances of each particular case, and as no case has been found involving the same language and circumstances as those in controversy here, we are practically without direct precedent in construing the said instrument of March 31st. It does seem, though, as suggested by appellant, that if the plaintiff had intended to authorize the defendant simply to find a purchaser for the property, and not to bind himself to convey to such purchaser, he would have used simpler terms than those found in the instrument before us. Knowing, as it is presumed he did, the meaning which usage has given to the phrase "to sell" when contained in a broker's contract, it is reasonable to suppose that he would have gone no further, except to describe the property, provide, probably, in a general way for the terms of the sale, and to specify the broker's commission. But the first significant departure from such a simple and certain formula is marked by the use of the words "for me, in my name." These words are declared by respondent to be mere surplusage. The sale,

if made, and, whether binding upon the owner or not, it is true, would be for his benefit and by his authority. But must they not be considered in determining the intention of the owner? It is not to be supposed that they are idle words, used without purpose, adding nothing to the significance of the instrument; and they are not to be ignored in our effort to ascertain what was in the mind of the owner at the time of its execution. "In my name," conveys the idea, not only of using the name of the principal, but by his authority. *State v. Kerr*, 3 N. D. 523, 58 N. W. 27. Hence we have the owner declaring: "I authorize the real estate company to sell for me, and by my authority, or representing me"—indicating additional authority to what is committed to a mere broker. It reveals an intention to give the agent a power of attorney to dispose of the land; but, when considered with the other expression to which attention has been called, it harmonizes with the view that an executory contract of sale was contemplated, with the duty imposed upon the owner of consummating the sale by the execution of the conveyance—the final act in the transfer of the title. This is made clear by the provision "and I hereby agree to sell and convey by a good and sufficient grant," etc.

In *Farris v. Marten*, 29 Tenn. 495, we have an illustration of the significance commonly attached to the words "for me" and "in my name." The written authorization was: "Dear Sir: I have received \$72, rents you collected for me, for which I kindly thank you, and wish you to rent it out in the same manner, and upon the same terms, you would your own, or sell. One of the gentlemen wants to buy the land. He offers \$3.50 per acre, payable next Christmas. If you are of opinion that it is a fair price for the land, please to confirm the contract for me, take his bond, and give him a bond in my name to make a title when the money is paid." Indeed, as pointed out by appellant in the oral argument, "for me and in my name" are familiar expressions in the literature of the law and in instruments defining confidential relations, and are indicative of authority, in a comprehensive and exacting sense, to represent and bind the principal or owner of property.

In *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277, it is said: "It is a general principle that no word in the contract is to be treated as a redundancy if any meaning, reasonable and consistent with its parts, can be given to it."

In *Haydock v. Steele*, 40 N. Y. 363, the authorization was: "You are authorized and empowered as agents for me to sell my property." It is said by the Chief Justice, speaking for the court: "I consider the instrument to be a plain, direct, unqualified power of attorney to sell the land mentioned in it, nothing more, nothing less." Assuredly the words "to sell for me in my name" are

equally as potent. In fact, without the words "in my name" the authorization here would be almost exactly the same as in the Haydock Case, for the word "empowered" is a synonym for "authorized," and the words "as agents" add nothing to the significance of the expression, for they are clearly implied, and with or without them there could be no doubt as to the agency but only as to its extent. The New York Case is simply, this, therefore: "You are authorized for me to sell my property." Here we have the additional confirmation of authority disclosed by the phrase "in my name."

But again the owner meant something by this covenant: "I agree to sell and convey by a good and sufficient grant, bargain and sale deed and give the usual covenants therein to any purchaser obtained by said company." It certainly imposes some obligation upon the owner in reference to a purchaser that might be secured by the agent. As suggested by appellant, it is difficult to distinguish between the significance of these two clauses, taken together, and that of the ordinary phraseology employed in a power of attorney to sell, where the owner authorizes or empowers the agent to sell the property, and then adds the covenant "hereby ratifying and confirming all such sales as he may make." This is illustrated by reference to Tyrell v. O'Connor, 56 N. J. Eq. 448, 41 Atl. 674, where the court said: "Mere authority to sell, without more, does not exhibit such intent that the attorney may bind the principal to convey. But where, however, the design and terms of the power manifest an intent to give the agent authority to effect a sale and conveyance, and the instrument assumes to ratify the 'bargain' he may make. It will be held to give him authority to bind his principal to convey." So here, if the owner had provided: "I authorize the Lymance Real Estate Company for me in my name to sell my property, hereby ratifying and confirming the sale to any purchaser that it may secure"—there would be no kind of doubt as to the authority of the agent to bind the owner to make a conveyance. There is no appreciable difference between such a covenant and the one before us. Can it be said that, when the owner promises to convey to any purchaser secured by the agent, he reserves the right to decline to execute a deed? To so contend is to read into the contract something that the parties have not provided. Indeed it is in direct conflict with the express covenant of the owner. It seems clear, at least, that the ordinary mind, unembarrassed by scholastic refinement, but appreciating the significance of the simple terms employed, and scanning them carefully in view of the surrounding circumstances, would inevitably reach the conclusion, from reading these covenants together, that the owner clearly intended to authorize the agent to bind him by a contract of sale. The explanation by respondent of this agreement to

convey is that it is meant to describe the kind of deed which the owner would execute if he accepted the purchaser. But if this had been the purpose, it would seem probable that the description would have followed the expression "on the delivery by me of a good and sufficient deed" in a preceding portion of the contract. Again, it is said to have been incorporated for the benefit of the broker to secure his commission. But it is clear that he would earn his commissions if he secured a purchaser, ready, able, and willing to purchase for any price in excess of \$135,000. He would be entitled to that excess.

In Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111, it is held that "the contract of a broker who undertakes to sell a tract of land is that he will find a purchaser who is ready to buy on the specified terms; and, when he produces such a purchaser, he performs his contract."

In Grant v. Ede, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237, where the broker was authorized to sell for \$30,000, it was held that he was entitled to his commission on finding a purchaser willing to buy at that price.

In Oullahan v. Baldwin, 100 Cal. 648, 35 Pac. 319, the broker was authorized in writing to negotiate the sale of certain lands. The instrument contained the statement: "Our price for said land is \$116,666.65 net to us, and, any amount over and above said sum for which our said agents may sell said land we agree to give them for commissions for their services." It is said by the court: "The brokers were simply authorized to negotiate a sale. Their contract was completed, and their commissions earned, when they produced a purchaser within the five days, willing, ready, and able, to purchase upon the terms stated in the contract of employment."

If it is meant to intimate that the Lymance Real Estate Company could compel a sale to protect itself, this authority must be found in the contract, and amounts to the same grant of power as that contended for by appellant. But the answer to the whole contention is that the owner solemnly promised to execute a deed to any purchaser secured by the real estate company. The language is free from doubt, and the duty of the court is plain to give effect to the covenants of the parties, and not to seek to emasculate the contract by groping for some reason to conclude that its meaning is otherwise than the language clearly imports.

Again, the circumstance in reference to the terms of the sale, while not controlling, is of persuasive force in indicating the intention of the parties. The importance of this circumstance is indicated in the case of Brandrup v. Britten, supra, by the language which we have already quoted. The omissions as to the terms of the sale, which, in that case are said to tend strongly to show

that the sale was to be approved and the contract of sale executed by the principal, and not by the broker, are supplied in the instrument before us. Hence it is fair to argue that, these details being present, they tend to show that the purpose was to authorize the broker to bind the contract of sale whenever he could find a purchaser willing to pay the price. The particularity and elaboration with which the terms of sale are recited in the instrument here leave nothing to be supplied by the owner, and point strongly to the conclusion that it was designed by the parties to authorize what was afterwards done by the said real estate company.

There are indeed portions of the instrument in question isolated from the context that would support respondent's contention. For instance, the inducement, "in consideration of securing the services of Laymance Real Estate Company, a corporation, and efforts on its part, and at its expense to obtain for me a purchaser," etc., and, if this had been followed simply by the authorization "to sell," appellant could not prevail. But, considering the whole of the instrument, it seems to mean nothing less than "I authorize the Laymance Real Estate Company to enter into an executory contract of sale of the property described and upon the terms set out and I promise to execute to the purchaser a good and sufficient deed to said premises." If this is the right construction of the instrument, then there can be no doubt that defendant in his answer and cross-complaint set out sufficient facts to entitle him to a specific performance of the contract. It cannot be held that the contract was not made for his benefit, and therefore he is not entitled to take advantage of it, because it is a question of the authority of the agent to bind the principal. If it had such authority, its act was the act of the principal. "An agent, authorized to sell either real or personal property, may enter into a contract within the terms of his authority, which will bind his principal. This is of the very essence of the authority given, viz., an authority to sell. That he can bind his principal by a formal contract is the doctrine of the books from the earliest law on the subject." *Haydock v. Steele*, supra. It would hardly be contended that, if the principal directly entered into such a contract, he could repudiate it and successfully resist an action for specific performance, assuming, as appears here, that the contract was fair and reasonable and the consideration just and adequate. We can see no merit, therefore, in respondent's contention that the contract was not made for the benefit of Davis, and hence that it cannot be enforced by him.

But, even if section 1559 of the Civil Code has any application which provides that "a

contract made expressly for the benefit of a third person may be enforced by him at any time before the parties rescind it," it would require no argument to show that, when the owner promises to convey to any purchaser who might be secured, the contract was made for the benefit of such purchaser. It is said, in *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100: "It is not necessary that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, by the direct terms of the contract that it was made for the benefit of such parties."

We cannot agree with the conclusion of the learned trial judge, and the judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 141

HUENE v. CRIBB et al. (Civ. 519.)

(Court of Appeal, Second District, California.
Sept. 30, 1908.)

1. MORTGAGES (§ 53*)—POWER OF SALE.

Trust deeds, ordinarily, and mortgages may, confer a power of sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 123; Dec. Dig. § 53.*]

2. PLEADING (§ 34*)—CONSTRUCTION AGAINST PLEADER.

A complaint, in a suit to set aside a sale under a trust deed on the ground that no power of sale was given, must allege the fact that no power of sale was given, or it will be presumed that the power was contained in the deed; a pleading being most strongly construed against the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.*]

3. MORTGAGES (§ 345*)—ASSUMPTION OF PAYMENT—CONSIDERATION.

The assumption by a purchaser of property of an incumbrance thereon is a sufficient consideration for the extension of time of payment.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 345.*]

4. MORTGAGES (§ 280*)—SALES—VALIDITY.

Where a purchaser of property incumbered by a trust deed agreed with the creditor secured thereby to assume the obligation in consideration that the time for payment should be extended until the trustee should deliver to the purchaser an abstract of title, the creditor could not without notice arbitrarily declare a default, and a sale under the trust deed in violation of the agreement was void.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 745; Dec. Dig. § 280.*]

5. MORTGAGES (§ 369*)—SALES—ACCOUNTING BY TRUSTEE.

A complaint to set aside a sale under a trust deed, which shows that an excess above the amount due was realized from the sale at which the creditor became a purchaser, sufficiently states facts for an accounting as against the trustee, to which suit the creditor is a proper party.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1097; Dec. Dig. § 369.*]

6. ACTION (§ 48*)—JOINDER OF CAUSES.

A complaint to set aside a sale under a trust deed, which sets forth facts relied on for such relief, and which shows facts warranting an accounting as against the trustee, is not bad for misjoinder of causes of action, under Code Civ. Proc. § 427, subd. 4, authorizing plaintiff to unite several causes of action where the claims are against trustee by virtue of a contract or by operation of law.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 490; Dec. Dig. § 48.*]

7. PLEADING (§ 193*)—COMPLAINT—SEPARATE CAUSES OF ACTION—FAILURE TO SEPARATELY STATE SEPARATE CAUSES OF ACTION—OBJECTIONS.

An objection that causes of action were not separately stated in the complaint could not be reached by demurrer prior to Laws 1907, p. 706, c. 372, amending Code Civ. Proc. § 430, authorizing a demurrer to the complaint on specified grounds.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 428; Dec. Dig. § 193.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Clara A. Huene against J. C. Cribb and others. From a judgment for defendants on sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

D. P. Hatch and Ansel Smith, for appellant. Taylor O. Taylor, for respondents.

ALLEN, P. J. Appeal by plaintiff from a judgment rendered upon an order sustaining a demurrer to a complaint.

It is alleged in the complaint: That on September 7, 1904, defendants Cribb and Sinclair conveyed to one Holmes certain described premises, and received, as part of the consideration therefor, the note of Holmes for \$1,100, secured by a written instrument on the premises sold, in form a trust deed, but in fact a mortgage, in which instrument said Holmes was party of the first part, the Title Guarantee & Trust Company the party of the second part, and Cribb and Sinclair parties of the third part. That on May 24, 1906, plaintiff acquired said premises subject to said written instrument. That afterwards, on the 10th of July, 1906, when \$889.98 of the indebtedness secured by said instrument was unpaid, the Title Guarantee & Trust Company and said Cribb and Sinclair agreed with plaintiff, in consideration of the full payment of the said note and interest due thereon, to extend the time of payment of said note until the Title Guarantee & Trust Company should prepare and deliver to plaintiff an abstract of title for said premises, and on the 18th of October, 1906, on the same consideration, renewed said agreement; but the Title Guarantee & Trust Company, although requested, failed and neglected to deliver to plaintiff such abstract of title and never prepared the same. That plaintiff, relying upon said promise and agreement, provided and had in her possession at all times the money with which to

pay off the obligation so secured by said written instrument. That, notwithstanding this agreement, Cribb and Sinclair, on the 17th of November, 1906, caused the Title Guarantee & Trust Company to sell, under notice, the said premises, and Cribb and Sinclair purchased the same for \$1,275, claiming that sum to be the amount due under the said instrument. That plaintiff had no knowledge of such sale until the 26th of November, 1906. That on December 7th following she tendered to Cribb and Sinclair and to the trustee the full amount for which such property was sold and all interest due thereon, and demanded a reconveyance of said premises. That the property so sold is of the value of \$6,500. Plaintiff prays that the sale be set aside and declared void, that the property be reconveyed to plaintiff, and her title thereto be quieted, and for other appropriate relief. Defendants all joined in a demurrer to the complaint upon the grounds: First, that several causes of action were improperly joined and the causes of action were not separately stated; second, on account of a misjoinder of parties defendant, on account of uncertainties and ambiguities not necessary to notice, and, finally, a general demurrer for insufficiency of the complaint to state a cause of action against the defendants or either of them. The court sustained this demurrer, and, no amendment being had, judgment was entered accordingly.

It is insisted by appellant that the sale was void because it affirmatively appears by the complaint that no power of sale was given in the instrument executed to secure the note. The instrument is declared by the complaint to have been in form a trust deed, but in fact a mortgage. Trust deeds in this state ordinarily do, and mortgages may, confer a power of sale. The complaint must be construed most strongly against the pleader. "If a fact necessary to his cause of action is not alleged, it must be taken as having no existence." *Hildreth v. Montecito Creek W. Co.*, 139 Cal. 27, 72 Pac. 395. If as a fact the usual and ordinary power of sale was not conferred by this deed of trust, it was incumbent upon plaintiff to allege that fact; otherwise, it will be presumed that the usual and ordinary powers were therein contained. The complaint, however, stated facts which, if true, were sufficient to defeat the sale so made, under the circumstances. Plaintiff alleges that she purchased the property subject to the incumbrance, from which no personal liability would follow, but that after she acquired the title she entered into an agreement with Cribb and Sinclair by which she assumed the obligation, in consideration that the payment of the note be extended until the defendant corporation should prepare and deliver to plaintiff an abstract of title. This assumption of payment was a sufficient consideration for the extension of time, and

until such abstract was furnished the note did not mature, and until its maturity and default in payment no authority reposed in the trustee to sell. This, of course, presupposes good faith upon the part of all concerned, and would not conclude Cribb and Sinclair to the extent of indefinitely postponing payment in the event the corporation should fail for an unreasonable period to provide such abstract; but an unreasonable delay upon the part of the abstract company, or its refusal to carry out its agreement, would be facts of which Cribb and Sinclair might avail themselves under a notice of rescission of the contract of extension, but, having once agreed to extend payment until the abstract company furnished the abstract, they could not, without notice to plaintiff, arbitrarily proceed to declare plaintiff's default. Cribb and Sinclair, having made the agreement through which the time was extended, are estopped now to claim any title acquired by sale made in violation thereof. In addition to this, were it even conceded that under the allegations of the complaint the sale so made was effective, nevertheless it affirmatively appears that a large excess above the amount due upon the note was realized from the sale, which, if not paid to the trustee, is now in the hands of the purchasers, Cribb and Sinclair. All of these parties are affected by the trust undertaken by the corporation, and, if the fact be as alleged in the complaint, that the sale price was in excess of the amount required to satisfy the indebtedness, there is sufficient in the complaint for an accounting as against the trustee, to which proceeding Cribb and Sinclair are proper parties under the circumstances detailed in the complaint. There was no misjoinder of causes of action (subd. 4, § 427, Code Civ. Proc.), and that they were not separately stated was a matter which could not be reached by a demurrer at the time these proceedings were had; the amendment to section 430, Code Civ. Proc. (Laws 1907, p. 706, c. 372), not then being in force.

We think the court erred in sustaining the demurrer, and the judgment is reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 123

HOMAN v. WAYER et al. (Civ. 307.)

(Court of Appeal, Second District, California.
Sept. 28, 1908. Rehearing Denied by
Supreme Court Nov. 27, 1908.)

1. ACKNOWLEDGMENT (§ 36*)—OWNERSHIP OF PROPERTY—NECESSITY FOR CERTIFICATE.

A notary taking an acknowledgment to a deed need not certify to the ownership of the property.

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 36.*]

2. ACKNOWLEDGMENT (§ 8*)—DEEDS—PURPOSE OF CERTIFICATE.

The purpose of a certificate of acknowledgment to a deed is to establish the identity of the grantor and the genuineness of the signature.

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 8.*]

3. ACKNOWLEDGMENT (§ 22*)—CERTIFICATE—PERSONAL KNOWLEDGE—BASIS.

Under Civ. Code, § 1185, prohibiting the taking of an acknowledgment unless the officer knows or has satisfactory evidence that the person acknowledging is the person who executed the instrument, and under section 1189, providing that the form of the certificate shall be substantially, "personally appeared —, known to me (or proved to me on the oath of —), to be," etc., a certificate of personal knowledge is not justified by swearing the person who executed the instrument or any other person.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 123; Dec. Dig. § 22.*]

4. ACKNOWLEDGMENT (§ 22*)—CERTIFICATE—NOTARY'S KNOWLEDGE—REQUIREMENTS.

Under Civ. Code, § 1185, prohibiting the taking of an acknowledgment unless the officer knows or has satisfactory evidence through a credible witness that the person acknowledging is the person who executed the instrument, the witness must be known to the notary.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 123; Dec. Dig. § 22.*]

5. ACKNOWLEDGMENT (§ 48*)—NOTARIES—DISOBEDIENCE OF STATUTE—LIABILITY.

Under Pol. Code, § 801, making a notary and his sureties liable for his official misconduct to those injured thereby, a notary is liable to one sustaining loss through his violation of Civ. Code, § 1185, prohibiting the taking of acknowledgments unless the acknowledging person is identified to him in a prescribed manner.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 243; Dec. Dig. § 48.*]

6. ACKNOWLEDGMENT (§ 48*)—NOTARIES—FALSE CERTIFICATE—LIABILITY.

Under Pol. Code, § 801, making a notary liable for official misconduct to those injured thereby, a notary's liability for making a false certificate to an acknowledgment does not depend upon whether the acts of others have contributed to the injury.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 243; Dec. Dig. § 48.*]

7. ACKNOWLEDGMENT (§ 55*)—FALSE CERTIFICATE—ASSUMED NAMES—MATERIALITY.

The right of a purchaser of land to rely upon a false certificate to an acknowledgment to a deed to his vendor was not defeated because the title of his vendor stood in an assumed name, since a deed in that name conveyed as good title as if the property had stood in the real name.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 314; Dec. Dig. § 55.*]

8. VENDOR AND PURCHASER (§ 229*)—MISREPRESENTATIONS—EFFECT.

Misrepresentations of a vendor relating to matters of value did not charge the purchaser to further inquire as to title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 477; Dec. Dig. § 229.*]

9. DEPOSITIONS (§ 92*)—EXCLUSION—GROUNDS—FAIRNESS.

Discretion was not abused in admitting plaintiff's depositions, though he saw the interrogatories when opened by the notary four days before one of the depositions was taken, and received what purported to be a copy of the in-

terrogatories when the originals were received by the notary when the other deposition was taken; such facts not necessarily rendering the taking of the depositions unfair within Code Civ. Proc. § 2033, authorizing the exclusion of depositions in certain cases.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 92.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by W. R. Homan against John Wayer and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Hunsaker & Britt, for appellants. Byron L. Oliver and Grant Jackson, for respondent.

TAGGART, J. This is an action brought to recover from the defendant Wayer, as a notary public, and the defendant corporation, as surety on his notarial bond, the sum of \$550, damages alleged to have been sustained by reason of a false and deceptive certificate of acknowledgment made by said notary. Judgment was for plaintiff, and defendants appeal from the judgment and from an order denying their motion for a new trial.

On the 28th day of November, 1903, plaintiff, who was then living in Omaha, Neb., purchased from one J. A. Overholtzer, who was acting under the assumed name of Carl Anderson, five acres of land located in Pasadena, Cal. The transaction took place in Omaha, and Overholtzer as evidence of his title presented an abstract of title made by the Pomona Abstract & Trust Company showing title in the premises vested in Mary E. Griswold and a grant, bargain, and sale deed from Mary E. Griswold to Carl Anderson, dated September 26, 1903. To the latter was attached the certificate of acknowledgment in question, wherein defendant Wayer, as a notary public of Los Angeles county, Cal., certified in the usual form, under date of September 26, 1903, "before me, * * * personally appeared Mrs. Mary E. Griswold, a widow, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same." Upon this showing the parties entered into a preliminary contract, and conveyances were executed. Plaintiff made inquiry by mail through parties residing near the premises as to the value of the property, its location, and so forth, and, upon receipt of a certificate of title from the Pomona Abstract & Title Company showing the title regular in accordance with the representations made by Anderson, the deeds were recorded, and plaintiff paid to Anderson \$550 cash and executed and delivered a note and mortgage for deferred payment of \$500 in accordance with the contract.

The person who acknowledged the Griswold-Anderson deed before the defendant Wayer was not Mary E. Griswold, but one

Emma W. Allen, who impersonated Mary E. Griswold in the execution and acknowledgment of that deed. Defendant Wayer does not contend that he knew the woman whom he certified to be Mary E. Griswold. His knowledge of her identity was gained by an introduction from Overholtzer, a man whom he did not know, a reassuring remark or two from this man, and an "oath" administered to the woman herself at the time of taking her acknowledgment. If we were permitted to consider the so-called "oath" of the woman as proof or evidence upon which the notary could base his certificate, it did not establish the things which he is required to know and certify. The essential fact to be known by, or proven to, the notary is that the person making the acknowledgment is the person described in and who executed the instrument. The woman who executed the deed was asked if her name was Mary E. Griswold, and if she was the sole owner of the property. Her name might have been Mary E. Griswold, and she not the person described in the deed. The notary is not required to certify to the ownership of the property (*Overacre v. Blake*, 82 Cal. 77, 22 Pac. 979; *Barnard v. Schuler*, 100 Minn. 289, 110 N. W. 966), and this only indirectly bore upon the matter to be certified. The purpose of the certificate is to establish the identity of the grantor and genuineness of the signature to the deed.

Section 1185 of the Civil Code reads: "The acknowledgment of an instrument must not be taken, unless the officer taking it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument," etc. Section 1189 provides "substantially" the form of the certificate, which in the respect here important reads: "Personally appeared ———, known to me (or proved to me on the oath of ———) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same." A certificate of personal knowledge is not justified by swearing the person who executed the instrument or any other person. The statute draws a distinction between those "known" and those "proven to be" the individual described in the instrument. In the former case no taking of testimony and no "satisfactory evidence" is required. It is sufficient that the officer knows. If the officer does not "know," then the law makes it his duty to inform himself by satisfactory evidence on the oath or affirmation of a credible witness. In this event he is called upon to certify by whose oath it was proven to him that the person whose acknowledgment was taken is the person described in the instrument. The witness by whose oath the execution of the instrument is proven, when

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the person executing the instrument is not previously known to the officer, must himself be known to the notary. This is implied by the requirement that the officer shall certify that such person is a credible witness. A person who is not sufficiently known to the notary to authorize the latter to certify to his identity without proof is not sufficiently known to him to be a credible witness to prove either his own or some one else's identity. When the person seeking to have his identity certified does not comply with these rules, the notary is expressly prohibited from taking the acknowledgment at all. When the notary does not obey this statute, he should expect to be held liable. *Joost v. Craig*, 131 Cal. 509, 63 Pac. 840, 82 Am. St. Rep. 374.

This is not a case where a mistake was made through inadvertence, or one in which due precaution was taken, the statute fully complied with, and still the notary was deceived. It is not within the exception stated in the *Joost-Craig* Case, but comes clearly within the rule of law declared in the case of *State v. Meyer*, 2 Mo. App. 413, therein cited. The facts in the Missouri case were much less favorable to the plaintiff than those here. The evidence there showed throughout the transaction a singular disregard, upon the part of the persons relying upon the false certificate, of all the precautions which are ordinarily suggested by experience of men of adult years, and yet a judgment against the notary was affirmed. The court says: "Others may have been guilty of contributory negligence; but, if the careless act done by Meyer (the notary) was necessary to the accomplishment of the loss, there can be little doubt that, in a proper form of action, he alone may be made answerable for the resulting damages." With that case and the case of *Oakland Bank v. Murfey*, 68 Cal. 455, 9 Pac. 843 (relied upon by appellants), before it, the Supreme Court of this state accepted the Missouri case as authority and distinguished the *Oakland Bank Case* in the opinion in the *Joost-Craig Case*. It is apparent, then, that the fact that others have aided in the transaction and contributed to bring about the conditions from which the plaintiff's loss arose does not relieve defendants from liability for the loss of the plaintiff, if the latter relied upon the false certificate when paying out his money. In taking an acknowledgment to a deed, a notary's official services are limited. He certifies to the identity of the grantor named in the instrument, but he has no control over the deed to which his certificate is attached. This must be delivered to the grantee by the grantor, or some one on his behalf, in order to become effective. No official act of the notary in certifying an acknowledgment to a deed can alone result in injury to any one. The deed cannot become the means of defrauding any one until used in some trans-

action entirely outside of the official duties of the notary. For this reason the statutory right of action is not dependent upon a showing that the acts of others have not contributed to the injury, or defeated by a showing that they have so contributed, if it appear that the party defrauded relied upon the notary's false certificate.

The terms "proximate cause," "negligence," and "contributory negligence," as used in appellants' presentation of the case, are somewhat misleading here. No official misconduct or neglect of a notary public in taking or certifying the acknowledgment of a deed could ever be the sole proximate cause of loss or injury to any person, but we cannot for that reason say no recovery can be had for a loss due to a false certificate of acknowledgment under the provisions of section 801 of the Political Code.

The evidence shows, and the court finds, in effect, that plaintiff here did rely upon the false certificate of the defendant. This finding is not affected by the fact that the title of *Overholtzer* to the land stood in an assumed name. A deed in this name conveyed as good title as if the property had stood in the real name of the party. *Wilson v. White*, 84 Cal. 239, 24 Pac. 114; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382. If it be contended that this circumstance put plaintiff upon inquiry, it may be said that, if he had made inquiry as to the identity of the grantee in the *Griswold-Anderson* deed, he would have discovered that *Overholtzer* was the man he was dealing with; but he would also have learned that *Overholtzer* and *Anderson* were one, and that the title of the land was held in the latter name as was represented to him. Inquiries were made by plaintiff by mail as to the possession, the value, the location, and character of the land. He found the possession to be that of *Mrs. Griswold*, a widow from Iowa. The misrepresentations made by *Anderson* relating to matters of value were apparently discounted in the price paid. These did not of themselves suggest anything calling for a further inquiry as to title. The possession of the premises, as disclosed by plaintiff's inquiries, was that of the party in whom the title appeared to be vested by the abstract. This only confirmed the apparent regularity of, and made more effective, the false certificate of the defendant. The evidence sustains the implied finding of the court that plaintiff acted with ordinary business prudence in making inquiry before paying his money to *Overholtzer*, and justifies the trial court's conclusion that the defendant *Wayer's* official misconduct was the cause of plaintiff's injury and loss.

Many cases are cited and several quotations from text-writers presented by the appellants to sustain the contention that a public officer is answerable only to the person employing him, or where a certificate is is-

sued to the parties to the instrument which he certifies. It is contended that the obligation of the officer and his sureties to pay damages for loss resulting from official misconduct rests upon a privity corresponding to what is called privity of contract, and that in order that the injured party may recover he must establish relations analogous to these, citing Thompson on Negligence, vol. 5, § 6405; 2 Cooley on Torts (3d Ed.) 782, etc. We do not think it necessary to distinguish these authorities or the cases upon which they rest any farther than they have been by declarations of the principles above applied. The rule declared by them is accepted in some jurisdictions, but is not supported by the weight of authority (Lammon v. Feusier, 111 U. S. 21, 4 Sup. Ct. 286, 28 L. Ed. 337; State v. Ryland, 163 Mo. 280, 63 S. W. 819), and is not consistent with that adopted in this state at an early date (Van Pelt v. Littler, 14 Cal. 194), and which still continues to be applied by our Supreme Court (Felonicher v. Stingley, 142 Cal. 630, 632, 76 Pac. 504). No privity between the parties is necessary to recovery. The cause of action arises from the breach of official duty by the officer and the special damage to the injured party. Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171.

The right of action here is statutory, and rests upon section 801 of the Political Code, which reads: "For the official misconduct or neglect of a notary public, he and his sureties on his official bond are liable to the parties injured thereby for all the damages sustained." By section 794 it is made the duty of a notary to take acknowledgments and give certificates thereof. This must be done in accordance with law, or there is a breach of official duty. The loss sustained is that which is the result of official misconduct or neglect. Heldt v. Minor, 89 Cal. 118, 26 Pac. 627; Id., 113 Cal. 389, 45 Pac. 700.

There is nothing in the record to show an abuse of discretion on the trial court's part in overruling defendants' objections to the introduction of the depositions of the plaintiff. That the plaintiff should have seen and glanced over the interrogatories when opened by the notary four days before one of the depositions was taken, and received what purported to be a copy of the interrogatories by the same mail as the originals were received by the notary, when the other deposition was taken, did not necessarily render the taking of such depositions or either of them unfair under the provisions of section 2033 of the Code of Civil Procedure.

In our opinion, the demurrer to the second amended complaint was properly overruled, and the findings and decision find ample support in the evidence.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 118

WILCOX-ROSE CONST. CO. v. EVANS.
(Civ. 524.)

(Court of Appeal, Second District, California.
Sept. 26, 1908. Rehearing Denied
Nov. 28, 1908.)

1. PRINCIPAL AND AGENT (§ 152*)—LIABILITY OF THIRD PERSONS—UNAUTHORIZED DEALINGS WITH PRINCIPAL'S PROPERTY.

As a general rule, a principal may recover the value of property from one to whom it has been transferred by an unauthorized act of his agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 567-569; Dec. Dig. § 152.*]

2. PRINCIPAL AND AGENT (§ 148*)—LIABILITY OF THIRD PERSONS—UNAUTHORIZED ACTS—APPARENT AUTHORITY OF AGENT.

Under Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by the act of a third, he whose negligence caused the act must suffer, where a principal invests his agent with apparent authority to dispose of property, he may not recover its value from an innocent third person, to whom it was transferred by the agent in violation of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 534-552; Dec. Dig. § 148.*]

3. CORPORATIONS (§ 431*)—AGENTS—LIABILITY AS TO THIRD PERSONS—UNDISCLOSED AGENCY—RIGHTS OF UNDISCLOSED PRINCIPAL.

Defendant employed a contracting firm to build a barn, and thereafter the roof was damaged because of defective construction, and the contractors agreed to repair it, they to pay one-half of the expense and defendant one-half, but, in the meantime, the contractors had become officers and stockholders in plaintiff company, and the work was done with plaintiff's labor and materials, which facts defendant did not know until after completion of the work, but supposed he was dealing with the original contractors who built the barn. Held, that the contract was one made by an agent in his own name for an undisclosed principal, and plaintiff could recover the amount due the contractors under the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1742; Dec. Dig. § 431.*]

4. ESTOPPEL (§ 56*)—EQUITABLE ESTOPPEL—MATTERS PRECLUDED—CONTRACT RIGHTS.

Though plaintiff was entitled to recover on a building contract made with defendant by plaintiff's agent in his own name, in the performance of which plaintiff's materials were used, plaintiff having refused the amount due the agent under the contract, and demanded the entire value of the work and materials, and defendant having paid the amount due under the contract to the assignee of the company, whom he supposed the agent represented, plaintiff was thereafter estopped from asserting any claim to the amount under his agent's contract.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. § 56.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by the Wilcox-Rose Construction Company against P. T. Evans. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Thomas T. Porteous, for appellant. Purington & Adair, for respondent.

SHAW, J. This is an action whereby plaintiff seeks to recover from defendant upon an implied contract for repairs made upon a building. Judgment went for defendant, from which, and an order denying plaintiff's motion for a new trial, it prosecutes this appeal.

It appears that the Lynn-Lewis Company was a corporation, and J. M. Lynn and J. W. Lewis were officers thereof. The company constructed for defendant a barn, upon the completion of which defendant paid therefor in full, according to the terms of the contract under which it was erected. Shortly thereafter the Lynn-Lewis Company ceased doing business, and Lynn and Lewis became stockholders and officers in a new corporation (plaintiff herein), known as the Wilcox-Rose Construction Company, of which E. H. Rose was president and general manager, J. M. Lewis vice president, and Lynn was superintendent of construction. On July 25th, and after Lynn and Lewis had become connected with plaintiff corporation, the roof of the barn constructed by the Lynn-Lewis Company fell in, damaging the vehicles of defendant's tenant, then occupying the barn. The next day defendant called upon Lynn and Lewis, both of whom, unknown to defendant, were at the time in the employ of plaintiff, with the view of having them make good his loss and damage resulting from the fall of said roof, which loss and damage he claimed was due to faulty construction thereof, for which the Lynn-Lewis Company was responsible. This conference resulted in a contract made between Lynn and Lewis and defendant, whereby it was agreed that the latter should have the vehicles repaired, and that Lynn and Lewis should repair the roof and the cost thereof be divided between the parties; or, using the language of Lynn, with whom the contract was made, and who testified for plaintiff, "the Lynn-Lewis people should stand one half and Evans the other half." In accordance with this arrangement Lynn and Lewis repaired the barn, and in the prosecution of the work, unknown, however, to defendant, used materials thereon belonging to plaintiff, and the labor necessary in making said repairs was performed by men in the employ of and paid by plaintiff. Lynn, as an officer of plaintiff, to wit, superintendent of construction, had charge of these men and control of the material belonging to plaintiff. Lynn and Lewis did not pay plaintiff for the labor done and materials furnished in performing said work, but had the same charged to defendant upon the books of plaintiff. Some time after the completion of the work, plaintiff presented a bill to defendant for the entire cost of making the repairs upon the building, whereupon defendant denied that he had ever made any contract with plaintiff for doing said work, and disclaimed any indebtedness by reason thereof to plain-

tiff. Defendant, according to the testimony of Mr. Rose, president of plaintiff, stated to him that there was in the neighborhood of \$100 unpaid under his contract, and offered to pay plaintiff this balance, due under his contract to Lynn and Lewis; but Mr. Rose refused to accept the same, insisting upon the payment of the full cost of making repairs upon the barn, without reference to the contract made between defendant and Lynn and Lewis. Thereafter defendant paid this sum, constituting the balance due to Lynn and Lewis, to the assignee of the Lynn-Lewis Company. While there is some conflict in the evidence, we think it clear that Evans dealt with Lynn and Lewis as representatives of the company which had erected the barn, and which, he asserted, by reason of its negligent construction thereof, should make the repairs. He did not know plaintiff in the transaction, nor that it had anything to do with the repairs, until some time after the completion of the work.

Appellant's contention is that, not only the material used, but the labor, including that of Lynn himself, belonged to it, and that, as Evans received the benefit of such labor and material, it should recover from him the reasonable value thereof, without regard to the contract under which the repairs were made. The general rule is that a principal may recover the value of his own property from a third person where it has been transferred to such person by an agent in violation of his duty to his principal. Section 543, Clark and Skyles, Law of Agency; *Harpending v. Meyer*, 55 Cal. 555; *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749. Where, however, the agent is invested with apparent authority to dispose of property, and by the principal held out as possessing authority to use materials and labor of his principal, such redress, notwithstanding the agent's wrongful act, will be denied against an innocent third person, for the reason that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Section 3543, Civ. Code; *McNear v. Bourn*, 122 Cal. 621, 55 Pac. 596; *Schultz v. McLean*, 93 Cal. 329, 28 Pac. 1053; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618. Conceding, as shown by the evidence, that Lynn wrongfully, and in violation of the duty imposed upon him as an agent and an officer of appellant, appropriated materials and the labor of employes belonging to appellant, in the performance of a contract made with Evans, the latter was wholly innocent. The wrong perpetrated by Lynn was due entirely to the fact that appellant had placed him in a position, as superintendent of construction, where his orders commanded the obedience of appellant's employes with reference to the work they should do, and his direction as to the delivery of materials to be used in buildings, the construction and repair of which were

under his control as such superintendent, received prompt attention. We are not unmindful of the fact that appellant insists that Lynn was without such authority. The fact remains, however, that he did perform the work at the expense of appellant corporation, of which he was the superintendent of construction, and it was undoubtedly by reason of his connection with the company in such capacity that he was enabled to perpetrate the fraud upon appellant.

The case is one of a contract made with a third party, by an agent in his own name, for an undisclosed principal, and notwithstanding the fact that Evans had dealt with Lynn and Lewis as representing the Lynn-Lewis Company, appellant might nevertheless have maintained an action against Evans upon the contract, and recovered from him such sum as might be due and unpaid under the terms of the contract to Lynn and Lewis. It appears that when Mr. Rose, the president of appellant, presented the bill for the work to Evans, and informed him that the work and materials had been furnished by appellant, Evans, although he disclaimed any contract with appellant, did, according to the testimony of Rose, offer to pay to appellant the sum of \$99.56, then in the hands of respondent, and due under the contract made with Lynn. Appellant declined to accept this sum, or in any way recognize the contract under which the work was done, and thereafter, the Lynn-Lewis Company having made an assignment, Evans applied the money so disclaimed by appellant to the discharge of other indebtedness of the Lynn-Lewis Company, which disposition received the approval of the assignee of said company. Appellant was therefore estopped from asserting any claim or right to such sum.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 26

ALAMEDA COUNTY v. DALTON et al.
(Civ. 209.)

(Court of Appeal, First District, California.
Sept. 14, 1908. Rehearing Denied by
Supreme Court Nov. 13, 1908.)

1. TAXATION (§ 570*) — COUNTY ASSESSOR — CONTRACT — PERSONAL INTEREST — EVIDENCE — SUFFICIENCY.

Evidence, in an action against a county tax assessor, held to justify a finding that he did not let an independent contract for making a certified copy of the assessment roll of the county so far as it pertained to property situated in the city of Oakland for the benefit of such city, but that he was personally interested in such work.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 570.*]

2. TAXATION (§ 549*) — ASSESSORS — EXTRA WORK.

County Government Act 1897 (St. 1897, p. 504, c. 277), § 160, subd. 7, providing that, when the assessor is required by law to make copies

of assessment rolls for cities contained within the county, he shall only receive the actual cost by him incurred in preparing such rolls, contemplated that the assessor should not be required, at his own expense, to do extra work in preparing such rolls.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 549.*]

3. TAXATION (§ 410*) — ASSESSORS — DUTIES — DELEGATION.

Under County Government Act 1897 (St. 1897, p. 504, c. 277), § 160, subd. 7, requiring the county assessor to prepare certified copies of assessment rolls for cities within the county, and to file with the county auditor a sworn statement showing the persons paid, and the amounts paid to each for such rolls, and to account forthwith and pay over to the county any difference between such cost and the amount allowed him for the work, the assessor is required to make such rolls as a part of his official duty, which he cannot delegate to another.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 676; Dec. Dig. § 410.*]

4. TAXATION (§ 570*) — OFFICERS — VIOLATION OF DUTY — ACTION ON BOND.

Where a county assessor, notwithstanding his duty to officially prepare a copy of the assessment roll for a city within the county and certify the actual cost thereof to the county auditor, as required by County Government Act 1897 (St. 1897, p. 504, c. 277), § 160, subd. 7, contracted with one of his deputies for the making of the roll, the county in an action against the assessor and his bondsmen for violation of duty, was entitled to prove by the contractor the number of days he was employed in making the copy, and the names of the persons employed in assisting him, and the amounts paid for their services.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 570.*]

Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by Alameda County against Henry P. Dalton and others. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Affirmed.

Campbell, Fitzgerald, Abbott & Fowler, for appellants. Attorney General Webb, for respondent.

COOPER, P. J. This action was brought to recover of defendant Henry P. Dalton, the assessor of Alameda county, and the other defendants as sureties on his official bond, the sum of \$2,600, being the amount received by said Dalton from the city of Oakland for making a certified copy of the assessment roll of said county of Alameda for the year 1902, so far as it pertains to property situate in the city of Oakland, less the actual cost incurred by said Dalton in preparing said roll. The case was tried before the court without a jury, and findings filed, on which judgment was entered for plaintiff in the sum of \$1,999, with costs. Defendant made a motion for a new trial, which was denied. This appeal is from the judgment and the order denying the motion for a new trial.

As stated by appellants in their opening brief, the question in the case is as to the

proper disposition of the money, received by the assessor from the city of Oakland for making the certified copy of the assessment roll, so far as it pertains to said city of Oakland. This is the main question in the case, and the only one that need be fully discussed. It is made the duty of the assessor to furnish, to incorporated cities or towns, upon request, on or before the third Monday in July of each year, "a complete certified copy of his assessment book so far as such assessment book pertains to property within the limits of said incorporated cities and towns. The assessor may charge incorporated cities and towns five cents per folio of 100 words for each copy of his assessment book furnished such incorporated cities and towns." Pol. Code, § 3653. It is provided, in County Government Act 1897 (St. 1897, p. 504, c. 277), as to the classes of counties to which the county of Alameda belongs (section 160, subd. 7), as follows: "* * * Provided however that should the assessor be directed by any law, or by any order of the board of supervisors, or by any municipality within said counties of the third class, to prepare maps, plats, block books for the use of the county, or assessment rolls for the use of any municipality, then said assessor shall only receive the actual cost by him incurred in making or preparing such maps, plats, block books or assessment rolls, and provided further that he shall file with the county auditor a sworn statement, showing the persons to whom, and the amounts paid to each, for such maps, plats, block books or assessment rolls; and he shall account forthwith and pay over to the county any difference between such cost and the amount so allowed him for such work." And section 216 of said county government act provides as follows: "All salaried officers of the several counties of this state shall charge and collect for the use of their respective counties, and pay into the county treasury on the first Monday in each month, the fees now or hereafter allowed by law in all cases, except where such fees or a percentage thereof is allowed such officers, and excepting also such fees as are charged against the county."

Under the above provisions the appellants do not claim that the assessor is allowed to make any personal profit to himself for such certified copies furnished to incorporated cities or towns, but they insist that the evidence in this case shows that the assessor let the contract to one Miller to make the certified copy of the assessment books required by the city of Oakland, at the sum of five cents per folio; that such sum was the reasonable value of making such copy of the assessment roll, and that the assessor actually paid Miller the whole \$2,650, receiving no part thereof himself. The trial court found otherwise, and the evidence in our opinion justifies the findings. Miller was a deputy in the assessor's office, receiving a monthly salary of \$100 per month, paid by

the county of Alameda, and received such salary during the time he was engaged in preparing the certified copy. He was assisted in the work by the other deputies in the office, all of whom were being paid their regular salaries by the county, and none of whom appears to have been paid any extra compensation with the exception of \$33.35 paid to one Wilson, and \$20 paid to one Stoddard. Nor does it appear that the other deputies demanded or asked for any extra compensation. It is true that Miller testified that he received \$2,650 from Dalton for making the copy; but he stated, in other parts of his testimony, that the reason he had not paid any other deputies who assisted in making the copy was because the matter was in litigation, and that he had never specified what he would pay them. It is evident that if Miller was really paid \$2,650 by Dalton, and hired his own assistants to make the copy, the litigation between Dalton and the county did not concern him. The testimony of Miller, to the effect that Dalton immediately gave him his promissory note for \$2,600, the contract price for doing the work, and that Dalton afterwards gave him a check in payment of the note—which check was produced and marked "Paid"—is, to say the least, peculiar. The usual way would have been for Miller to wait until the county had paid for the work, as the contract was for his benefit, and he was not paying out any money to have the work done. Dalton testified that he received the particular \$2,600 from the county, and that no part of that money was paid to Miller. The copy of the assessment so made was made in 27 volumes, a great portion of which was printed matter already printed in the volumes at the time the copying was done. These volumes cost the county \$10 to \$13 per volume. The amount of printed matter in the volumes is shown to have been 24,468 folios out of the entire 53,000 folios, or nearly one-half, for which the city of Oakland paid the \$2,600. It seems at least improbable that Miller received \$2,600 from Dalton for 10 days' work by himself and the other deputies in the office, each of whom was receiving a salary from the county for copying into 27 volumes, which volumes were paid for by the county and used in making the copies. The volumes, printed matter, ink, paper, salaries of deputies, and the office in which the work was done were all paid for by the county. We do not find the evidence in the record on which the court based its allowance of \$601 to Dalton, but we presume it was upon some basis or calculation by which the court intended to allow the reasonable value of the extra copying done in Dalton's office. The county government act contemplated that the assessor should not be required, at his own expense, to do extra work in preparing copies of the assessment roll for municipalities, for it expressly provides that when the assessor is by law required to make such

copies, he "shall only receive the actual cost by him incurred in making or preparing such * * * assessment rolls." It was the official duty of the assessor to make the certified copy of the assessment roll, and not to delegate such official duty to another or third party. This is further shown by the provision in the same section that the assessor "shall file with the county auditor a sworn statement, showing the persons to whom, and the amounts paid to each, for such * * * assessment rolls, and that he shall account forthwith and pay over to the county any difference between such cost and the amount so allowed him for such work." If under the above provision the assessor was compelled to employ extra help, he could make his verified statement, giving the names of the persons employed, and the sum paid to each person, and thus be saved from paying the amounts from his own pocket. To illustrate what the expense would have been to the assessor in this case had he employed the extra help and attended to the matter himself, we find the time, given by Miller, that he was engaged with the deputies in making the copies was 10 days, and that the number of deputies, including himself, was 13. 13 times 10 is 130, which, at \$4 per day—being about the wages paid the deputies, who received \$100 per month—would amount to \$520. The court allowed \$601, which indeed appears to be liberal.

The court did not err in allowing questions to be asked by plaintiff's counsel of Miller as to the number of days he was employed in making the copies, the names of the parties employed in assisting him, and the amount of money paid to each for such services.

The judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

(154 Cal. 497)

CASSIN v. NICHOLSON et al. (S. F. 3,617.)
(Supreme Court of California. Nov. 4, 1908.
Rehearing Denied Dec. 4, 1908.)

1. EJECTMENT (§ 26*)—EQUITABLE DEFENSE—FRAUD.

A defendant in ejectment may offer as an equitable defense that, by fraud of the predecessor in title of plaintiff's lessor, from whom he purchased the land in question he received a deed which did not include it.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 107, 108; Dec. Dig. § 26.*]

2. EJECTMENT (§ 106*)—EQUITABLE DEFENSES—DISPOSITION BY COURT WITHOUT JURY.

Where equitable defenses are interposed in ejectment, the court may dispose of them first and without a jury, and, if their disposition be adverse to defendant, may proceed to hear the legal controversy.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 310; Dec. Dig. § 106.*]

3. EJECTMENT (§ 50*)—PARTIES—BRINGING IN NEW PARTIES—SUBSTITUTION.

In ejectment by a lessee, the action being really brought on behalf of the lessor, the lessor, being bound by the judgment and having had the right to appear originally as plaintiff to protect either her tenant's or her own possession, was properly brought in by the court as a party plaintiff, and, where it appeared before her appearance that another had succeeded to her rights, he was properly substituted for her and allowed to appear in person, especially where the lessee's right of possession had expired, and no judgment for possession could therefore be given the nominal plaintiff under Code Civ. Proc. § 740, providing that in an action to recover realty, where plaintiff, with a right to recover at the commencement of suit, parts with the right during the action, the judgment must be according to the fact.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 50.*]

4. EJECTMENT (§ 127*)—PROCEEDINGS—DAMAGES—PARTY ENTITLED.

Where a lessee bringing ejectment was never in possession during his term, the presumption is that he did not pay rent to his landlord, and, if the successor of the lessor substituted as a coplaintiff in the lessor's stead recovers in the action, he may recover for the use and occupation of the land while unlawfully detained.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 127.*]

5. EJECTMENT (§ 9*)—PROCEEDINGS—SUBSTITUTED PLAINTIFF—TITLE AND RIGHT OF POSSESSION.

Where the successor of a coplaintiff in ejectment is substituted as a party, he must prevail by virtue of the title to which he succeeded, and not under another title disconnected with that originally asserted.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 28; Dec. Dig. § 9.*]

6. TENANCY IN COMMON (§ 15*)—EJECTMENT BY ONE TENANT—EFFECT OF JUDGMENT.

Where a tenant in common recovers in ejectment against an adverse claimant, the judgment determines the right of possession of the whole premises, and, as the recovery of possession under the judgment relates to the commencement of the action, plaintiff in contemplation of law is in possession of the whole premises as of that time, so as to prevent acquisition of title by adverse possession pending the action, as against co-tenants not suing.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 15.*]

7. JUDGMENT (§ 715*)—NATURE OF CLAIM OF TITLE—EVIDENCE.

Where defendant pleaded adverse possession, he could show that he had acquired possession under a written instrument and had continued to hold possession under claim of right and in hostility to all the world, though the testimony would also tend to show fraud of his grantor, which fraud the court had formerly held did not exist in determining equitable issues.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 715.*]

8. VENDOR AND PURCHASER (§ 189*) — VENDOR'S TITLE—ESTOPPEL OF VENDEE TO DENY.

While a vendee in possession under an executory contract of sale is estopped to deny the vendor's title, yet when, so far as the vendee is concerned, the contract is executed, he may thereafter assert his adverse possession as against the world, including his vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 381, 382; Dec. Dig. § 189.*]

9. VENUE (§ 56*) — CHANGE OF VENUE — DEMAND—NECESSITY.

The lessor's successor in interest being a proper party plaintiff, his appearance did not so change the action as to necessitate a transfer of the trial to the county in which the land was situated, in view of Code Civ. Proc. § 396, providing that an action may be tried in any county, unless defendant demand a trial in the proper county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 86, 87; Dec. Dig. § 56.*]

Department 2. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Michael Cassin against Murdock Nicholson and others. From a judgment for plaintiff, and from the refusal of a new trial, defendants appeal. Reversed and remanded.

William H. Jordan, for appellants. J. R. Welch, D. M. Delmas, and Garret W. McEnerney, for respondent.

HENSHAW, J. This is an action in ejectment commenced in the district court of the Twentieth judicial district of California July 11, 1879. It appears from the complaint and the verification thereto, made by Mrs. Winifred C. Tarpey, that plaintiff, Cassin, was her lessee for a term of five years, terminating upon the 1st day of October, 1883, and that the action was prosecuted by the lessee on behalf of Mrs. Tarpey and for the establishment of her title. The defendant answered by denial, and for an equitable defense pleaded certain circumstances of fraud alleged to have been perpetrated upon him by Matthew Tarpey, predecessor in interest to the title of Winifred C. Tarpey. These matters will be found set forth in the three appeals in the case of *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778, Id., 89 Cal. 617, 26 Pac. 1101, and Id., 124 Cal. 444, 57 Pac. 457. In substance, these allegations were: That he had entered into a written agreement with Tarpey for the conveyance of about 600 acres of land, a part of the Tarpey

ranch, at an agreed price of \$1,500; that he fully executed this agreement by the payment of the purchase price, and entered into possession of all the land; that there was delivered to him by Tarpey a deed, represented to embrace all of the land described in the written agreement, and he believed the representation; that he was unable to read; and that he continued so to hold possession of the land adversely to all the world in this belief. He averred that Winifred C. Tarpey and Mary Tarpey, Winifred Tarpey, and Frances Tarpey, her children, were the heirs at law and devisees of Matthew Tarpey, who had died in 1873, and that he had made demand of them for a correction deed and had been refused, and asked that they be brought into court for the complete determination and settlement of the controversy. In connection with these equitable matters defendant also pleaded title by adverse possession. Seemingly, under the mistaken idea that this equitable defense could not be successfully interposed in a legal action of ejectment (*Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; *Hyde v. Mangan*, 88 Cal. 319, 26 Pac. 180), the defendant Nicholson then commenced his action against Mrs. Tarpey and her children, alleging the fraud of Matthew Tarpey, as above indicated, and praying specific performance of the agreement to convey. This is the case, the three appeals from which will be found reported as above noted. Upon the last appeal the trial court found the fraud substantially as pleaded, but found facts from which this court declared that plaintiff had not commenced his action within the three years after the discovery of the fraud, and was therefore barred from the relief he sought by the statute of limitations. Upon the rendition of this judgment, Nicholson dismissed his action, and the ejectment suit here under consideration was aroused from its long slumber. Since it would have been permissible for defendant to have offered his equitable defense and to have sought equitable relief in the original ejectment suit, this case is no different from the situation which would have resulted had the issues in *Nicholson v. Tarpey* been here tried. It would have been proper for the court to have disposed of the equitable matters first and without a jury, and upon the final disposition of them, if their disposition were adverse to Nicholson, to proceed to the hearing of the legal controversy. The present action may therefore be regarded as one wherein Nicholson has interposed an equitable cross-complaint seeking affirmative relief upon the ground of fraud, and has been refused relief because of his neglect to commence his action within the time limited by the statute.

In 1901 this action came on for hearing. The trial court called in Winifred C. Tarpey and her children as parties plaintiff, and, it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

being made to appear that John Tarpey had succeeded to all the right, title, and interest of Winifred C. Tarpey and her children, John Tarpey was ordered to appear as substituted plaintiff for them. He made such appearance and filed a complaint, setting forth the history of the action of Nicholson v. Tarpey and the final dismissal of it by plaintiff, and his own title, and, with the usual allegations appropriate to an action of ejectment, prayed judgment for the possession of the premises and the rental value during the occupancy of defendant. To this complaint Nicholson answered by denials and by pleading title in himself by adverse possession. He also set up all the matters of equitable consideration alleged in his answer to Cassin's complaint and in his own complaint in Nicholson v. Tarpey. The trial court first took evidence upon this equitable defense and found: That Tarpey had committed no fraud; that there was a written agreement between the parties for the conveyance of a piece of land containing 191.14 acres; that on the 29th of October, 1868, the full purchase price was paid by Nicholson for this land; and that Matthew Tarpey executed a deed in full conformity with the written agreement without intending or contriving or designing to mislead, deceive, overreach, swindle, or defraud defendant, and without in fact misleading, deceiving, overreaching, swindling, or defrauding the defendant; and that Tarpey did convey all the property which he had ever agreed to convey or had ever represented that he would convey. Proceeding next to the trial of the legal issues, a jury was impaneled. Plaintiff made proof of the legal title. The court, however, refused to admit most of the evidence offered by the defendant, upon the ground that he was "equitably estopped," and instructed the jury to return a verdict for the plaintiff, which it did, fixing the rental value of the property during the time of its detention at \$1,778.12. Judgment followed for plaintiff, and from that judgment and from an order denying a motion for a new trial defendant appeals.

Appellants' first complaint is as to the ruling of the court in admitting John Tarpey as plaintiff in the action under an order substituting him as plaintiff for Winifred Tarpey and her children, who, it is asserted, never appeared in the action. Herein various contentions are raised, as: That the original action was by the termor for possession for a limited term of years; that that term had long expired before trial; and that the action was thus one contemplated by section 740, Code Civ. Proc., where, the right of possession in Cassin having terminated, the judgment should so declare, and, at the utmost, the award should have been merely for damages for detention. Again, it is urged that the court after trial of the issues in the Cassin action, and when defendant had moved for a nonsuit, of its own motion

first called in Winifred Tarpey and her children, and, upon their failure to appear, allowed John Tarpey to be substituted for them. It is asserted that, if treated as an intervener, it was error to allow him to appear, and that it was error also to allow him to appear as a substitute for Winifred Tarpey and her children, who had never appeared. But, as has been pointed out, Winifred Tarpey by her affidavit had so connected herself with Cassin's claim to possession as to be bound by whatever judgment was rendered, and the action was in strictness one to determine her title. Convenient as was the common-law action of ejectment under the ancient practice for the determination of title to land, in this state where equity and law are administered in the same forum and under a single pleading, where an action to quiet title or to determine conflicting claims to real estate may be brought indifferently by one in or out of possession, the utility of such an action no longer exists, and its legal fictions, admirable as they were under common-law procedure, serve but as matters of embarrassment under our code procedure, where every action should be prosecuted in the name of the real party in interest. But it may not be said that the court erred in permitting Tarpey to appear as plaintiff. The commencement of Cassin's action interfered with the running of the statute of limitations in favor of Nicholson, and as Mrs. Tarpey would have had the undoubted right to have appeared as plaintiff with Cassin to protect her tenant's possession, or to have appeared alone to have established her own right of possession, so plaintiff John Tarpey, having succeeded, as he pleads, to the right of Mrs. Winifred Tarpey, is himself entitled to appear in person and prosecute the action. Especially is this so where a termor's right of possession has long since expired and no judgment for possession could therefore be given to the nominal plaintiff (Cassin), under section 740, Code Civ. Proc., no matter how completely the right to such possession during the term of his lease might have been established. And, while upon this subject, it may be added that the presumption is, since Cassin was never in possession during the term of his lease, that he did not pay, as he would not have been obliged to pay, rent to his landlord. If John Tarpey shall prevail in the action, the resultant damages for the value of the use and occupation during the period of the unlawful detention are properly awardable to him. It is perhaps unnecessary to add that John Tarpey, as plaintiff, must prevail by virtue of the title to which he succeeded from Mrs. Winifred Tarpey, and not by virtue of any other title disconnected with that which was asserted in the original action. In this connection appellants argue that Matthew Tarpey in his lifetime owned an undivided seven-eighths of the rancho, that upon his death one-half of that seven-

eighths was devised, and distributed to his wife, and the other moiety to his children, and that, as the lease was made by Mrs. Tarpey alone, there is in litigation the title only to one-half of seven-eighths; but the Cassin action, with which Mrs. Tarpey connected herself, was an action for the possession of all the property, and when one of several tenants in common recovers judgment in ejectment against an adverse claimant the judgment determines the right of possession of the whole of the premises, and the recovery of possession under the judgment relates to the commencement of the action, so that, in contemplation of law, the plaintiff must be considered in possession of the whole premises as of that date, and the effect of the recovery inures to the benefit of other co-tenants not suing, so as to prevent the acquisition of title, by adverse possession against them pending the action. *Newman v. Bank of California*, 80 Cal. 368, 22 Pac. 261, 5 L. R. A. 467, 13 Am. St. Rep. 169.

It is to be remembered that defendant Nicholson had pleaded title by adverse possession to Cassin's complaint, alleging such possession to have been continuous from the year 1867. He entered the same plea to the complaint of John Tarpey. All evidence under this plea was ruled out upon trial before the jury, upon the ground, as has been stated, that the defendant was equitably estopped. Upon this the record discloses the following: Objection was made to a question asked of defendant Nicholson. The court requested the defendants' counsel to state the purpose of the testimony. He responded: "It is for the purpose of showing our ownership and title to the land in dispute and of our right to the possession of it. It is for the purpose of giving support to the plea of the statute of limitations and to our title by prescription, and also for the purposes, generally, of showing our title to the land and our right to the possession of the land. Mr. Delmas: Then, I am prepared to argue that question, if your honor please. No evidence of that kind is admissible in this case, and the defendant is estopped from introducing it; estopped by his pleadings and by his own conduct. The Court: I think, gentlemen, that the rule of equitable estoppel will have to apply in this case. The objection will be sustained." Counsel for appellants then, amongst other specific offers, made the following: "Now, I offer to prove that the defendant Murdock Nicholson from the month of June, 1867, to July 11, 1879, was in the actual, continuous, exclusive, hostile, and adverse possession of the lands in dispute, holding and claiming the same against Michael Cassin, the plaintiff, and against the world. I further offer to prove that Murdock Nicholson, the defendant in this case, during this period subjected the premises and lands in dispute to his will and dominion and exercised acts of ownership over the same. I further offer to prove that

during this period just named, and the whole of it, he used the premises in dispute for fuel, also for fencing and timber, also for wood, also for pasture, also for the ordinary use of the occupant, and also for the uses that lands contiguous to these lands were used, and in the usual way of land surrounding these lands." To each and all of these offers the plaintiff objected upon the grounds above stated, and the court sustained the objection. Wherein an equitable estoppel had arisen against the defendant so as to prevent him from proving, if he was able to do so, his prescriptive title antedating the commencement of the action, is not made plain. It is true that in the trial of the equitable defense the court found as above indicated, but those findings and that determination could not be used to prevent the defendant from introducing all pertinent evidence upon the subject of the legal title which he claimed. Thus, in his legal defense, defendant was entitled to show before the jury under his plea that he had entered into possession under a written instrument and had continued to hold that possession under claim of right and in hostility to all the world, the facts and circumstances which were at the initiation of his possession. He was entitled to establish the written agreement between himself and Tarpey, that that agreement had been fully executed, and, upon proof of its destruction, he was entitled to show the contents of the agreement. The fact that in making this proof the testimony would go to the asserted fraud of Tarpey, against the existence of which fraud the court, in determining the equitable issues, had found adversely to defendant, could not deprive him of the right to present the same facts and circumstances to the jury, not as seeking at their hands any equitable relief, but as showing, if his evidence was believed, the circumstances of his entry, that it was in good faith, and that it was under a written instrument. Defendant had pleaded adverse possession under section 323, Code Civ. Proc. If he were not permitted to prove, as he had pleaded, that he had entered under a written instrument, he would have to establish an adverse holding under sections 324 and 325, Code Civ. Proc., an occupancy, use, and holding very different from that required of one who claims title founded upon a written instrument. If the court's ruling therefore was based on the belief that, the findings in the equitable defense having been adverse to defendant, he was estopped from offering proof of any of these matters, in support of the legal title which he was seeking to establish before the jury, the answer already made disposes of the proposition. He was not urging an equitable defense before the jury, but he was seeking to show the nature of his adverse possession. In showing this it was pertinent and proper for him to prove how that possession was initiated and upon what it was based, and in doing this it mat-

tered not that the evidence tending to establish his alleged entry under a written instrument went likewise to the alleged fraud of Tarpey. The jury was not called upon to pass upon the issue of fraud, but it was entitled, in considering the claim of adverse possession set up by defendant, to be informed of the character and circumstances of his entry, as well as of the character and circumstances of his continued possession after entry.

The only other foundation for this ruling of equitable estoppel is based upon the doctrine that a vendee is estopped from denying his vendor's title, as a tenant is estopped from denying his landlord's title. This doctrine was never applied between vendor and vendee with the strictness which, upon good reason, obtains in the case of landlord and tenant. As early as 1822 its application to the vendee was doubted by Chief Justice Marshall. *Blight's Lessee v. Rochester*, 7 Wheat. 534, 5 L. Ed. 516. He says: "The propriety of applying the doctrines between lessor and lessee to a vendor and vendee may well be doubted. The vendee acquires the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or spirit of the contract violated by it. The only controversy which ought to arise between him and the vendor respects the payment of the purchase money. How far he may be bound by this, by law, or by the obligations of good faith, is a question depending on all the circumstances of the case, and in deciding it all these circumstances are examinable. If the vendor has actually made a conveyance, his title is extinguished, in law as well as equity, and it will not be pretended that he can maintain an ejectment. If he has sold, but has not conveyed, the contract of sale binds him to convey, unless it be conditional. If, after such contract, he brings an ejectment for the land, he violates his own contract, unless the condition be broken by the vendee, and, if it be, the vendor ought to show it." Since then, the rule and doctrine which Chief Justice Marshall expressed as being the true one has received universal recognition. It still is true that a vendee in possession under an executory contract of sale is estopped from denying the vendor's title, for the same reasons that would apply in the case of a tenant; but whenever, so far as the vendee is concerned, the contract is executed, from the

time of its execution the vendee may assert his adverse possession against the world, including his vendor. "It is a rule of law now uncontroverted that, where the vendee under a contract or agreement to purchase land has executed or performed the agreement on his part, by full payment of the purchase money his possession from that time becomes adverse to that of the vendor, having gone into possession primarily under the agreement." *Ambrose v. Huntington*, 34 Or. 484, 56 Pac. 513; 2 Woods, Limitations, 260. And so it is said by this court in *Fleishman v. Wood*, 135 Cal. 256, 67 Pac. 276, speaking of the defendant in possession: "He was the owner and in possession, and, if he had remained in possession for five years from and after the completion of his contract, he would have acquired the legal title by adverse possession." If the case of *Farish v. Coon*, 40 Cal. 33, shall be deemed to announce a contrary doctrine, it must be considered overruled by the later and better authority.

For the reasons above given, and under section 396, Code Civ. Proc., John Tarpey being a proper party plaintiff, his appearance did not so change the action as to necessitate a transfer of the trial of it to the county in which the land was situated. The action, having been properly commenced in the district court, was properly heard and determined in the superior court of Santa Clara county. *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91.

No other matters call for special attention.

For the foregoing reason, the judgment and order are reversed, and the cause remanded.

We concur: BEATTY, C. J.; LORIGAN, J.

154 Cal. 472

PEOPLE v. WHALEN. (Cr. 1,440.)

(Supreme Court of California. Nov. 4, 1908.
Rehearing Denied Dec. 4, 1908.)

1. FALSE PRETENSES (§ 49*)—SUFFICIENCY OF EVIDENCE.

Evidence, in a prosecution for obtaining money under false pretenses, considered, and held sufficient to show an actual payment of money on a check given by the prosecuting witness to defendant.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 49.*]

2. CRIMINAL LAW (§ 737*)—INSTRUCTIONS—QUESTIONS OF LAW OR FACT—DEFINITION OF TERMS.

In a prosecution for obtaining money under false pretenses, by representing that the mine of a corporation in which defendant sold the prosecuting witness stock was a fully developed mine, an instruction as to what in general would constitute a fully developed mine was not objectionable as instructing on a question of fact.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 737.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. WORDS AND PHRASES—"FULLY DEVELOPED MINE."

To constitute a "fully developed mine," it is not necessary that the mine shall be in such a condition that the metals or minerals therein contained may be extracted with profit without further waste work, as it would be "fully developed" if the ore was sufficiently exposed and ready for extraction to permit active operations in the regular course of mining, although, owing to the barrenness of the ore, it would be impossible to work it with profit.

4. FALSE PRETENSES (§ 52*)—INSTRUCTIONS—"FULLY DEVELOPED MINE."

In a prosecution for obtaining money under false pretenses, by representing that the mine of a corporation in which defendant sold the prosecuting witness stock was a fully developed mine, the jury were instructed that "a 'fully developed mine' is a deposit of metals or minerals whose underground works or developments are of such an extent or nature as to permit of the extraction of the metals and minerals therein contained with profit without further waste work." *Held*, that the instruction, though incorrect as a general proposition, properly defined the meaning of the term "fully developed mine" as used by defendant in his representations to the prosecuting witness.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 52.*]

5. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS.

Where requested instructions in a criminal prosecution are included in other instructions given by the court, it is not error to refuse the request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. WITNESSES (§ 269*)—CROSS-EXAMINATION.

In a prosecution for obtaining money by false pretenses as to the value of mining stock sold by defendant to the prosecuting witness, a sister of the prosecuting witness, who was present at the time the alleged false representations were made, in giving her testimony, was allowed to state that she had paid a certain sum for stock of the company which she had bought at the same time, and payment for which had been included in the check given by the prosecuting witness. *Held*, that this evidence did not put in issue whether she had been deceived by defendant's false representations, and hence it was proper to refuse to allow her to be cross-examined as to whether she believed the representations, and to elicit other facts immaterial except on the theory that defendant was on trial for obtaining money from her.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 269.*]

7. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

In a prosecution for obtaining money under false pretenses, evidence that defendant, prior to the transaction in controversy, had made substantially the same representations to other persons in an endeavor to sell them stock in the same company in which he sold the prosecuting witness stock, is admissible to show that defendant was aware of the falsity of his statements, and that, knowing them to be false, he made them with intent to deceive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

8. CRIMINAL LAW (§ 419*)—EVIDENCE—DOCUMENTARY EVIDENCE—PRIVATE WRITINGS—CERTIFICATES OF ASSAYER.

In a prosecution for obtaining money under false pretenses as to the value of a mine, it was shown by a witness that he had taken ore from the mine, had given it to an assayer to be as-

sayed, and had received from the assayer certain certificates stating the result. The assayer was not produced, and no evidence of the correctness of the certificates was furnished. *Held*, that the certificates were not admissible in evidence, as they were not of an official character, but mere private statements, of no higher value than other hearsay evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 419.*]

9. CRIMINAL LAW (§ 419*)—EVIDENCE—HEARSAY.

In a prosecution for obtaining money under false pretenses as to the value of a mine, testimony of a witness, that assays of ore taken from the mine were made in his assaying establishment, was not admissible, where the assays were not made by him or under his supervision, and he had no personal knowledge as to their correctness.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 419.*]

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

William Whalen was convicted of obtaining money under false pretenses, and he appeals. Affirmed.

Rehearing denied in bank; Beatty, C. J., dissenting.

Henry C. Ross for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

SHAW, J. The defendant was tried and convicted upon a charge of having by false pretenses obtained the sum of \$1,000 of lawful money from one Urilda M. Martin.

It is claimed that there was no proof that any money was actually obtained by the defendant. It appeared from the testimony of Mrs. Martin, the prosecuting witness, that she and her sister, Mrs. Francis H. Martin, were induced to buy of the defendant 100 shares of stock in the United States Mining & Smelting Company, the sister taking 20 shares of stock at the price of \$200, and the prosecuting witness 80 shares at the price of \$1,000, and that the prosecuting witness gave him a check on a bank in New York for \$1,200, in payment for the 100 shares, \$200 of the amount being loaned by her to her sister for that purpose. It may be conceded that, if nothing more had been shown than the giving of the check, it would not prove the charge of having obtained money; but we think the jury were fairly justified in concluding from the entire evidence that the check thus given was cashed by the defendant and the money obtained thereon. The two sisters both testified upon the trial, and both expressly stated, that they paid him \$1,200 in money, and that they had "invested" in the stock. The prosecuting witness said: "Up to January, 1906, I fully believed these mines to be worth every dollar I had put into them." The check was given on May 3, 1905. The defendant remained in Sacramento, where this transaction occurred, for several weeks

thereafter, and, while there, hired men to go with him to the mines, which were in the state of Nevada, and for more than six months thereafter he was in charge of the affairs of the mining company, either at the mines or in Sacramento. During this time the two sisters resided in Sacramento and were associating with other stockholders in the company to whom the defendant had sold other stock. There was nothing disclosed by the evidence to indicate that the defendant experienced any difficulty or delay in obtaining payment of the check. The facts concerning the payment of the money were all elicited upon the examination in chief of the two witnesses. There was no cross-examination on that subject, nor any attempt, at any stage of the case, to show that the check had not been paid in the usual course of business. Under these circumstances, the jury were justified in construing the testimony of the prosecuting witness and her sister to mean that the money called for by the check had actually been paid.

It is claimed that the following instruction by the court was erroneous: "A 'fully developed mine' is a deposit of metals or minerals whose underground works or developments are of such an extent and nature as to permit of the extraction of the metals and minerals therein contained with profit without further waste work." The claim is that the question whether or not the mines were fully developed is a question of fact to be decided by the jury, and also that, if it is a question of law, the instruction was erroneous in stating that it was necessary, in order for a mine to be fully developed, that it be susceptible of being worked with profit. We think the question as to what in general would constitute a fully developed mine was one upon which the court might well instruct the jury, and that, if the instruction was not otherwise objectionable, it is not so because of its being an instruction upon a question of fact. Upon the other proposition, it may be conceded that if the instruction is taken alone, without reference to the facts of the case or the crime involved, and as an abstract proposition, it would be erroneous. A mine composed of ore containing so little precious metal that it would not pay for the mere crushing of the rock after it was taken out might nevertheless be fully developed in the sense that the ore, such as it was, would be sufficiently exposed and ready for extraction to permit active operations in the regular course of mining to begin, and in such condition it might be said to be fully developed, and yet, owing to the barrenness of the ore, it would be impossible to work it with profit. But an instruction may be incorrect as an abstract or general proposition, and yet not erroneous or injurious when considered in connection with the particular case and the facts to which it relates. The

statement that the mines were fully developed was made, as is alleged, to induce the prosecuting witness to buy stock of the company to which the mines belonged, and it is in this connection that the meaning of the expression must be considered. Such a statement, made for such a purpose and in connection with such a proposition, would imply that the ores of the mines referred to were of such value that profitable mining operations could be immediately begun therein without further preparatory work. The instruction therefore merely expresses in language what the representation, in connection with the circumstances under which it is alleged to have been made, necessarily implied. The jury was fully instructed to the effect that it must appear that the money was obtained by means of the representation or representations charged in the information. The charge was that the representations were made to induce the prosecuting witness to buy stock in the corporation owning the mines and pay the sum of a thousand dollars therefor, and that, relying thereon, the prosecuting witness did buy the stock and pay the money. Taken in connection with the transaction in which the representation was made, the instruction properly defines the meaning of the term "fully developed mine" according to the meaning it must have been intended to have when it was made to the prosecuting witness, and, in connection with the other instructions, was a correct exposition of the law.

It is claimed that the court erred in refusing certain instructions asked by the defendant. We have examined the instructions given, and we think that in each case where a proper instruction was refused the proposition covered thereby was included in other instructions given by the court. In such case there could be no error in the refusal complained of.

Mrs. Francis H. Martin, a sister of the prosecuting witness, was present at the time the alleged false misrepresentations were made to the prosecuting witness. In giving her testimony, she was allowed to state that she herself had paid \$200 for the stock. This it was necessary for her to do for the reason that the check given by the prosecuting witness included \$200 in payment of the stock bought by Mrs. Francis H. Martin, and in order to give an intelligent narrative of what occurred at that time it was necessary for her to state her own purchase. Counsel for defendant appear to have conceived the idea that this put in issue the question whether or not Mrs. Francis H. Martin had been deceived and defrauded by the false representations of the defendant. He sought in his cross-examination to ascertain whether or not she herself believed the representations, and also to elicit other facts immaterial except upon the theory that the defendant was on trial for obtaining money from the witness Mrs. Francis H. Martin. These questions

were all immaterial to the case on trial and were properly excluded by the court.

Evidence was given upon the trial that the defendant, prior to the transaction in controversy, had made substantially the same representations to other persons in an endeavor to sell to them stock in the same company. It was proper for the court to admit evidence of this character to show that the representations were not inadvertent, but were deliberately made, with knowledge of the facts, and with intent to deceive. "Evidence of similar offenses involving the making of other false representations is admissible against the prisoner to show that he is aware of the falsity of the statements made by him in the present case, and that, knowing them to be false, he made them with the intent to deceive." *State v. Briggs*, 74 Kan. 382, 86 Pac. 449, 7 L. R. A. (N. S.) 278. See, also, *People v. Gray*, 66 Cal. 275, 5 Pac. 240; *People v. Neyce*, 86 Cal. 393, 24 Pac. 1091; *People v. McGlade*, 139 Cal. 70, 72 Pac. 600; 7 Ency. of Ev. 627; 12 Cyc. 408, 411; 1 Wigmore, § 320.

In defense it was shown by a witness named Hassett that, after the commission of the crime charged, he had taken ore from these mines, had given it to the assayer to be assayed and had received from the assayer certain certificates stating the result, a copy of which he gave to the defendant. The assayer was not produced, and no evidence of the correctness of the certificates was furnished. For the purpose of proving the value of the ore, the certificates were offered in evidence on this testimony, and were rejected. This ruling was correct. The certificates were not of an official character, but were mere private statements, and in legal contemplation were of no higher value than any other hearsay testimony. The same considerations apply to the refusal of the court to allow the witness Thomas Price to testify to the assays afterwards made in his assaying establishment, but not made by him or under his supervision, and not under such circumstances that he had any personal knowledge whether they were correct or not.

There was no misconduct on the part of the prosecuting attorney in his argument to the jury. His method of arraying the facts in the case, as he claimed them to be, and facts which he claimed to be matter of common knowledge, could not have misled the jury as to the evidence and did not transcend the limits of fair argument.

Numerous other objections to rulings made by the court are contained in the brief of counsel and but slightly argued. They all related to trivial matters not worthy of further comment. In general, the rulings were correct, and, where technically erroneous, they were of trifling importance or related to matters immaterial to the case and which could

not have been prejudicial to the rights of the defendant.

The judgment of conviction and the orders denying motion for new trial and the motion in arrest of judgment are affirmed.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.

9 Cal. App. 114

MYERS v. HOLTON. (Civ. 535.)

(Court of Appeal, Second District, California. Sept. 25, 1908.)

1. APPEAL AND ERROR (§ 103*) — DECISIONS REVIEWABLE.

An order denying defendant's motion to strike from the files an amended complaint, filed by direction of the court after submission of the cause and before the findings and judgment are signed and filed, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 704; Dec. Dig. § 103.*]

2. APPEAL AND ERROR (§ 871*) — REVIEW — QUESTIONS CONSIDERED.

Where an exception is preserved to the ruling of the court in denying a motion to strike an amended complaint from the files, the objection may be considered on appeal from the judgment roll, where it is brought up by a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 871.*]

3. PLEADING (§ 237*) — AMENDMENTS — CONFORMITY TO PROOFS.

A trial court is warranted in directing an amendment to the pleading to conform to the proofs after submission, when necessary to prevent a mistrial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

4. PLEADING (§ 248*) — AMENDMENT OF COMPLAINT—NEW CAUSE OF ACTION.

In an action against a purchaser of property by one who had a prior option to purchase for a smaller amount than that given by defendant, plaintiff alleged a promise of defendant to protect him in the matter of his commission, and prayed judgment for the difference between the amount of his option and the sum for which defendant purchased. In an amended complaint, plaintiff alleged the same promise as to his commission, but asked judgment for his commission to be measured by a percentage. *Held*, that the amended complaint did not state a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

5. WORK AND LABOR (§ 2*)—AMOUNT OF RECOVERY.

In the absence of an express contract as to compensation, the implied promise is to pay what the service is reasonably worth.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 2.*]

6. TRIAL (§ 396*)—TRIAL BY COURT—PLEADINGS TO SUPPORT FINDINGS.

In an action against the purchaser of property by one holding a prior option to purchase to recover commissions, the admission in the answer that defendant believed that plaintiff was getting the ordinary commissions, not exceeding 10 per cent., is not sufficient to support a finding that the reasonable value of the service was \$1,200, and it is not material that there was an allegation in an amended complaint that the reasonable value of such services

is \$1,200, which allegation was not denied, where such allegation was made for the purpose of having the pleading conform to the proof.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 396.*]

7. APPEAL AND ERROR (§ 931*) — PRESUMPTIONS—FINDINGS OF COURT.

Where there is an allegation in the complaint and a finding by the trial court in accordance therewith, in the absence of anything to the contrary in the record, the appellate court will assume that the finding was supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3762; Dec. Dig. § 931*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Lee R. Myers against G. L. Holton. Judgment for plaintiff, and defendant appeals. Affirmed.

D. P. Hatch and Myron Westover, for appellant. Andrew G. Park, Theodore G. Park, and T. M. McNamara, for respondent.

TAGGART, J. Appeal from judgment in favor of plaintiff from an order denying defendant's motion for a new trial and from an order denying defendant's motion to strike from the files an amended complaint filed by direction of the court after submission of the cause and before the findings and judgment were signed and filed.

The last order is not an appealable one; but, an exception having been preserved to the ruling of the court, the matter is before us by bill of exceptions on the appeal from the judgment roll. We see no error in denying the motion to strike out. Not only is the trial court warranted in directing an amendment to the pleading to conform to the proofs after submission, but the court should do so when it is necessary to prevent a mistrial. *Hancock v. Board*, 140 Cal. 554, 74 Pac. 44; *Hedstrom v. Union Trust Co.*, 94 Pac. 386. There is nothing in the bill of exceptions showing that the amended complaint does not conform to the evidence introduced, and the same facts and promise are counted upon in the amended complaint that are alleged in the original complaint. The right to recover rests upon the same breach of the same contract. *People's Lumber Co. v. Gillard*, 5 Cal. App. 440, 90 Pac. 556.

In both complaints the plaintiff relies upon the promise of the defendant "to protect him in the matter of his commission," because the defendant purchased the property on which plaintiff held an option. In the first complaint the amount prayed for is \$3,500, the difference between the amount of his option and the sum for which defendant purchased the property. In the second, the commission sued for is measured by a percentage. This is not the statement of a new cause of action.

The writings set forth in the complaint satisfy the provisions of the statute of frauds

as an acknowledgment of the employment of plaintiff. They show sufficient recognition of his agency under subdivision 6 of section 1624 of the Civil Code to support an action for commissions. *Kennedy v. Merickel* (Cal. App.) 97 Pac. 81.

The writing upon which plaintiff relies as a promise to pay his commissions does not specify either an amount or a percentage to be paid. The answer to the original complaint (there was no answer to the amended complaint) avers that defendant believed that plaintiff was getting the ordinary commissions such as are customarily paid in sales of the character then being made by plaintiff, to wit, not in excess of 10 per cent. of the purchase price. In the amended complaint it is alleged that "the defendant understood that he had bound himself and was to pay to the said plaintiff in case of purchase of said property by himself, or his assigns, the sum of 10 per cent. upon the purchase price thereof, to wit, the sum of \$1,200. That the said sum * * * is and was a reasonable sum for the services rendered," etc. The findings of the court in this respect are in substantially the same language. The bill of exceptions contains this statement: "There was no evidence introduced as to what the reasonable market value of the services so rendered by plaintiff would be or was at the time the same were rendered. The evidence did show the kind and character of the services so rendered, but no witness or witnesses testified as to what would be the reasonable value of such services." The contract of employment of plaintiff provides for neither a sum certain nor a method by which a certain sum can be arrived at by computation. In the absence of an express contract as to compensation, the implied promise is to pay what the service is reasonably worth. *Kennedy v. Merickel*, supra. The admission in the answer that defendant believed that the plaintiff was getting the ordinary commissions not exceeding 10 per cent. is not sufficient to support the finding that the reasonable value of the service was \$1,200. Neither is it material in this connection that the allegation in the amended complaint that the reasonable value of such services is \$1,200 is undenied. This allegation was made for the purpose of having the pleading conform to the proof. Such amendments are not intended to frame issues for trial, but are made upon the supposition that the issues therein have already been tried. *Hedstrom v. Union Trust Co.*, supra; *McDougald v. Argonaut*, 117 Cal. 95, 48 Pac. 1021.

Respondent contends, however, that, even though there be no evidence to sustain a finding as to the reasonable value of plaintiff's service, the finding above quoted to the effect that defendant, at the time he executed the writing agreeing to protect plaintiff in

his commissions, understood (thereby) that he had bound himself and was to pay to the said plaintiff * * * the sum of \$1,200, is sufficient to sustain the judgment. This is alleged and found, and, in the absence of anything to the contrary in the record, we must assume it was supported by the evidence. *Pacific Pav. Co. v. Mowbray*, 127 Cal. 1, 59 Pac. 205. While such words as "the defendant understood" are generally to be regarded as mere deductions or conclusions when they appear in the testimony of a witness, if the trial court finds therefrom that an express contract was made between the parties, such finding will not be disturbed or questioned on appeal. This court will always assume that the trial court made an inference of fact to support the judgment, rather than one which would not, and, if any inference of fact could have been made from the evidence by the trial court that would support the judgment, it will be presumed that it made such inference. *Griffin v. Pacific E. Ry. Co.*, 1 Cal. App. 673, 82 Pac. 1084. The judgment finds sufficient support in this finding.

It is not necessary to consider the objections of respondent to the bill of exceptions that it does not conform to the requirements of section 648 of the Code of Civil Procedure. No reason is assigned for this contention and none suggests itself upon an inspection of the record.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J

9 Cal. App. 192

PEOPLE v. PATINO. (Cr. 97.)

(Court of Appeal, Second District, California.
Oct. 6, 1908.)

CRIMINAL LAW (§ 829*)—INSTRUCTIONS—PRESUMPTION OF INNOCENCE.

It was not prejudicial error to refuse to instruct that the jury must, if possible, reconcile the evidence with the presumption of accused's innocence, where the court instructed, in the language of Pen. Code, § 1096, that accused is presumed to be innocent until the contrary is proved, and that in a case of reasonable doubt he is entitled to acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Charles Patino was convicted of grand larceny, and he appeals from the judgment of conviction, from decisions refusing to vacate the information and disallowing a demurrer, and from an order denying a new trial. Affirmed.

Clyde Bishop and A. R. Holston, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Information for grand larceny, with charge of prior conviction of burglary. Four appeals are designated in the

notice as follows: From the judgment, from the decision refusing to set aside the information, from the decision disallowing the demurrer, and from the order denying defendant's motion for a new trial.

But one question is presented: The refusal of the trial court to give, at defendant's request, an instruction in the following language: "The jury are instructed that the defendant must be presumed to be innocent until his guilt is fully established by legal evidence. The presumption of innocence prevails throughout the trial, and it is the duty of the jury, if possible, to reconcile the evidence with this presumption." It is admitted by appellant that the first part of the instruction was substantially covered by the instruction given by the court in relation to reasonable doubt, but he contends that the last clause was not. The defendant was entitled to have the jury instructed that the law was as declared in the last clause, if they were not so informed by the other instructions given by the court. The jury were instructed, in the language of section 1096 of the Penal Code, that "a defendant in a criminal case is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." This was said in *People v. Jailles*, 146 Cal. 301, 79 Pac. 965, to be the equivalent of an instruction that the "presumption of innocence must go with you in all your deliberations as jurors in arriving at your verdict;" the court in that case saying: "There was nowhere in the charge any intimation * * * that this presumption of innocence could be lost sight of at any time prior to arriving at a verdict, and the jury could not have so understood in view of the instructions given." This is true of the charge in the case at bar; and in relation to the instruction here given, it may be said, as it was in *People v. Miles*, 143 Cal. 640, 77 Pac. 668: "As reasonable men of ordinary intelligence, the jurors must have known that the presumption of defendants' innocence mentioned by the court had reference to the entire trial, and to all the evidence there adduced."

The jury being instructed that the presumption of innocence related to all the evidence introduced during the trial, it was necessarily implied they were to consider each and every portion of the evidence with that presumption in mind. It cannot be said that defendant was prejudiced by the refusal of the trial court to add the further direction that the jury must, "if possible [to], reconcile the evidence with the presumption of innocence."

No other question being presented, the judgment and order denying the motion for a new trial are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 148

PEOPLE ex rel. MATTISON v. NYE.
(Civ. 467.)(Court of Appeal, Third District, California.
Oct. 2, 1908. Rehearing Denied by
Supreme Court Nov. 30, 1908.)1. OFFICERS (§ 49*)—VACANCIES—MANNER OF
FILLING VACANCIES—STATUTES—"CONSTITUTION
AND LAW."

Under Const. art. 5, § 8, providing that, when any office shall become vacant, and no mode is provided "by the Constitution and law" for filling the vacancy, the Governor shall fill it, the Legislature may specify what shall constitute a vacancy in any of the offices for which no provision is made in the Constitution, and may provide how the same shall be filled, though by virtue of article 1, § 22, the provisions of the Constitution are mandatory; the phrase, "Constitution and law" meaning "Constitution or law."

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 70; Dec. Dig. § 49.*]

2. CONSTITUTIONAL LAW (§ 50*)—LEGISLATIVE
POWER.

The declaration in Const. art. 4, § 1, providing that the legislative power shall be vested in a Senate and Assembly, comprehends the exercise of all the sovereign authority of the state in matters properly the subject of legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 48; Dec. Dig. § 50.*]

3. CONSTITUTIONAL LAW (§ 48*)—STATUTES—
VALIDITY—PRESUMPTIONS.

The presumption is that an act of the Legislature is within its power, and one asserting its invalidity has the burden of showing it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

4. OFFICERS (§ 49*)—VACANCIES—STATUTES—
VALIDITY.

Pol. Code, §§ 996, 1001, declaring the manner in which an office shall become vacant, and providing that a vacancy in enumerated state officers shall be filled by appointment by the Governor, are valid.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 70; Dec. Dig. § 49.*]

5. STATES (§ 51*)—OFFICERS—VACANCIES—
STATUTES.

Under Pol. Code, § 1001, providing that a vacancy in the office of controller, etc., shall be filled by appointment by the Governor, and that the appointee shall hold office for the balance of the unexpired term, one appointed to the office of controller on the death of the incumbent, after his election to, but before his qualification for, the succeeding term, holds only for the balance of the unexpired term, ending the day before the beginning of the succeeding term, subject to the right to hold over as provided by section 879, until his successor has qualified.

[Ed. Note.—For other cases, see States, Cent. Dig. § 56; Dec. Dig. § 51.*]

6. STATES (§ 51*)—OFFICERS—VACANCIES—
FILLING VACANCY.

Under Pol. Code, § 996, providing that an office becomes vacant on the death of the incumbent, or on his neglect to file his official oath or bond within the time prescribed, the death of the incumbent of the office of controller after his election for the succeeding term, and before his qualification therefor, creates a vacancy at the beginning of the succeeding term, which, under section 1001, the Governor must fill by appointment.

[Ed. Note.—For other cases, see States, Cent. Dig. § 56; Dec. Dig. § 51.*]

7. CONSTITUTIONAL LAW (§ 12*)—CONSTITUTION—
CONSTRUCTION.

Where there is a conflict between a general and special provision in the Constitution, the special provision prevails.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 12.*]

8. CONSTITUTIONAL LAW (§ 15*)—CONSTITUTION—
CONSTRUCTION.

The court, in construing a constitutional provision, must have regard to the whole instrument, and must seek to harmonize the various sections, and, if possible, give effect to all of them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 15.*]

9. STATES (§ 51*)—OFFICERS—TERM OF OFFICE—
"FROM AND AFTER."

Under Const. art. 5, §§ 2, 17, providing that the Governor, Secretary of State, Controller, etc., shall be elected and shall hold office for four years "from and after" the first Monday after the first day of January, subsequent to the election, and article 20, § 20, providing that the terms of officers shall commence "on" the first Monday after the first day of January following their election, the official term of the state officers begins "on" the first Monday after the first day of January after the election. The phrase "from and after" does not have any certain meaning that can be accepted as a guide under all circumstances and is equivalent to the words "on and after," though as a general rule, the phrase "from and after" a designated day requires the exclusion of the first day.

[Ed. Note.—For other cases, see States, Cent. Dig. § 56; Dec. Dig. § 51.*]

For other definitions, see Words and Phrases, vol. 4, pp. 2986, 2987.]

10. STATES (§ 51*)—OFFICERS—VACANCIES—
APPOINTMENTS.

Where, on the death of the incumbent of the office of controller before the expiration of his term, and after his election in November, 1906, for the succeeding term, beginning on the first Monday in January following, the Governor appointed one to fill the unexpired term, and on Monday after the first day of January following appointed one to fill the term prescribed by law, the appointee was entitled to hold the office for the term beginning on the first Monday after the first day of January.

[Ed. Note.—For other cases, see States, Cent. Dig. § 56; Dec. Dig. § 51.*]

11. CONSTITUTIONAL LAW (§ 20*)—CONSTRUCTION—
CONTEMPORANEOUS CONSTRUCTION.

The fact that, for nearly 30 years since the adoption of the Constitution, the executive officers of the state, with the exception of the Governor and Lieutenant Governor, have been installed in office on the first Monday after the first day of January following their election is entitled to great weight in ascertaining the meaning of Const. art. 5, §§ 2, 17, providing that enumerated state officers shall hold office for four years from and after the first Monday in January after their election.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. § 20.*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Action by the People, on the relation of Frank Mattison, against A. B. Nye. From a judgment for defendant, on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen. (T. J. Lyons, A. M. Seymour, and G. W. McEnerney, of counsel),

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for appellant. J. A. Ellston, White & Miller, and A. L. Shinn, for respondent.

BURNETT, J. The appeal is from the judgment following an order sustaining a demurrer to the complaint. The demurrer was sustained on the ground that the complaint fails to state facts sufficient to constitute a cause of action. From the complaint the following facts appear: At the general state election held in November, 1906, J. N. Gillett was elected Governor of California, and E. P. Colgan was re-elected Controller for the same term. At this time George C. Pardee was the duly elected, qualified, and acting Governor of the state. On the 20th day of November, 1906, and after he was elected to succeed himself, but before he had qualified for the succeeding term, and without having received notification of his election, E. P. Colgan died, and on November 23d thereafter Governor Pardee appointed respondent Nye to fill the unexpired term of the office of controller. Nye immediately qualified, and took possession of the office on said date. On Monday, the 7th of January, 1907, Governor Pardee issued a second commission to said Nye as Controller "for the term prescribed by law, vice self and E. P. Colgan, deceased." On said date Mr. Nye, acting under said commission, again qualified according to law. Governor Gillett was installed the following Wednesday, January 9, 1907, and on April 29th following he issued a commission in due form to the relator, Mattison, to act as Controller for the remainder of the term for which said Colgan, deceased, had been elected in November, 1906. Said Mattison duly qualified for said office, and on said April 29, 1907, demanded of said Nye the possession of the office, and said Nye refused and ever since has refused, to surrender the same. By this action it was sought to have it adjudged that the said A. B. Nye is now, and since the said appointment and qualification of said Mattison has been, usurping and unlawfully holding the said office.

As stated by respondent, these two questions arise upon this appeal: (1) Did a vacancy in the office ever occur after the appointment of respondent, on November 23, 1906? (2) If a vacancy occurred, did the commission issued to respondent on January 7th fill the vacancy? It is his contention: (1) That a vacancy in the office occurred on the death of said Colgan, and as said Nye was admittedly appointed to fill said vacancy, the Controller thus appointed holds office until his successor shall be elected and qualified. Therefore it is insisted that, as no election of controller has taken place since said appointment, no other vacancy has occurred. (2) If the term given respondent by the first commission expired so that a new appointment could thereafter be made, said first commission expired at such time that the second appointment of January 7, 1907,

by Governor Pardee entitled respondent to a new term. Appellant maintains (1) That there were two distinct terms for which said Colgan had been elected. (2) That the defendant Nye's appointment covered the first term of Colgan only. (3) That whatever force there might be in the words of Colgan's first term "until his successor is elected and qualified" could only apply to Colgan himself, had he lived until the regular expiration of his term, which would have been January 7, 1907. It could not apply to Nye, as he was not elected under the Constitution. (4) That the second commission to Nye, issued January 7, 1907, was void on two grounds: (a) There was no existing vacancy; (b) there is no power to anticipate a vacancy, but, on the contrary, such a power is negated. Governor Pardee had no right of appointment beyond the legal limits of his own term, which ended at midnight on January 7, 1907. The trial court agreed with the views of respondent, which are epitomized in the foregoing statement of his position as to the scope and effect of each of said commissions.

1. The basis for respondent's contention that under the first commission he is still entitled to the office is the following provisions of the state Constitution: Section 2, art. 5: "The Governor shall be elected by the qualified electors at the time and place of voting for members of the Assembly, and shall hold his office four years from and after the first Monday after the first day of January subsequent to his election and until his successor is elected and qualified." Section 17, art. 5: "A secretary of state, a controller, a treasurer, an attorney general and a surveyor general shall be elected at the same time and places and in the same manner as the governor and lieutenant governor and their terms of office shall be the same as that of the governor." Section 8, art. 5: "When any office shall from any cause become vacant and no mode is provided by the Constitution and law for filling such vacancy the Governor shall have power to fill such vacancy by granting a commission which shall expire at the end of the next session of the Legislature, or at the next election by the people." To appreciate the significance of respondent's attempted application of the foregoing provisions to the present situation, the following conceded facts must be regarded: The controversy involves a constitutional office; a vacancy therein was created by the death of the said Colgan; respondent was regularly appointed to fill said vacancy; the Constitution does not expressly limit said appointment to the term of four years within which the appointment was made; and since said appointment, there has been no election of a successor to said Nye. Then respondent argues that as to county offices, considered in some of the cases hereafter cited, the statutes have fixed a definite term, and have simply provided that the officer must discharge the duties of his office, al-

though his term has expired, until his successor is qualified; but said statutes can have no application here, as the Constitution is supreme, and under its provisions, upon the admitted facts, Mr. Nye has succeeded to all the rights of Mr. Colgan as an incumbent of the office at the time of his death. The case is the same, therefore, it is maintained, as if Mr. Colgan had survived, held over in consequence of the failure of a successor to qualify, and were now contesting the claim of relator to the office.

We proceed to notice some of the cases cited in support of this position.

In *People v. Whitman*, 10 Cal. 44, as stated by the court: "The defendant was duly elected Controller at the election of 1855, and within the time required by law qualified and entered upon his office, which he has continued to hold ever since. At the election of 1857 the defendant and J. W. Mandeville were candidates for the office, the latter receiving the highest number of votes. * * * The election took place on the 3d of September, and Mandeville never qualified or claimed the office of controller. On the 28th of April, 1858, the Governor, regarding the office as vacant, appointed the relator (Melony), and the appointment was confirmed by the Senate. The relator, having qualified, demanded possession of the office, which demand being refused, he brings this suit." The second proposition discussed by the court, viz., Was there a vacancy in the office at the time of the appointment of the relator? is the only one of interest here. As to that it is said: "The Constitution itself clearly defines the sense of the phrase 'vacancy of the office of governor' as used in the sixteenth section, by specifically enumerating in the succeeding section the instances which devolve the duties of the executive upon the Lieutenant Governor. It will be seen that all the instances mentioned are such as can only occur after the term of the Governor has commenced to run. It is only after the installation of the particular incumbent that any one of these contingencies can happen. * * * When the Constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded. * * * And by the provisions of section 18 of the same article the manner of electing a controller and the term of his office are the same as are prescribed for the Governor and Lieutenant Governor. If the controller-elect fail to qualify from any cause, the Controller holds over until his successor is elected and qualified. If the failure of the governor-elect to qualify creates no vacancy in the office, but a mere extension of the term of the particular incumbent, neither does such a failure on the part of the controller-elect create a vacancy in that office." The court, therefore, concluded that there was no vacancy in the office at the time of the appointment of the relator, and hence this case was dismissed. The logic

of that opinion, no doubt, affords much comfort and no little support to respondent in his first contention. The decision is criticised by appellant. Attention is called to the dissenting views of Justice Field. It is claimed that the corresponding provisions of the present Constitution in point are somewhat different from those in force at that time, and that the case has been virtually overruled by subsequent decisions. We pause now only to note that in the *Whitman Case* the "hold-over" clause of the Constitution was applied in favor of the party incumbent, who had been elected by the people, whereas here it is invoked in favor of the appointee of the Governor. In other words, the case would be more directly in point if another than Mr. Colgan had been elected Controller in November, 1906, had failed to qualify, and Mr. Colgan had held over, and were now contesting the right of an appointee to the office. Then would be applicable one of the persuasive reasons which induced the court in the *Whitman Case* to decide in favor of the incumbent of the office; that is, "the executive officers are elected by the people, and under an elective system it is more proper that these officers should hold over than that the duties should devolve upon those in whose selection the people have had no choice." And importance seems to have been attached to the circumstance that the court was called upon to decide between the choice of the people and the appointee of the Governor. What weight it had in the determination of the cause we are, of course, unable to discover.

In *People v. Tilton*, 37 Cal. 614, the *Whitman Case* is cited with approval, and it is said that "it was manifestly the intent of the Constitution that the Governor should appoint only when there is no party authorized by law to discharge the duties of the office. When there is a party expressly authorized by law to discharge those duties temporarily, till the power upon whom the duty of election or appointment is devolved can regularly act, there is no occasion for calling into exercise this extraordinary power vested in the Governor to make a merely temporary appointment. There is no good reason for appointing a party to temporarily discharge the duties of an office when there is already a party expressly authorized by the Constitution or laws to temporarily discharge those duties." The decision was in favor of Tilton, a harbor commissioner, who had been elected by the Legislature for the term of four years, "and until his successor is elected, commissioned and qualified as in this act provided." The term of four years expired November 3, 1868. The Legislature met on the first Monday of December, 1867, and adjourned without day, on the 30th of March, 1868, without electing a successor to Tilton. On the first day of December, 1868, and before another session of the Legislature, the Governor, assuming that there was a vacancy in said office, and that there was

no other mode provided for filling it, appointed and commissioned the relator, Baird, who qualified, demanded possession of the office, and the demand was refused. He then brought suit against Tilton to determine the right to the office, and, as we have seen, the court held that there was no vacancy, and therefore the appointment was ineffectual.

In *People v. Edwards*, 93 Cal. 153, 28 Pac. 832, it is held that "where the term of an office is fixed and determinate, a provision requiring the officer to continue to discharge the duties of his office, although his term has expired, until his successor has qualified, adds an additional, contingent, and defeasible term to the original fixed term, and excludes the possibility of a vacancy, within the appointing power of the Governor, except in case of death, resignation, ineligibility, or the like; and the office is held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of a duly elected and qualified successor, at least, as before and during the term."

In *People v. Campbell*, 138 Cal. 16, 70 Pac. 921, it is said: "In the case of an office created by the Legislature * * * it was competent for the Legislature to provide for such additional contingent term, but where the office, as well as its term, is fixed, determinate by the Constitution, the Legislature has no power to extend or diminish the term or to add any contingent term thereto."

Invoking these and other decisions, it is therefore maintained by respondent that sections 996 and 1001 of the Political Code are void, so far as they attempt to affect the tenure of the person who has been legally inducted into the office of controller, or to provide for a vacancy therein, and it is further insisted that no authority can be found for any difference in this respect between an elected and an appointed official. But the fallacy of the position, as we view it, lies in the assumption that the Constitution attempts to prescribe what shall constitute a vacancy in the office of controller, and again, while it is true that no distinction is expressly made between the elected and the appointed "hold-over," the sweeping declarations we have already quoted were made in behalf of those who had been regularly elected.

The Constitution refers expressly to a vacancy only in the offices of governor and lieutenant governor. This is found in section 16, art. 5, which is as follows: "In case of the impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of his office, resignation or absence from the state, the powers and duties of the office shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease, and should the Lieutenant Governor be impeached, displaced, die or become incapable of performing the duties of his office or be absent from the state, the president

pro tempore of the Senate shall act as governor until the vacancy in the office of governor shall be filled at the next general election when members of the Legislature shall be chosen, or until such disability of the Lieutenant Governor shall cease." There is no provision of the Constitution that makes this section in reference to vacancy applicable to the Controller. The term of office of the Governor is indeed the same as that of the Controller, but the term of office and a vacancy in that term are manifestly distinct and separate entities. Nor is there any express provision in the Constitution applicable to the case at bar providing for the appointment of a controller in case of a vacancy. It is true that the Constitution provides in section 8, art. 5, as we have seen, for the appointment to fill a vacancy when no mode is provided "by the Constitution and law." But this is inoperative here, for the reason that a mode has been provided by law for filling a vacancy. When the Constitution speaks of a mode provided by "the Constitution and law" it obviously means "the Constitution or law." Of course the law must be in harmony with the Constitution; in other words, not opposed to any of its provisions. But we can see nothing that precludes the Legislature from specifying what shall constitute a vacancy in any of the offices for which no provision is made in the Constitution, and providing how it shall be filled. It is true that the provisions of the Constitution are "mandatory and prohibitory" (article 1, § 22), but it is a familiar principle that the organic law provides simply a limitation upon the power of the Legislature, which otherwise is supreme. There is no mandate nor prohibition, as we view it, in the Constitution that bars the right and authority of the Legislature to provide for the contingencies we have suggested. The people, therefore, through the lawmaking department of the government, have the right to exercise this privilege, which they have not surrendered. "The declaration in article 4, § 1, of the Constitution, 'The legislative power of this state shall be vested in a Senate and Assembly, which shall be designated the Legislature of the state of California,' comprehends the exercise of all the sovereign authority of the state in matters which are properly the subject of legislation; and it is incumbent upon any one who will challenge an act of the Legislature as being invalid to show, either that such act is without the province of legislation, or that the particular subject-matter of that act has been by the Constitution, either by express provision or by necessary implication, withdrawn by the people from the consideration of the Legislature. The presumption which attends every act of the Legislature is that it is within its power; and he who would exempt it from the power must point out the particular provision of

the Constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body." In *re Madera Irrigation District*, 92 Cal. 307, 28 Pac. 273, 14 L. R. A. 755, 27 Am. St. Rep. 106. The legislation to which we have referred is obviously within the province of the Legislature, and it is not obnoxious to any provision of the Constitution. We, therefore, look to it for guidance in seeking to ascertain the contingencies that shall cause a vacancy in the office of controller, the method for filling said vacancy, and the tenure by which the office shall be subsequently held. Section 1001 of the Political Code provides how a vacancy shall be filled as follows: "A vacancy in the office of either the secretary of state, controller, treasurer, attorney general, surveyor general, or clerk of the Supreme Court, must be filled by a person appointed by the Governor, who shall hold his office for the balance of the unexpired term." And the various circumstances, by virtue of which a vacancy is created, thereby calling for the exercise of this appointing power of the Governor are found enumerated in section 996 of the Political Code which, as far as applicable here, is as follows: "An office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. * * * (9) His refusal, or neglect to file his official oath or bond and within the time prescribed." It is elsewhere provided that the oath and bond must be filed within 10 days after the officer has notice of his election or appointment, or before the expiration of 15 days from the commencement of his term of office, when no such notice has been given. Sections 907, 947, Pol. Code.

By the death of Mr. Colgan, then, the duty was imposed upon the Governor to appoint a controller for "the balance of the unexpired term." This was done, the commission so providing. What was the "balance of the unexpired term"? It seems almost too clear for argument that the balance of the unexpired term would end the day before the beginning of the term for which he was elected in November, 1906. Two distinct terms are involved in this controversy. Mr. Colgan was serving one term as Controller when in November, 1906, he was elected for another term. If the first term did not come to an end, there could be no beginning of the second term. It is impossible to conceive of the beginning of one without the ending of the other. But the term for which he was elected in November, 1906, according to the provisions of the Constitution, began either January 7, or 8, 1907, according to the proper construction of the phrase in the Constitution "from and after the first Monday after the first day of January." Therefore, if effect is to be given to the law quoted above, Mr. Nye's right to hold the office under the first commission expired either January 6,

or January 7, 1907. It is true that, in the interests of the public service, to prevent an "interregnum" it was his privilege and duty to discharge the functions of the office until it could be regularly filled by appointment or election, but he no longer had any right or title to the office, except that which comes by virtue of his possession of said office under section 879 of the Political Code, providing that "every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified." But he did not thereby acquire any right to a new, fixed, and definite term. He became a temporary incumbent, *locum tenens*, by virtue of public necessity, it has been said, until the place could be regularly filled. This seems to be the reasonable view and in harmony with the later decisions of the Supreme Court. In *Adams v. Doyle*, 139 Cal. 681, 73 Pac. 582, it is said: "The law divides the right to the office into certain terms, each of four years' duration. When a person who has been elected to hold the office for one of these terms fails to qualify, he, of course, cannot hold the term—he has forfeited his title. There is no other person legally entitled to it, and hence there is a vacancy in that term as soon as it begins. It is that sort of a vacancy to which the statute refers, and not to the actual absence of any person in the office to discharge the duties thereof. The incumbent, in the sense of the statute, is the person declared elected to hold the term, who holds title to it, subject to forfeiture by failing to qualify, although it is not yet begun. The fact that the prior incumbent, in order that the public business may be done, is allowed and directed to continue to discharge the duties in the meantime, and until some person is lawfully invested with the title to the term, does not affect the question of there being a vacancy in the sense intended." See, also, *People v. Ward*, 107 Cal. 236, 40 Pac. 538.

From the foregoing considerations it clearly follows that at the beginning of the term for which Mr. Colgan was elected in November, 1906, there was in legal contemplation a vacancy in the office of controller. It is suggested by appellant—but we cannot think very seriously—that there was no vacancy until 15 days after the beginning of the term, because Mr. Colgan could not be considered as having forfeited the office until the expiration of 15 days after the beginning of the term, within which time he had the privilege of qualifying. But it is manifest that, if he is to be regarded as an incumbent in the application of said subdivision 9, the same principle must apply in the application of subdivision 1 of said section 996 of the Political Code. But the position is directly opposed to the *Doyle Case*, *supra*, and other decisions, and bears upon its face its own condemnation. In *People v. Taylor*, 57 Cal. 622, it is said: "This provision of the Code

(section 996, Pol. Code) regards the person duly elected to an office as the incumbent of that office from the time of the commencement of the term for which he was elected until the expiration thereof whether he qualifies or not." In the Ward Case, *supra*, it is said: "The death of the incumbent creates a vacancy as a matter of course, and without any expression from the Legislature upon the question." And again: "It [the vacancy] arose when, upon noon of January 7, 1895, Darby by death was not able to take his office." The proposition is rather startling that when the actual incumbent's term has expired, and the one regularly elected for the ensuing term has died, there is no vacancy in the office, for the reason that the statute contemplates that the one regularly elected may, within 15 days, return from the grave to qualify for the position. The fact is, of course, that the relation of the deceased to the office could not be changed after his death; and, while the Legislature may sometimes lack wisdom, it is never so unwise as to attempt to confer a personal privilege upon, or exact a statutory duty from, one who is no longer subject to human laws. There was undoubtedly, then, a vacancy in the office at the beginning of Mr. Colgan's second term, and there can be no doubt, since the acting Governor has the power of appointment—indeed, it is not contested—that if his second term had begun before the second appointment of Mr. Nye, the latter is now entitled to the office. That brings us to the most serious question in the case, which is:

2. When did Mr. Colgan's second term begin? As we have already seen, the Constitution provides that the term of office of the Controller is the same as that of the Governor, and it is provided that the latter shall hold his office four years "from and after the first Monday after the first day of January subsequent to his election." But section 20 of article 20 provides that: "Elections of the officers provided for by this Constitution * * * shall be held in the even-numbered years next before the expiration of their respective terms. The terms of such officers shall commence on the first Monday after the first day of January next following their election." The general rule is, no doubt, that a term "from and after Monday" begins on Tuesday, as the first day is excluded. But the phrase does not have an absolute and invariable sense, and it will receive an inclusive or exclusive construction, according to the intention with which it is used. This intention, of course, we are to ascertain by an examination of the whole instrument in which the expression is found, seeking to harmonize and give effect to all its provisions. *Saands v. Lyons*, 18 Conn. 18; *Oatman v. Walker*, 33 Me. 67. "From and after" have no certain or legal meaning that can be accepted as a guide under all circumstances, but it is generally accepted as a rule

that they exclude the day from which the reckoning is to be made; and, in order to avoid the application of it as a rule of construction, there must be something in the act, or the result of a literal application of the words to the subject treated by it, to indicate a contrary intent." *O'Connor v. City of Fond du Lac*, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831; *Parkinson v. Brandenburg*, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326; *Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114. Another rule of construction undoubtedly is, as suggested by appellant, that "where there is a conflict between a general and special provision in a Constitution, the special provision must prevail in respect to the subject-matter of it." *Warren v. Shuman*, 5 Tex. 442; *Martin v. Election Commissioners*, 126 Cal. 411, 58 Pac. 932. But, after all, the foregoing are only rules or guides to aid in the determination of the intention of the Constitution makers. The whole instrument must be regarded. We have no right arbitrarily to reject any provision. We should seek to harmonize its various sections and, if possible, give effect to all. *French v. Teschemacher*, 24 Cal. 539; *San Diego v. Grannis*, 77 Cal. 511, 19 Pac. 875; *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47. Appellant's argument, as seen, proceeds upon the assumption that "from and after" necessarily excludes the first day, and therefore there is a conflict between the special and general provisions. The more reasonable view, in our opinion, is that the phrase was used in the inclusive sense, as equivalent to "on and after," and hence there is no special provision at least, as applied to the Controller and therefore no conflict as to when his term of office begins. The construction of appellant necessarily leads to the rejection of said later section 20 of article 20 as an interloper without any function to perform. The conclusion we have reached gives effect to the whole instrument, and seems to be entirely in harmony with the intention of those who framed it. Objection is made to this view for the reason that the Legislature meets at noon on the first Monday to canvass the returns of the election for Governor, and he is not installed, of course, until after that event, and it is claimed that his term could not begin prior to noon of said day. But it has been held in the decisions already cited that the term may and sometimes does begin before the qualification of the one elected or his actual incumbency of the office, and it would seem competent for the Constitution to provide that the term of the Governor should begin at a date prior to even the formal canvass of the returns, but after his actual election. Even according to the contention of appellant the term of the present Governor began one day before he qualified and took possession of the office. But aside from the foregoing, if, in view of the

provision in reference to the canvass of the returns, the expression "from and after" must be held to convey its ordinary signification as applied to the beginning of the term of the Governor, there is no such reason for so construing it in reference to the office of controller.

The Supreme Court has determined—although in a sense obiter—that the term begins on, and not, after, Monday. In *re Stuart*, 53 Cal. 748, it is said: "Who are the officers provided for in the new Constitution, and whose terms of office are, by the express commands of the Constitution itself, to commence absolutely on the first Monday after the first day of January next following their election? We think that these are not municipal, county, or township officers chosen in 1879, but state officers, such as Governor and the other officers who constitute the executive department of the state government." In *Barton v. Kalloch*, 56 Cal. 101, it is declared that the terms of these executive state officers "are fixed at four years, and until their successors are elected and qualified, and commence on the first Monday after the first day of January." In *Merced Bank v. Rosenthal*, 99 Cal. 44, 31 Pac. 850, it is said: "It is contended that the whole term must be after Monday, that the use of either word 'from' or 'after' would exclude Monday, and by using both words an intention is manifested to make this clear.

* * * To sustain this position numerous authorities are cited, and if the question depended upon this language alone, I think the position of respondent would be impregnable; but it is not the only provision in the Constitution affecting the question." The said section 20 of article 20 is then quoted, and the court proceeds: "The only way to reconcile them is to suppose, as no doubt the fact was, that in fixing the length of the term the attention of the convention was, not distinctly called to the exact date of the commencement, but the last section was intended to perform this office, and to provide that all officers of the state should take office on the same day. * * * On the whole, even if it must be concluded that section 6, art. 6, and section 20, art. 20, are repugnant, the latter must control."

It is also true that for nearly 30 years—since the adoption of the Constitution—all these executive officers, except the Governor and Lieutenant Governor, have been installed in office on the first Monday after the first day of January. While this circumstance is not controlling, it is, as held by the authorities, an executive and contemporaneous construction of the Constitution entitled to great weight in the effort to ascertain the meaning of the instrument. *Schell v. Fauche*, 138 U. S. 562, 11 Sup. Ct. 376, 34 L. Ed. 1040; *Heath v. Wallace*, 138 U. S. 582, 11 Sup. Ct. 380, 34 L. Ed. 1063; *United*

States v. Alabama R. R., 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134. The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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PEOPLE v. GARNETT. (Cr. 98.)

(Court of Appeal, First District, California.
Oct. 7, 1908. Rehearing Denied by
Supreme Court Dec. 3, 1908.)

1. CRIMINAL LAW (§ 1106*)—CONCLUSIVENESS OF DETERMINATION—DESTRUCTION OF TRANSCRIPT—MOTION TO STRIKE OUT SUBSTITUTED TRANSCRIPT.

On appeal in a criminal prosecution, the District Court of Appeal having sustained a motion of the Attorney General to substitute a printed copy of the transcript to supply the place of the original transcript which had been destroyed, such court will not entertain a motion by appellant to strike the substituted copy on the sole ground of deficiencies and defects in the proof of the correctness of the substituted copy and of the destruction of the original transcript, as such objection should have been made at the hearing of the motion for substitution.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1106.*]

2. CRIMINAL LAW (§ 1106*)—SUPPLYING DESTROYED RECORD—POWER OF COURT.

The District Court of Appeal, to which an appeal in a criminal case has been transferred from the Supreme Court, has jurisdiction to make an order in accordance with the act relating to the restoration of court records, approved June 16, 1906 (St. Extra Sess. 1906, p. 73, c. 55), substituting a printed copy of the transcript in place of the original transcript, which was destroyed by fire before the appeal was transferred from the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1106.*]

3. CRIMINAL LAW (§ 701*)—TRIAL—CONDUCT—COUNSEL FOR ACCUSED.

Accused was represented at his arraignment by G., an attorney of his own selection. On the calling of the case, G. announced to the court that C., another attorney, was associated as counsel for accused. C. conducted the trial almost exclusively without objection from accused, and, on conviction of accused, perfected an appeal. *Held*, that accused could not complain that he was not represented on the trial by his attorney of record, since Code Civ. Proc. §§ 284, 235, providing for the substitution of attorneys, has no application to criminal cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1499; Dec. Dig. § 701.*]

4. CRIMINAL LAW (§ 1137*)—APPEAL—REVIEW—RIGHT TO ALLEGE ERROR.

Defendant in a criminal prosecution could not complain on appeal that the attorney who represented him at the trial, and who perfected his appeal, was not his attorney of record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3008; Dec. Dig. § 1137.*]

5. CRIMINAL LAW (§ 547*)—EVIDENCE—EVIDENCE TAKEN AT PRELIMINARY EXAMINATION.

The stenographer who took the evidence of a witness at a preliminary examination testified that he transcribed a portion of the notes and dictated a portion to a typewriter, that he compared the transcript with his original notes and that the same was correct, and that all typewriting done by persons other than himself was done under his dictation and in his presence.

Held, that the transcript was admissible in evidence on the trial; the witness being out of the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1246; Dec. Dig. § 547.*]

6. CRIMINAL LAW (§ 547*)—EVIDENCE—EVIDENCE TAKEN AT PRELIMINARY EXAMINATION.

The prima facie effect of the certificate to a transcript of evidence taken at a preliminary examination was not impaired by the fact that the stenographer in transcribing his original notes wrote out in longhand above certain of the characters which were obscure and puzzling the translation of such characters, where it is not shown that such translation was not correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1246; Dec. Dig. § 547.*]

7. CRIMINAL LAW (§ 1036*)—APPEAL—PRESENTATION OF QUESTIONS IN TRIAL COURT.

A contention on appeal in a criminal case that a transcript of the evidence of a witness given at the preliminary examination was inadmissible on the trial because defendant, prior to the trial, had procured the issuance of a commission to take the depositions of such witness in a foreign country, will not be reviewed where that objection was not made in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2639; Dec. Dig. § 1036.*]

8. CRIMINAL LAW (§ 1120*)—APPEAL—RECORD—MATTERS PRESENTED FOR REVIEW.

Such contention will not be reviewed where the fact that such commission was issued is not shown by the record, except by a copy of certain minutes of the clerk printed in the transcript, which are not a part of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2931; Dec. Dig. § 1120.*]

9. CRIMINAL LAW (§ 696*)—TRIAL—RECEPTION OF EVIDENCE—STRIKING OUT TESTIMONY.

In a prosecution for homicide, the trial court did not err in refusing to strike out an answer in the deposition: "He said: 'I have shot M.' or 'M. is shot.' I don't know which"—since the uncertainty in the testimony affected its weight, and not its admissibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1639; Dec. Dig. § 696.*]

10. HOMICIDE (§ 174*)—EVIDENCE—SUBSEQUENT CONDUCT OF ACCUSED.

In a prosecution for homicide, testimony of a witness who was present at the shooting that defendant disabled the telephone to prevent witness from telephoning for medical assistance for deceased was admissible to rebut defendant's contention that the shooting was accidental.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 359; Dec. Dig. § 174.*]

11. WITNESSES (§ 388*)—IMPEACHMENT—DEPOSITIONS—LAYING FOUNDATION.

To impeach the evidence of a witness contained in a deposition by showing inconsistent statements, a proper foundation must have been laid, as required by Code Civ. Proc. § 2052, in the case of witnesses examined in person before the court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1233; Dec. Dig. § 388.*]

12. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In a prosecution for homicide, defendant claimed that the discharge of the pistol which caused the death was accidental. The court charged that if the jury found that the revolver was discharged, and that defendant was engaged in the commission of an unlawful act at such time, he will not be relieved from respon-

sibility for any result which might follow such discharge, though the revolver was discharged accidentally. *Held*, that, though the instruction was erroneous, in that it rendered defendant responsible for the accidental discharge of the pistol when engaged in an unlawful act, regardless of whether the unlawful act had any connection with the discharge other than in point of time, it was not ground for reversal, where the evidence clearly negated an accidental shooting, and where the court otherwise gave a correct instruction on the theory of accidental shooting, and fully instructed on the elements applicable to the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.*]

13. CRIMINAL LAW (§ 1144*)—APPEAL—REVIEW—PRESUMPTIONS—PRESENCE OF ACCUSED.

Where the record on appeal in a criminal prosecution shows that the court convened at 1:30 p. m., at which time defendant was present, and that the jury retired at 3:40 p. m. and returned into court at 9:45 p. m. for further instructions, it will be presumed, in the absence of a showing to the contrary by the record, that the court remained in session awaiting the return of the jury, and that defendant was present when the further instructions were given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3027; Dec. Dig. § 1144.*]

14. CRIMINAL LAW (§ 1144*)—APPEAL—REVIEW—PRESUMPTIONS—SETTLEMENT OF BILL OF EXCEPTIONS.

In the absence of an affirmative showing to the contrary in the record on appeal in a criminal prosecution, it will be presumed that defendant received notice of the time for settlement of the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3037; Dec. Dig. § 1144.*]

15. CRIMINAL LAW (§ 1127*)—APPEAL—QUESTIONS PRESENTED FOR REVIEW—SETTLEMENT OF BILL OF EXCEPTIONS—NECESSITY OF MOTION RAISING OBJECTION.

Defendant in a criminal prosecution cannot complain on appeal from the judgment and from the denial of his motion for new trial that he received no notice of the settlement of the bill of exceptions, where such bill was not settled until after the motion for a new trial had been made and denied, and the judgment had been rendered and the appeal taken.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1127.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge.

Alexander G. Garnett was convicted of murder in the second degree, and appeals. Affirmed.

W. D. Grady, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Appellant was charged by information filed in the superior court of the city and county of San Francisco, by the district attorney of said city and county, with the crime of murder, for the killing of one J. W. McClung on the 25th day of November, 1903. Upon his trial he was convicted of murder in the second degree. He made a motion for an arrest of judgment, and also a motion for a new trial. Both motions were denied, and he thereupon appealed from the judgment,

and from the order denying his motion for a new trial, to the Supreme Court. The appeal was taken on the 18th day of October, 1904, which was before the adoption of the amendment to the Constitution providing for district courts of appeal; but subsequently to the adoption of said amendment, to wit, on the 25th day of May, 1907, the appeal was by order of the Supreme Court transferred to this court.

Before taking up the appeal upon its merits, it is necessary to dispose of a motion made by the appellant to strike from the files of this court the copy of the transcript on appeal filed in this court as a substitute for the original transcript filed in the Supreme Court. This court on the 28th day of October, 1907, made an order for the substitution of the printed copy of the transcript now on file in this court in place of the original transcript which had theretofore, to wit, on the 18th day of April, 1906, been destroyed by fire. This order was made upon motion of the Attorney General, after due notice thereof served on the appellant personally, on his attorney who took the appeal, and upon the attorney who now appears for him. Our records disclose that upon the hearing of the motion to restore the record neither one of the said attorneys appeared, but the appellant was present in person. While there is a suggestion in the brief of appellant of the reason why the attorney who now represents the appellant did not appear upon the hearing of said motion, there is nothing in the record of which we can take notice excusing his nonappearance. Appellant does not, in support of his motion, suggest or claim that the substituted transcript is not a true and correct copy of the original, nor that the original was not in fact destroyed by the conflagration that destroyed the offices, rooms, and chambers of the Supreme Court, of this court, and of the clerks of said courts on the 18th day of April, 1906. He, however, urges as a reason for now striking from the files the substituted transcript what he claims to be deficiencies and defects in the proof of the correctness of the substituted copy, and of the destruction of the original transcript, upon which the court acted in making the order of substitution. These objections, if they have any merit, should have been presented at the hearing of the original motion for restoration of the record. Not having been made then, and no excuse for not then making them being shown, it is now too late to make such objections. If any showing were made that the original transcript had not been destroyed, or that the substituted transcript was not in fact a true copy of the original, this court would be most liberal in entertaining a motion having for its object the presenting for the consideration of the court a correct record of the proceedings to be reviewed on this appeal. But, as before observed, appellant does not suggest that the substituted transcript is not a correct copy

of the original, nor that the original was not in fact destroyed. Neither has the defendant, although he is the appellant and the party whose duty it is primarily to present to the court a record of the proceeding to be reviewed on the appeal, taken any steps to cause a restoration of the destroyed record, although more than two years have elapsed since the destruction of the original transcript. It is apparent that the granting of appellant's motion, upon the ground now being considered, will serve no purpose other than a further delay in the final determination of this case.

Appellant also contends that, the transcript having been destroyed before the appeal was transferred to this court, the Supreme Court alone had jurisdiction to order a restoration of the record. No authority is cited to support this contention, and we see no merit in it. After the transfer by the Supreme Court to this court of the appeal, this court had complete jurisdiction thereof, and we have no doubt was the proper court to make orders, under the provisions of the act relating to the restoration of court records, approved June 16, 1906 (St. Extra Sess. 1906, p. 73, c. 55), for the restoration of the record on appeal. The motion of the appellant to strike from the files of this court the substituted transcript is denied.

The first point urged by appellant for a reversal of the judgment and order is that George D. Collins, who represented the defendant at the trial, was not the attorney of record for the defendant. The record discloses that at the arraignment of defendant on January 11, 1904, he stated that W. D. Grady was his counsel. On the next day, January 12, 1904, upon the calling of the case, W. D. Grady, in the presence of defendant, announced to the court that G. D. Collins was associated as counsel for defendant. W. D. Grady does not appear to have participated in the actual trial of the case, but, upon the calling of the case for trial, the defendant was present with George D. Collins, who throughout the trial appeared and acted as attorney for defendant without objection, and apparently with his full consent. Collins cross-examined the witnesses of the prosecution and examined witnesses on behalf of defendant, and made objections and reserved exceptions on behalf of defendant. He made the motion for a new trial, and is the only attorney who signed the notice of appeal now relied on by defendant. No formal substitution of attorneys in conformity to sections 284 and 285 of the Code of Civil Procedure appears to have been made, but these sections have no application to a criminal case. Ex parte Clarke, 62 Cal. 490. The entire argument of appellant upon the point is self-destructive; for, if Mr. Collins was not the attorney for defendant, there is no valid appeal before this court. It is perfectly manifest that appellant was represented at the trial by counsel of his own choosing, and cannot now

be heard to say that he was in any way deprived of the right to appear and defend in person and with counsel. Const. art. 1, § 13.

It is next urged that the court erred in allowing to be read from the deposition of Dr. Shiels, taken at the preliminary examination of defendant, statements in the nature of "dying declarations," made by J. W. McClung. A careful reading of the record, however, discloses that such portion of the deposition of Dr. Shiels as contained any statement of McClung in the nature of a "dying declaration" or that in any manner referred to the cause of his death, or the circumstances under which he received the wound from which he subsequently died, was not read to the jury. The court permitted to be read to the court, as evidence addressed to the court, certain statements made by McClung to Dr. Shiels that tended to prove whether or not McClung believed that his death was then imminent and had abandoned all hope, but the record does not disclose that any evidence was read from the deposition of any "dying declarations" of McClung, but, on the contrary, it quite clearly appears that no such evidence was read; for, after reading from the deposition of Dr. Shiels, a description of the wounds and condition of McClung, and what he, the witness, stated to McClung as to the fatal character of his wounds, we find the district attorney said: "There I stop; the rest not being brought under the rule of dying declaration, and an objection will be proper." It is not contended that the proper foundation had not been laid for reading the deposition of Dr. Shiels, as an absent witness, and, as shown by the record, there is no merit in the contention that evidence was given of any dying declaration of McClung.

The court did not err in overruling the objection to reading in evidence the deposition of Elizabeth W. Coit, taken at the preliminary examination of defendant before the police judge who held defendant to answer. No contention is made that, the stenographer who took down the evidence and proceedings was not regularly appointed, or that his certificate to the transcript of the evidence and proceedings is not in proper form, nor that it was not sufficiently shown that the witness Mrs. Coit was out of the state at the time of the trial. The certificate of the stenographer in form complies with the requirements of the statute. This seems to be conceded by appellant. The stenographer testified that he personally transcribed a portion of the notes, and dictated a portion to a typewriter, that he had compared all the transcript of the testimony of Mrs. Coit with his original notes, and that all the typewriting that was done by persons other than himself was done under his dictation and in his presence, and the entire transcript of the testimony of Mrs. Coit was compared by him with his original notes of the same, and that it was correct.

The showing in this regard fully complied with the law as laid down in *People v. Buckley*, 143 Cal. 375, 77 Pac. 169. Neither was the prima facie effect of the certificate that the transcript contained a correct statement of the evidence and proceedings overcome by the evidence that there were certain words and phrases written in longhand on the original notes by the stenographer at the time of the transcription thereof. In this regard the record shows that, before the deposition was read in evidence, the original notes were produced, and the stenographer testified that a large number of words and phrases appearing on said notes were written by him thereon at the time of the transcription (typewriting) thereof, but he further testified that all such words and phrases were also represented in his original notes taken at the time the witness gave her testimony. Among other things that he testified on this matter, he said: "While the typewriter was present, I would read, and then I would write above it anything that was obscure or take me some little time to puzzle out, and I would make a memorandum as shorthand reporters are accustomed to do. In those instances that I put the longhand word down it correctly represented the shorthand notes that I made at the time the witnesses gave their testimony." We think it clear from the evidence of the stenographer that the words written on the original notes by him at the time of the transcription were represented by the original notes, and were so written by him so that he could the more readily make comparison between the transcription and the original notes. We find nothing in this testimony that discredits the correctness of his certificate to his transcript of the evidence read in evidence.

Neither is there anything in the point that the deposition of Mrs. Coit should not have been admitted in evidence because a commission had been theretofore issued, upon application of defendant, to take the deposition of Mrs. Coit, upon interrogatories, at Paris, France. The objection that was made to reading in evidence the deposition of Mrs. Coit did not point to any such ground of objection. The fact that such a commission had issued does not appear from the bill of exceptions, nor was the attention of the court at the trial called to the fact that any such commission had been issued, or that defendant desired to introduce the deposition of Mrs. Coit taken at Paris; but, on the contrary, the bill of exceptions shows that at the calling of the case for trial both parties answered ready. Indeed, the fact that such a commission had issued only appears by a copy of certain minutes of the clerk printed in the transcript, but forming no part of the record of the action (Pen. Code, § 1207), and therefore not properly before us. In what we have just said we do not wish to be understood as conceding that the taking of a

subsequent deposition under a commission would render inadmissible a deposition taken at the preliminary examination where the witness is absent from the state at the time of the trial. The point does not properly arise upon the record before us. The court did not err in refusing to strike out the answer in the deposition of Mrs. Coit: "He said, 'I have shot McClung', or 'McClung is shot.' I don't know which." The uncertainty in her testimony affected its weight, but not its admissibility. The court did not err in admitting the testimony of Mrs. Coit that tended to show that defendant disabled the telephone connected with her apartments immediately or very shortly after the shooting of McClung, and after she had attempted to telephone for a doctor, but had been prevented by defendant. This evidence tended to prove that the shooting of McClung by defendant was not accidental, as defendant claimed, but was prompted by malice. It tended to show that after McClung was wounded, and manifestly in great need of immediate medical assistance, defendant did an act which tended to cause delay in getting such assistance. Such conduct was inconsistent with his defense that the shooting of McClung was accidental, and for that reason was pertinent and material. *People v. Craig*, 111 Cal. 467, 44 Pac. 186.

The court sustained the objection of the district attorney to questions put to the witness George N. Martin for the purpose of showing that Mrs. Coit had made statements to him inconsistent with the evidence read from her deposition. There was no error in this. No foundation had been laid for the impeachment of Mrs. Coit as required by section 2052, Code Civ. Proc. The fact that her testimony was read from her deposition taken at the preliminary examination does not alter the rule. *People v. Compton*, 132 Cal. 484, 64 Pac. 849; *People v. Witty*, 138 Cal. 576, 72 Pac. 177; *People v. Pembroke*, 6 Cal. App. Rep. 588, 92 Pac. 668.

For the same reason the court properly sustained the objection of the district attorney to the reading in evidence of the testimony given by Mrs. Coit at the coroner's inquest. No foundation had been laid therefore as required by the section of the Code above referred to.

Appellant urges that the evidence "is insufficient to establish the crime of murder in the second degree, inasmuch as there is a total lack of evidence to establish malice aforethought, express or implied." With this contention we cannot agree. It is sufficient to say that, although defendant claimed that the shooting was accidental, the evidence was amply sufficient to justify the conclusion that it was intentional. And, if it was intentional, it certainly was, under the evidence disclosed in the record, without any "considerable provocation." Under such circumstances malice is implied. Pen. Code, § 188.

Appellant in his brief attacks but one instruction, as follows: "If you find to a moral certainty and beyond a reasonable doubt that the revolver introduced in evidence in this case was discharged at the time mentioned, and that the defendant was engaged in the commission of an unlawful act at such time, then as a matter of law he will not be relieved from responsibility for any result which may have followed such discharge, even though such revolver was at such time discharged accidentally." This instruction is not a clear and correct statement of any principle concerning the law of homicide. It ignores the question as to whether or not the discharge of the pistol was caused by an unlawful act of defendant. Under this instruction, defendant would not be relieved of responsibility for results from the accidental discharge of the pistol, if it were accidentally discharged, at the time he was engaged in doing an unlawful act, regardless of whether or not the unlawful act had any connection with the discharge other than in point of time. The instruction should not have been given. It is inaccurate, to say the least, as a statement of any principle of the law of homicide. Yet it does not necessarily follow that any prejudicial error was committed in the giving of this instruction when the entire charge of the court is considered, as well as the status of the evidence. According to all the evidence, including that given by the defendant himself, the pistol was drawn by himself, and was discharged while in his hand and while he was engaged in a struggle with McClung. About these facts there was no dispute, but the defendant testified that he did not intentionally discharge the pistol, but that the same was accidentally discharged while he and McClung were struggling together.

It will be observed that in this instruction the court does not tell the jury that under the circumstances indicated in the instruction any verdict of guilty should be returned. But, on the contrary, the court at the request of the defendant instructed the jury "that, if you believe from the evidence before you that the deceased was killed from the accidental discharge of the revolver in evidence here, your verdict must be that the defendant is not guilty. If you have a reasonable doubt upon the subject, you must give the defendant the benefit of the doubt, and return a verdict that he is not guilty." In the face of this clear and explicit instruction, calling for a verdict of not guilty if deceased was killed by the accidental discharge of the pistol, it is impossible to believe that the jury could have been misled to the prejudice of defendant by the vague and practically meaningless statement of the first instruction. *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310. In other parts of its charge the court gave full and complete instructions as to what constitutes murder, both of the first and second degree, and a full

and accurate statement of what constitutes manslaughter, both voluntary and involuntary. After giving the definition of murder according to section 187 of the Penal Code, the court fully and correctly stated the requisites for murder of the first degree as given in section 189, Pen. Code, followed by the statement that all other kinds of murder are of the second degree. The court then charged the jury that, in murder of the second degree, "the act of killing must be committed with a felonious purpose and accomplished by felonious means." The instructions as a whole, especially touching the killing by the accidental discharge of the pistol, were quite as favorable to defendant as the law would permit. Under such circumstances, a verdict of guilty should not be set aside because of too general statements contained in a vague and meaningless instruction such as is here attacked. *People v. Tomlinson*, 66 Cal. 344, 5 Pac. 509; *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310; *People v. Ah Jake*, 91 Cal. 98, 27 Pac. 595; *People v. Leonard*, 106 Cal. 302, 39 Pac. 617; *People v. Weber*, 149 Cal. 325, 86 Pac. 671.

The attorney for appellant contends that the record shows that the court gave some instructions to the jury in the absence of defendant and his counsel. In this we think counsel, who is not the attorney who represented defendant in the trial court, is in error. The "minutes of the trial," which are a part of the record (Pen. Code, § 1207), show that the court convened on Wednesday, August 31, 1904, and that the judge and other officers of the court, the defendant and counsel for all the parties, were present. After argument by the attorney for defendant, the court took a recess until 1:30 p. m. of the same day. At 1:30 p. m. court convened, and the trial of the cause was resumed; "the defendant and all the parties being present as heretofore." The minutes of the trial under this date further show that after the closing of the arguments the court charged the jury, and they retired to deliberate on their verdict at 3:40 p. m., and subsequently, at 9:45 p. m., returned into court, and desired further instructions, which the court gave and which were taken down at the time by the official reporter, "counsel for the respective parties expressly waiving written instructions." It is these instructions that counsel now claim the record shows were given in the absence of the defendant and his counsel. But we think the "minutes of the trial" show otherwise, for from these minutes it appears that at the convening of the court at 1:30 p. m. of August 31, 1904, all parties were present, and it does not appear that the court took any recess after the jury first retired until they returned at 9:45 p. m. for further instructions. The court apparently remained in session waiting for the return of the jury. The record showing that

defendant and his counsel were present at the convening of the court at 1:30 p. m., we cannot assume that they absented themselves thereafter during what on the record appears to have been a continuous session, without an affirmative showing to that effect.

Appellant also urges that notice was not given to counsel of defendant of the time when the judge would settle the bill of exceptions. The record, however, does not affirmatively show that such notice was not given, or that counsel for defendant was not present. In the absence of a showing to the contrary, we must presume that the bill was properly settled. *People v. Ye Foo*, 4 Cal. App. 743, 89 Pac. 450. Furthermore, the irregularity complained of is not a ground for a new trial or for reversing the judgment. The bill of exceptions was presented for settlement several months after the motion for a new trial had been made and denied, and the judgment rendered and the appeal taken from both judgment and order. The settlement of the bill of exceptions occurred more than a year after the taking of this appeal. Manifestly any irregularities that occurred in the settlement of such bill could not have been reviewed on the motion for a new trial, and cannot be reviewed on the appeal from the order denying such motion or on the appeal from such judgment.

Some other exceptions concerning the rulings of the court upon the admission of evidence have been called to our attention, but none of them are of sufficient importance to require discussion.

We are satisfied that no error prejudicial to any substantial right of the defendant has been committed by the trial court.

The judgment and order are affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 172

WARDEN v. BROOME et al. (Civ. 509.)

(Court of Appeal, Second District, California.
Oct. 5, 1908. Rehearing Denied by Supreme Court Dec. 4, 1908.)

1. TAXATION (§ 630*)—TAX SALES—VALIDITY—DELINQUENT LIST—PUBLICATION.

The publication of a delinquent list setting forth therein the amount due for taxes, penalties, and costs, as required by Pol. Code, § 3764, is a prerequisite of a valid sale to the state on the day and hour fixed in the notice of sale attached to such delinquent list.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1283; Dec. Dig. § 630.*]

2. TAXATION (§ 630*)—TAX SALES—DELINQUENT LIST—PUBLICATION—ERROR IN AMOUNT.

Pol. Code, § 3764, requires the publication of a delinquent list containing the names of the persons and a description of the property and the amount of taxes, penalties, and costs, and section 3765 requires the collector to publish

with the delinquent list a notice that the property will be sold, etc. *Held*, that where a delinquent list otherwise correct stated that the taxes, penalties, and costs against the property in controversy was \$19.90, when the correct amount was \$19.40, for which the property was in fact sold to the state, the sale was void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1283; Dec. Dig. § 630.*]

3. TAXATION (§ 773*) — TAX DEEDS—CONCLUSIVENESS — JURISDICTIONAL DEFECTS—"ALL OTHER PROCEEDINGS."

Pol. Code, § 3787, makes a tax deed conclusive evidence of the regularity of all other proceedings than those enumerated in section 3786 as to which the deed is prima facie evidence only. The publication of a delinquent list specified in section 3764, together with the notice of sale designated in section 3765, and fixing the day and hour of sale required by section 3767, are not among the matters enumerated in section 3786, as to which the deed is prima facie evidence. *Held*, that the phrase "all other proceedings" did not include the omission of a jurisdictional prerequisite to a valid sale, and that a tax deed was therefore not conclusive that the delinquent list and published notice stated the correct amount of taxes, penalties, and costs due.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1541; Dec. Dig. § 773.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 338.]

Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Julia P. Warden against Francis Broome and others. Judgment for defendants, and plaintiff appeals. Affirmed.

George H. Moore, for appellant. F. E. Davis and J. W. Cochran, for respondents.

SHAW, J. Plaintiff appeals from judgment in an action to quiet title.

Defendants' title to the property was derived from one George P. Badger, who in the year 1894 was the owner thereof. Badger failed to pay the state and county tax levied upon the property for the year 1894, whereupon proceedings were had and taken which on July 6, 1900, resulted in a deed of the property to the state, made by the tax collector pursuant to the provisions of section 3785 of the Political Code. On March 15, 1901, the state conveyed the property to plaintiff's grantor. Plaintiff's title, therefore, depends upon the validity of the tax proceedings under and by virtue of which the state acquired the property. The law (section 3764, Pol. Code) contains a provision requiring the tax collector on or before June 5th to publish a delinquent list, which list "must contain the names of the persons and a description of the property delinquent, and the amount of taxes, penalties, and costs due, opposite each name and description"; and section 3765 of said Code provides that "the tax collector must append and publish with the delinquent list a notice that unless the taxes delinquent, together with the costs and penalties, are paid, the real property upon which such taxes are a lien will be sold,"

which "publication (Pol. Code, § 3767) must designate the day and hour when the property will, by operation of law, be sold to the state," etc. The notice under which the property was sold to the state was in full compliance with the provisions of the three sections of the Political Code above referred to, except that there was an erroneous statement contained in the delinquent list in that the amount of taxes, penalties, and costs set opposite the name of said George P. Badger as being due on account of said taxes, penalties, and costs was \$19.90, instead of the correct amount of \$19.40, and for which the property was in fact sold to the state. The trial court held the deed to the state under which plaintiff deraigned title invalid and gave judgment for defendants, from which plaintiff appeals upon a bill of exceptions.

Appellant contends, first, that the deed to the state is conclusive evidence (except as against actual fraud) of the due and regular publication of the delinquent list (section 3787, Pol. Code); and, second, that, if not conclusive, the error of 50 cents in the amount alleged to be due in the delinquent list as published cannot invalidate the deed, inasmuch as the property was in fact sold for the correct amount. The publication of the delinquent list, setting forth therein the amount due for taxes, penalties, and costs, is a prerequisite of a valid sale to the state on the day and hour fixed in the notice of sale attached to such delinquent list. Since it is a statutory requirement, we cannot give less weight to its importance than to other provisions contained in said section which require a description of the property and the name of the owner. *Fox v. Wright*, 152 Cal. 59, 91 Pac. 1005; *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301; *Davis v. Improvement Co.*, 137 Cal. 245, 70 Pac. 15. The delinquent list as published did not state the amount of taxes, penalties, and costs, but stated a wholly different amount. With reference to an error in the advertisement of 82 cents in excess of the amount actually due, and where the property was sold, as in the case at bar, for the correct sum, the Supreme Court of Massachusetts says: "To comply with the statute the exact amount must be given. A deviation, however small, is fatal, because a rule of law cannot be made to fluctuate according to the degree or extent of its violation." *Alexander v. Pitts*, 61 Mass. 503. The provisions of said section 3764 as to what the publication of the delinquent list shall contain are a part of the notice of sale. *Ellis v. Witmer*, supra; *Fox v. Wright*, supra. It is immaterial that the property was sold to the state for the correct amount. This result might have been accomplished equally well in the absence of any advertisement of the amount due. The effect of the proceeding is to divest the owner of his title by virtue of

statutory proceedings. In such proceedings the provisions of the statute should be strictly followed. *Washington v. Pratt*, 8 Wheat. (U. S.) 681, 5 L. Ed. 714; *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761; *Blackwell on Tax Titles*, § 424; 2 *Cooley on Taxation*, p. 934. A sale of property made for an excess as much as the smallest fractional coin authorized by law is void. *Treadwell v. Patterson*, 51 Cal. 637. In *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. 599, it is said: "In proceedings where the property of a citizen is to be taken, every requirement of the statute having the least semblance of benefit to the owner must be complied with." The object of the Legislature in enacting the provision under consideration was to give notice of the amount due to those who were delinquent, and who, upon their attention being called to the fact, might respond by payment. The notice was, in fact, a demand for payment of an excessive amount, with the alternative that, unless paid, the land would be sold. Clearly the provision is a beneficial one to the property owner. We perceive no reason why the same rule announced in the *Treadwell* Case as applicable to sales for an excessive amount should not be likewise applied to a statement of an excessive amount published in the delinquent list. Why should not a strict compliance with this regulation be as essential to the legal transfer of an estate in tax proceedings as compliance with a requirement for the observance of prescribed formalities in the transfer of title between individuals? Conceding that the published notice did not in fact comply with the statute, appellant insists that the deed to the state, which was introduced in evidence, is by its recitals made conclusive evidence of compliance therewith. Section 3787, Pol. Code.

Section 3787 of the Political Code in express terms makes the deed conclusive evidence of the regularity of other proceedings than those enumerated in section 3786 of the Political Code, as to which the deed is made prima facie evidence. The publishing of the delinquent list containing the matters specified in said section 3764, together with the notice of sale designated in section 3765, and fixing the day and hour of sale required by section 3767, are not among the matters enumerated in section 3786, as to the correctness of which the deed is prima facie evidence. According to appellant's contention, these requirements fall within the phrase, "all other proceedings" referred to in section 3787 in proof of the regularity of which the deed is made conclusive evidence. In the recent case of *Fox v. Wright*, 152 Cal. 59, 91 Pac. 1005, wherein it was claimed that the notice of sale of the property acquired in the tax proceedings (section 3897, Pol. Code) was defective, in that it did not set forth the name of the delinquent owner, the court says:

"But, upon the other hand, since the owner had received due notice by publication of the fact that his taxes were delinquent and the property had been (would be) sold to the state for such delinquency, it was not necessary to the validity of the proceedings that any notice of the intended sale by the state should be given to him at all." And, again, in discussing another phase of this case, the court says: "The owner of the property who has permitted his taxes to become delinquent receives notice that, unless the taxes be paid by a given date, his land will be sold to the state." The notice published for the reasons heretofore assigned was unauthorized, and therefore constituted no notice. The only notice to the owner which could constitute due process, and under which he could be deprived of his property, is that which the Legislature has designated in sections 3764, 3765 and 3767 of the Political Code. As this is the only notice required as a condition of transferring the owner's title to the state, it follows that the giving of it in the manner prescribed by the Legislature must be regarded as a jurisdictional prerequisite to the making of a valid sale, as to which the deed is not conclusive. As to the performance of non-essentials—those things which the Legislature might in the first instance have dispensed with without affecting the validity of the proceeding—it may make the deed conclusive evidence, but not as to the performance of those acts necessary to confer jurisdiction. "The Legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land." *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410; *Cooley on Taxation*, p. 1010; *Blackwell on Tax Titles*, § 844; *Martin v. Cole*, 38 Iowa, 141; *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227; *Townsend v. Martin*, 55 Ark. 192, 17 S. W. 875.

From the foregoing views, it follows that the judgment should be affirmed, and it is so ordered.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 145

DAVIDSON v. ELLIS et al. (Civ. 522.)
(Court of Appeal, Second District, California.
Oct. 2, 1908.)

1. CONTRACTS (§ 226*) — CONDITIONS SUBSEQUENT—FORFEITURES.

Conditions subsequent, when relied on to work a forfeiture, must be created by express terms or clear implication.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1033-1037; Dec. Dig. § 226.*]

2. EASEMENTS (§ 61*)—RIGHTS OF WAY—LOCATION.

Where the location of a right of way granted over land retained on a conveyance of ad-

joining land is contested, the owner of either the dominant or of the servient estate can procure a decree fixing the right affirmatively and specifically, including the width of the way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 103; Dec. Dig. § 61.*]

3. EASEMENTS (§ 36*) — RIGHTS OF WAY — ABANDONMENT—BURDEN OF PROOF.

To defeat one's right to a location of a right of way granted on the ground of abandonment, the burden is on the owner of the servient estate to show abandonment, and to show acts performed and expense incurred by him in reliance thereon.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 89; Dec. Dig. § 36.*]

4. EASEMENTS (§ 3*)—RIGHTS OF WAY—APPURTENANCES.

An easement for a right of way granted over land retained on a conveyance of adjoining land to connect with a highway became appurtenant to the land conveyed, following the estate.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 10; Dec. Dig. § 3.*]

5. EASEMENTS (§ 30*)—NONUSER—EFFECT.

An easement for a right of way granted by deed will not be impaired by mere nonuser, however long.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 77; Dec. Dig. § 30.*]

6. EASEMENTS (§ 61*)—RIGHTS OF WAY—LOCATION—PLEADING.

Plaintiff alleged a conveyance by defendants to his grantors with an easement for a right of way over land retained to connect with a highway, the way to be located by the grantee within a reasonable time, alleges that, no way having been located for three years, defendants refused to join in a definite location; and that before suing he definitely located the right of way on an old road across defendants' land, and sued for confirmation of his location. *Held*, that the complaint unambiguously stated a cause of action, and that, if through lapse of time plaintiff had lost his right to fix the route, the allegation respecting the route described in the complaint might be taken as an allegation that such route was reasonably convenient for all parties.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 103; Dec. Dig. § 61.*]

7. EASEMENTS (§ 61*)—RIGHTS OF WAY—LOCATION.

If, under a grant of an easement for a right of way across land retained on a conveyance of adjoining land, to be located by the grantee within a reasonable time, the right to locate it was lost by failure to exercise it within three years, equity can locate it.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 103; Dec. Dig. § 61.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by William Davidson against Mary E. Ellis and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Day & Day, for appellant. W. P. Butcher, for respondents.

ALLEN, P. J. Appeal by plaintiff from a judgment rendered against him and in defendants' favor, based upon an order sustaining a demurrer to a complaint.

The complaint alleged the ownership by defendants in 1901 of certain premises, a

part of which at that date were by them conveyed to plaintiff's grantors, together with a perpetual right of way from a fixed point on the exterior boundary of the lands sold across the lands of defendants not so conveyed to a certain county road, which grant specified that the way "so granted to be thereafter and within a reasonable time definitely located by said grantee." Plaintiff's ownership in the dominant tenement is averred. It further appears that when said deed of plaintiff's grantors was executed, and at all times thereafter, there was an old road leading from the fixed terminus of the right of way to said county road; that plaintiff's grantors did not at any time while they owned the premises, nor did plaintiff until after 1904, definitely locate said right of way; that plaintiff has requested defendants to join in such definite location, which they refused to do; that plaintiff, before the filing of the complaint, definitely located said right of way upon the route of such old road, the center line of which is the center line of the right of way, and so located the same having a width of 15 feet upon either side of such center line. The prayer of the complaint is that such location be confirmed and plaintiff's right to such right of way be quieted. The demurrer to the complaint was general, and upon the further ground that it was unintelligible, in that it could not be ascertained therefrom when or where the request was made to join in the location, or that the location had been actually made or could be made under the deed, or of what width the same could be made.

The grant of the right of way by defendants was not one made upon condition, and nothing in the language of the grant indicates that a failure to fix the definite route should work a forfeiture of the right of way. "Conditions subsequent, when relied on to work a forfeiture, must be created by express terms or clear implication." *Behlow v. Southern Pac. R. R. Co.*, 130 Cal. 16, 62 Pac. 295. The right of the arbitrary fixation of the line of location upon the part of the grantor was restricted by the deed to a reasonable time. The theory upon which plaintiff seems to proceed is that, by reason of the lapse of time, the location of the line of the right of way became a matter of joint agreement, and, such agreement not being possible, that a court of equity should hear and determine the question. If the location is the subject of contest, either party may procure a decree fixing the right affirmatively and specifically (*Gardner v. Webster*, 64 N. H. 520, 15 Atl. 146); and this of necessity would authorize the court to determine the width thereof. There is nothing in the complaint suggesting an abandonment, and, if such fact exists, the onus of showing the same would devolve upon the

defendant, and could only be supported by allegations and proof thereof and acts performed and expense incurred by the owner of the servient estate relying thereon. *Smith v. Worn*, 93 Cal. 207, 28 Pac. 944. The easement was made and became appurtenant to the property owned by plaintiff and follows the estate. *Currier v. Howes*, 103 Cal. 436, 37 Pac. 521. The easement having been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right. *Gardner v. San Gabriel Valley Bank* (Cal. App.) 93 Pac. 900. The location determined by plaintiff, if his right to fix the line has not terminated, is given by the deed. If by reason of the lapse of time such right to so fix the route has terminated, the allegation with reference to the route described in the complaint may be taken as an allegation that such route is reasonably convenient for all parties. Whatever may be the effect of the nonlocation for the period shown, as affecting the right of plaintiff to arbitrarily fix the same, the right to have a court of equity definitely locate the right of way exists, if plaintiff's right to fix has lapsed. The complaint states a cause of action therefor, and no uncertainty or ambiguity therein is manifest.

Judgment reversed and cause remanded.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 134

PEOPLE v. LAPIQUE. (Civ. 620.)†

(Court of Appeal, Second District, California.
Sept. 29, 1908.)

1. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—COMPELLING SETTLEMENT—GROUNDS.

Primarily the duty of authenticating the record on an appeal rests with the trial court, and before the appellate court will interfere, it must clearly appear that the trial court refused to embody in the bill of exceptions an objection to a ruling on a matter of law, and that an exception was regularly taken to the decision.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2843; Dec. Dig. § 1092.*]

2. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—COMPELLING SETTLEMENT.

The trial court having settled and allowed one bill of exceptions on an appeal, the appellate court cannot compel it to settle another bill, or do so itself.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

3. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—SETTLEMENT—NOTICE—NECESSITY.

Bills of exception can only be settled on notice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2834; Dec. Dig. § 1092.*]

4. CRIMINAL LAW (§ 1092*)—APPEAL—RECORD—EXCEPTIONS—PROCEEDINGS TO COMPEL SETTLEMENT—NECESSITY OF NOTICE.

On an application to the District Court of Appeal to settle a bill of exceptions refused by the trial court in a criminal case, the application could be considered only after notice to the district attorney; the general rules relating to

notice of applications made to and motions before the court applying.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

Application by John Lapique, a defendant in a criminal case, to compel the allowance of a bill of exceptions. Application denied.

John Lapique, in pro. per.

PER CURIAM. Application to this court to settle a bill of exceptions which it is claimed the trial judge refused to settle. It is, in effect, a renewal of a former application (Civil No. 576) by petitioner, which was treated as a petition for a writ of mandate in order that the court might have jurisdiction to consider the matter. Then, as now, petitioner was seeking to compel the trial judge to settle a particular bill of exceptions presented by himself. *People v. Lapique* (Cal. App.) 98 Pac. 46. For this reason this petition was at first treated as an application for a writ of mandate, and petitioner was required to pay the clerk's fees necessary to be paid in such a proceeding.

A more careful examination of the petition and papers accompanying it discloses that another bill of exceptions has been settled and allowed by the trial judge since the former application was heard, but it cannot be determined from the record before us whether that bill of exceptions was settled and allowed in accordance with sections 1175 and 1177 of the Penal Code or not. Neither can we determine from the petition whether, by the settlement of the bill which was settled, petitioner was denied the right to prove any exception which he should be permitted to prove in this court. Primarily the duty of authenticating the record on an appeal rests with the trial court, and, in order that this court should interfere, it must clearly appear that the party seeking relief should show that the trial court refused to embody in the bill an objection to a decision of the court on a matter of law and that an exception was regularly taken to such decision. *Vance v. Superior Court*, 87 Cal. 390, 25 Pac. 500. One bill of exceptions having been settled and allowed on the appeal, the trial court has acted, and this court has no power to compel the trial judge to settle another bill or to itself assume to do so.

The petition was presented by the petitioner in person, and was without notice. If the petition was sufficient in form to sustain a proceeding for the proving of an exception which has been denied and refused by the trial court, we could not act upon an ex parte application. Bills of exception are only settled upon notice, and the bill or statement embodying the exceptions which defendant desired to prove before this court could be considered only after notice given to the district attorney. In the absence of a special

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on motion to prove exceptions, see 98 Pac. 868.

provision for applications of this kind, it would have to be governed by the general rule relating to notice of applications made to and motions before the court. The transcript of the evidence has not been produced, and the petition does not allege that the "substitute bill" presented with it was the bill actually settled by the trial judge.

The petition is denied without prejudice, and the clerk directed to remit and return to petitioner the fee paid upon filing his petition herein.

(154 Cal. 518)

PEOPLE v. LAPIQUE. (Cr. 1,495.)†

(Supreme Court of California. Nov. 13, 1908.)

1. CRIMINAL LAW (§ 1092*)—APPEAL—EXCEPTIONS—COMPELLING ALLOWANCE—JURISDICTION OF PROCEEDINGS.

Under Const. art. 6, § 4, making all statutes regulating appeals to the Supreme Court apply to appeals to the District Courts of Appeal so far as not inconsistent with this article, and Pen. Code, § 1174, providing that, if the trial court refuses to allow an exception, the party aggrieved may apply to the Supreme Court by petition to prove such exception, the District Court of Appeal is the proper court to which to apply to prove exceptions on a criminal appeal to that court, and not to the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2841; Dec. Dig. § 1092.*]

2. CRIMINAL LAW (§ 1092*)—EXCEPTIONS—COMPELLING SETTLEMENT—CERTIFICATION BY JUDGE.

Under Const. art. 6, § 4, making the statutes relating to appeals to the Supreme Court applicable to the District Court of Appeal, and Pen. Code, § 1174, providing that exceptions, when proven in proceedings to establish exceptions, shall be certified by the chief justice, where an application to compel the allowance of exceptions is properly addressed to the District Court of Appeal, the bill, when proven, should be certified by the presiding justice of that court, he standing in the same relation to that court as the chief justice does to the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2841; Dec. Dig. § 1092.*]

3. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—SETTLEMENT—COMPELLING ALLOWANCE.

Where an application to prove exceptions in a criminal case was properly addressed to the District Court of Appeal, and it has denied the application, petitioner's remedy is exhausted unless he applies to the Supreme Court or the District Court of Appeal for a rehearing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2841; Dec. Dig. § 1092.*]

In Banc. Application to the Supreme Court by John Lapique, a defendant in a criminal case, to prove a bill of exceptions. Application dismissed.

John Lapique, in pro. per.

PER CURIAM. The defendant applies to this court, under the provisions of section 1174 of the Penal Code, to be allowed to prove certain exceptions, which he alleges the judge of the superior court before whom the

case was tried has refused to allow in accordance with the facts.

It appears from his application here that he has made similar applications to the District Court of Appeal of the Second District, which is the court having jurisdiction of any appeal he may take from the judgment against him. He desires to use the bill of exceptions, when settled, in aid of such appeal. The district court refused his applications. The Constitution (article 6, § 4) provides that "All statutes now in force allowing, providing for, or regulating appeals to the Supreme Court shall apply to such appeals to the District Courts of Appeal, so far as such statutes are not inconsistent with this article." The provisions of section 1174 of the Penal Code, so far as it applies to the matter in hand, are provisions regulating appeals. The proper court to act in the matter of proving an exception not allowed by the trial judge is the court to which an appeal must be taken in the case, in this instance the District Court of Appeal of the Second District. The Constitution makes the provisions of section 1174, in respect to such exception, applicable to the District Court of Appeal, and gives that court jurisdiction to entertain and decide an application to prove such exceptions. The functions of the chief justice in that proceeding, as expressed in the statute, will be performed by the presiding justice of the District Court of Appeal, he standing in the same relation to that court as that of the chief justice to the Supreme Court. As the District Court of Appeal has acted in the matter of the proposed exceptions and given its judgment thereon, the matter is adjudicated and the remedy of the defendant is exhausted, unless he should apply to this court or the district court for a rehearing, which he has not done.

The application is dismissed.

(154 Cal. 520)

MOULTRIE, Adm'x, v. WRIGHT et al.

(S. F. 4,761.)

(Supreme Court of California. Nov. 13, 1908.
Rehearing Denied Dec. 10, 1908.)

1. TRUSTS (§ 79*)—CREATION—RESULTING TRUST.

Where one-half the price of land is paid by one in whose name the title is taken, under an agreement with another, who pays the remainder at the time of the conveyance, a resulting trust arises in favor of the latter for an undivided one-half of the land.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 111, 112; Dec. Dig. § 79.*]

2. TRUSTS (§ 357*)—FOLLOWING TRUST FUNDS—BONA FIDE PURCHASER.

If a mortgage is taken with notice that the land is charged with a resulting trust in favor of a contributor to the consideration for the conveyance to the mortgagor, the mortgage lien is subject to the trust, and any title to the contributor's interest, obtained by the mortgagee's administratrix in her representative ca-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

capacity under foreclosure, will be held in trust for the contributor or his grantee, free from the mortgage lien, although the administratrix herself obtains such a title without notice of the trust; but, if the mortgagee and his administrator have no notice, the latter will hold as an innocent purchaser free from the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 539-552; Dec. Dig. § 357.*]

3. TRUSTS (§ 230*)—DISPOSAL OF TRUST PROPERTY—ESTOPPEL.

The mortgagor of land charged in his hands with a resulting trust is a competent witness for a party asserting the trust to prove that he informed the mortgagee of the trust.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 230.*]

4. TRUSTS (§ 86*)—CREATION—RESULTING TRUST.

Under the express provision of Civ. Code, § 853, payment of a part of the consideration by a third person for a conveyance to another raises a presumption that a trust in favor of such third person was intended.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.*]

5. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR—CREATION—RESULTING TRUST.

Where direct evidence to prove a resulting trust in land, based on part payment of the price, is excluded on the objection of a party, he cannot claim that the circumstances rebutted the presumption that a trust was intended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3600; Dec. Dig. § 882.*]

6. TRUSTS (§ 87*)—ENFORCEMENT—EVIDENCE.

The insufficiency of the evidence to prove a resulting trust in land based on part payment of the price is not ground for excluding evidence of notice thereof to party dealing with the land.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 87.*]

7. TRUSTS (§ 86*)—CREATION—RESULTING TRUST.

The presumption of a resulting trust in favor of a contributor to the consideration for a conveyance to another is not rebutted by the mere fact of such conveyance.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.*]

8. TRUSTS (§ 88*)—CREATION—RESULTING TRUST—PAROL EVIDENCE.

Parol evidence is admissible to prove a resulting trust arising from the payment of the consideration by a third person for a conveyance to another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 130-133; Dec. Dig. § 88.*]

9. TRUSTS (§ 87*)—ENFORCEMENT—EVIDENCE.

Evidence of a grantee's agreement to hold title to land in trust for a contributor to the consideration, is admissible to prove that a trust was intended.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 87.*]

10. TRUSTS (§ 372*)—FOLLOWING TRUST PROPERTY—EVIDENCE.

Evidence of a grantee's agreement to hold the title in trust for a person who paid a part of the purchase price is material on the question of laches in enforcing the trust as against a party dealing with the land, as tending to show a resulting trust if the deed was taken by agreement, rather than a constructive trust if the deed was taken in the name of the grantee alone, without any agreement therefor, there

being a possible difference as to what would be laches in the two cases.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 372.*]

11. TRUSTS (§ 79*)—CREATION—CONSTRUCTIVE TRUST.

Where two persons contribute to the purchase price of land, and the title is taken in the name of one of them without the knowledge or consent of the other, a constructive trust arises in favor of the latter.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 112; Dec. Dig. § 79.*]

12. TRUSTS (§ 365*)—ENFORCEMENT—LACHES.

What may be laches in enforcing a constructive trust as against a party dealing with the land may be of no significance in case of a resulting trust.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 365.*]

13. TRUSTS (§ 362*)—ENFORCEMENT—DEFENSES.

The mere existence of a lien of a prior mortgage on land, charged with a resulting trust based on part payment of the price of the land, is not a bar to the enforcement of the trust against parties claiming title to the land free from the trust.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 362.*]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Emelie Moultrie, Administratrix of Handley B. Doane, deceased, against Harry Wright, William C. Hoffmann, and others. From an order denying a motion for a new trial, defendants appeal. Reversed.

Chas. M. Cassin and Benj. K. Knight, for appellants. Charles B. Younger and Mul-laney, Grant & Cushing, for respondent.

SHAW, J. The defendants appeal from an order denying their motion for a new trial. The defendants interested are Hoffmann and Louise Wright. It is claimed that the court below erred in excluding important and material evidence for the defendants and for the cross-complainant, Hoffmann. The complaint stated a cause of action against the defendants to quiet title to a tract of land. The defendants jointly answered, alleging that Hoffmann was the owner of an undivided one-half of the land, that the defendant Louise Wright held under him as lessee thereof, and that the deceased, Handley B. Doane, and plaintiff, as his administratrix, held the title to said one-half interest in trust for said defendants. Hoffmann filed a cross-complaint, setting forth the facts upon which the alleged trust arose and existed, and asking that the trust be declared and enforced. The facts alleged in the cross-complaint are as follows: The plaintiff and Hoffmann claim under a common source of title, one Alfred H. Fitch, who was the owner in fee of the land on August 23, 1886. On that day he executed to Felipe Tarpio, whose true name is Tapia, but who is also known as Tarpio, a deed purporting to convey said land to Tarpio. The consideration for this deed consisted of \$600 in money paid to Fitch by

Tapia, a deed by Tapia to Fitch conveying to Fitch three lots in Santa Cruz, and a deed executed by one Carlotta Amaya, afterwards and now the wife of Tapia, conveying to Fitch a certain parcel of land near Santa Cruz, of the value of \$1,200 and equal in value to the lots conveyed and the money paid to Fitch by Tapia. It was at the time, agreed between Tapia and Carlotta Amaya that they were each to own an undivided one-half of the land conveyed by Fitch to Tapia, and that Tapia should hold title to the one-half thereof in trust for Amaya. On September 7, 1887, Handley B. Doane loaned to Tapia \$1,000, taking as security a mortgage on the land from Tapia alone. Tapia, at the time, informed Doane that he owned but an undivided one-half thereof, that Carlotta Amaya, who was then his wife, owned the other undivided one-half, and that he held title to her half in trust for her. Afterwards said mortgage was foreclosed by plaintiff as administratrix of Doane's estate, and a deed was executed to plaintiff, as such administratrix, in pursuance of the sale upon said foreclosure decree. Prior to the foreclosure, Tapia and his said wife, Carlotta, mortgaged the land to Christian Hoffmann, who assigned the mortgage to the appellant and cross-complainant, William C. Hoffmann. On May 25, 1897, while said foreclosure suit was pending, Tapia and his said wife conveyed the land to appellant, Hoffmann, in satisfaction of the Hoffmann mortgage. Hoffmann, as successor of Carlotta, claims an equitable title to an undivided one-half thereof, and that his said title is superior and paramount to the Doane mortgage and to the plaintiff's title thereunder.

The claim of Hoffmann depends upon the existence of the alleged trust in favor of Carlotta Amaya, and upon the knowledge of said trust by Doane at the time Tapia executed to him the mortgage under which plaintiff claims. The payment by Carlotta Amaya of one-half of the price of the land conveyed by Fitch to Tapia at once created a resulting trust in favor of Carlotta in an undivided one-half of the land and the title thereto was thereafter held by Tapia, the grantee, in trust for her. Civ. Code, § 853; *Thomas v. Jameson*, 77 Cal. 93, 19 Pac. 177; *Hidden v. Jordan*, 21 Cal. 99; *Case v. Codding*, 38 Cal. 193; *Somers v. Overhulser*, 67 Cal. 237, 7 Pac. 645; *Fulton v. Jansen*, 99 Cal. 591, 34 Pac. 331; *Murphy v. Clayton*, 113 Cal. 157, 45 Pac. 267; *Polk v. Boggs*, 122 Cal. 114, 54 Pac. 536; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482. And if Doane took his mortgage from Tapia with knowledge of the trust, his mortgage lien was subject thereto, and any title to such one-half interest that might be obtained by him, or by his estate, or by his administratrix in her representative capacity, under a foreclosure of such mortgage, would be held as successor of Tapia in trust for Carlotta Tapia or Hoffmann, her grantee, free from the mortgage lien. *Price v. Reeves*, 38

Cal. 457; *Riley v. Martinelli*, 97 Cal. 580, 32 Pac. 579, 21 L. R. A. 33, 33 Am. St. Rep. 209; *Murphy v. Clayton*, supra. If Doane had no notice when he took the mortgage, nor prior to his death, and the administratrix bought for the benefit of the estate, without notice, she would hold as an innocent purchaser free from the trust. *Riley v. Martinelli*, supra; *De Lany v. Knapp*, 111 Cal. 169, 43 Pac. 598, 52 Am. St. Rep. 160. But if Doane had notice, the mere purchase for the estate by the administratrix at the foreclosure sale, without knowledge on her part would not make her an innocent purchaser, nor discharge the land of the trust. It was therefore absolutely necessary for Hoffmann to prove, not only that Carlotta Amaya paid a part of the price of the land conveyed by Fitch to Tapia in 1886, but also that Doane had knowledge thereof when he took his mortgage in 1887. He introduced in evidence the deed from Fitch to Tapia and the deeds from Tapia to Fitch and from Carlotta Amaya to Fitch, and proved that all of them were recorded on the same day, August 31, 1886. Fitch then testified that these conveyances to him were made in consideration of the land he deeded to Tapia, that the land he got from Carlotta Amaya was then worth \$1,200, that the land obtained from Tapia was then worth \$900, and that Tapia paid some money in addition, the amount of which he could not remember. Tapia then testified that he paid Fitch \$600 in money as part of the price of the land, and that the lots he deeded to Fitch were then worth \$650. He was then asked if, at the time of making the Doane mortgage, he told Doane the facts as to the interest he owned. Objection was made and sustained to the question. Hoffmann thereupon offered to prove by the witness that, at the time witness made that mortgage, he told Doane that Carlotta Amaya had paid one-half of the price of the land to Fitch, that she was the real owner of one-half of the land and he of the other half, and that he held the title, as to one-half, in trust for her, and that Doane said he was satisfied with one-half of the land as security for the money loaned. This was objected to, on the ground that it was irrelevant, immaterial, and incompetent, that Tapia's mortgage purported to cover the entire estate in the land, and that he could not be a competent witness to explain or vary the terms of his mortgage. The court sustained the objection and excluded the evidence. That this was error there can be no doubt. We have already seen that proof that Doane had notice of the trust was material and essential to the case of Hoffmann. Tapia was a competent witness to prove that he informed Doane of the trust, or of the facts upon which the trust arose. If he himself had been claiming one-half of the land in question free of the mortgage lien, there would be force in the objection that, in the absence of mistake or fraud, he would be estopped to do so. But the person

in whose favor the trust was created was not Tapia, but Carlotta Amaya, and Hoffmann was claiming as her successor, and not as the successor of Tapia. Carlotta Amaya was not estopped by Tapia's mortgage, and neither was her successor in interest estopped. Tapia was not a party to this action.

Respondent asserts that the evidence of the trust was not clear or convincing, that the right to enforce the same was lost by laches, that it was a stale claim, and that the creation of such trust was rebutted by the taking of the deed in Tapia's name, and the other circumstances shown, and that it was not proven that a trust in her favor was intended or contemplated, and from these circumstances he argues that the defendant's case was without merit, and that the erroneous ruling was not prejudicial. The payment of a part of the consideration by a third person raises a presumption that a trust in favor of such third person was intended. Civ. Code, § 853. Respondent is not in a position to claim that the circumstances rebutted such presumption of intention, for Tapia was asked to testify as to the agreement between himself and Carlotta Amaya that he should hold in trust for her, and upon respondent's objection the evidence was excluded. If any direct proof of intention was required, defendants were entitled to this evidence, and its exclusion would be prejudicial error. The insufficiency of the admitted evidence to prove the trust alleged would be no ground for the exclusion of evidence of notice thereof to a third party dealing with the land. It might support the proposition that the rejection of evidence of notice caused no substantial injury, and would not justify a reversal of the judgment. But there is no basis for the claim that the evidence of the trust was not clear or convincing. The evidence as to the exact values of the respective tracts of land conveyed to Fitch was conflicting and this perhaps made the exact proportion or interest covered by the trust uncertain until the court should weigh the evidence and determine the values, but it was perfectly clear that Carlotta Amaya contributed substantially to the consideration paid and held a beneficial interest in a substantial proportion of the land bought of Fitch. We see nothing in rebuttal of the trust in the circumstance that the deed was made to Tapia. It was this conveyance which made the trust relation necessary. Such conveyance always attends a resulting trust of this character, and parol evidence is admissible to explain the deed to this extent.

The defense of laches was presented by the answer to the cross-complaint. The court made no finding as to laches, but did find that Tapia and Amaya did not agree that Tapia was to hold title to her interest in trust, that there was no trust in fact, that Tapia did not inform Doane of the trust, and

that Doane never had knowledge thereof. As the court had excluded the evidence to prove the agreement of Tapia, and Amaya and Doane's knowledge of the trust, the findings as to these particulars were in accordance with the evidence admitted, but not with that which should have been admitted. The finding that no trust ever existed was contrary to the evidence. The evidence that Carlotta paid part of the price was clear and uncontradicted. Furthermore the evidence of the agreement of Tapia, that he would hold title to one-half the land in trust for Amaya was important and material on the question of laches. If he took the title in his own name, without her knowledge or consent, the law would raise a constructive trust; if by agreement with her, then only a resulting trust would be created. *Fulton v. Jansen*, supra. What might be deemed laches in case of a constructive trust, might be of no significance if it were a resulting trust. Under these circumstances, the exclusion of the evidence to prove the facts alleged and found to be untrue as aforesaid was plainly prejudicial.

There was evidence that at the time Tapia bought the land it was incumbered by a mortgage to Elmer Dakan for \$1,000, that Tapia and Amaya agreed to pay this mortgage, as part of the price of the land, and that the money borrowed on the Doane mortgage was used to pay the prior mortgage to Dakan. The respondent claims that in equity this prior mortgage would be kept alive for her benefit, as administratrix and that the estate of Doane would be subrogated to the rights of Dakan. Whether this is so or not the claim under the Dakan mortgage would be only a lien until it was foreclosed, and as no claim to such lien was alleged or asserted in the Doane foreclosure suit, as the rights of Hoffmann in virtue of the trust, were expressly excepted and reserved by the decree in that suit, and as no lien was set up to be foreclosed in this action, it follows that the claim under the Dakan mortgage does not, in its present condition, constitute a bar to a judgment herein, declaring the alleged trust, nor a defense to the cross-complaint under the pleadings as they stand.

The order denying a new trial is reversed, and the judgment is vacated.

We concur: SLOSS, J.; ANGELLOTTI, J.

154 Cal. 428
Burr v. MacLay Rancho Water Co.
(Hille et al., Interveners). (L. A. 1,830.)
(Supreme Court of California. Oct. 16, 1908.
On Rehearing, Nov. 16, 1908.)

1. WATERS AND WATER COURSES (§ 156*)—ARTESIAN WATER—RIGHTS UNDER DEED.
A reservation in deeds to tracts of land of "all artesian water that may be developed on said land and not used thereon" does not extend to artesian water necessary for use on the land

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

from which it is obtained, nor to any water except artesian water, and reserves no right to enter the land to develop artesian water; the only limitation imposed being that, where different tracts are obtained by separate deeds containing the reservation, it does not in terms give the right to take water from the basin by wells on one of the tracts for use upon another.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 174-183; Dec. Dig. § 156.*]

2. WATERS AND WATER COURSES (§ 105*)—PERCOLATING WATER—PRIORITY OF RIGHTS—APPROPRIATION FOR DISTANT USE.

The right of a landowner to a quantity of percolating water necessary for use on the tract is paramount to that of an adjoining landowner to take the water to distant land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 113; Dec. Dig. § 105.*]

3. WATERS AND WATER COURSES (§ 105*)—PERCOLATING WATERS—PRIORITY OF RIGHTS.

An appropriation of water from a common water-bearing strata for use on distant lands not situated over the strata is subject to reasonable use by the owner of other overlying land upon which he has never used water, especially where such owner bought his tracts because of their situation respecting the water, relying upon the supply, and since without the water the land is of little use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 113; Dec. Dig. § 105.*]

4. WATERS AND WATER COURSES (§ 105*)—WATER RIGHTS—USE—STATE POLICY.

It is not the law's policy to permit any of the available waters of the county to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to use water, to prevent another from using it while he himself does not desire to do so.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 105.*]

5. WATERS AND WATER COURSES (§ 107*)—WATER RIGHTS—PRIORITIES—JUDICIAL POWER.

In a suit involving water right priorities, the court can make reasonable regulations for use by the parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect him having the paramount right, and to prevent its destruction.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 107.*]

6. WATERS AND WATER COURSES (§ 107*)—PERCOLATING WATER—RIGHTS—ADJUDICATION.

A judgment, fixing the rights of adjoining landowners to take percolating water from a common underlying basin, should be so framed as to prevent a depletion of the basin, limiting the amount taken by all the consumers to a quantity, as near as may be, equal to the average constant supply from the rainfall.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 107.*]

7. WORDS AND PHRASES—"ARTESIAN."

The word "artesian" is sometimes used in reference to underground water which, by reason of pressure, will rise above its natural level, though not the surface of the ground, when the stratum in which it lies is pierced by a well.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, p. 511.]

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by John Burr against the Maclay Rancho Water Company, H. R. Hille and others intervening. From the judgment, plaintiff appeals. Modified and affirmed.

Harris & Harris and Stephens & Stephens, for appellant. Williams, Goudge & Chandler and Hunsaker & Britt, for respondents.

SHAW, J. The plaintiff sued to enjoin the defendant company from pumping water from its wells on land adjoining that of plaintiff, and transporting such water to distant lands, for irrigation and use on such remote lands. The interveners own some of this remote land, and claim rights to receive the water pumped by the defendant, under contracts made with defendant to furnish them with water for use on their respective tracts of land. The plaintiff has wells on his land, from which he pumps water sufficient for irrigation, and other uses thereon, and the injury he complains of is the lowering of the water underneath the surface, caused by the pumping of the defendant's wells, whereby his wells are drained of water. The court, upon the facts found, concluded that the plaintiff was entitled to pump from his wells, for irrigation of one tract of his land containing 40 acres, designated as "block 191," for six consecutive days of 24 hours each, in each month, a constant flow of 25 inches of water, miners' measure, measured under 4-inch pressure, that during this period the defendant had no right to pump any water, and that, during the intervening time, the defendant has the right to pump water from its wells, and carry the same to distant lands for sale and use thereon, to the amount of 125 miners' inches, constant flow. The interveners claim, and were declared entitled to claim, solely under the defendant. Judgment was given in accordance with these conclusions. The plaintiff appeals from the judgment upon the judgment roll alone.

The lands of the plaintiff consists of three tracts, designated, respectively, as "blocks 153, 190, and 191 of the Maclay Rancho Ex-Mission San Fernando," according to the recorded plat thereof, and embracing 90 acres. His wells are situated on block 191, which is practically all set out in fruit trees requiring irrigation. Until shortly before this suit was begun he had not irrigated the other tracts. The main controversy concerns the rights pertaining to block 191, but the plaintiff also claims the right to pump water from his wells on that block to irrigate the lands of the other two blocks if he should find it convenient to do so. He did for a short time irrigate 15 acres of block 190. The plaintiff claims that, upon the facts found, the court erred in limiting at all his right to take water by means of his pumps, and in adjudging to the defendant the right to take water from the adjoining lot by means of pumps,

or otherwise than by the natural artesian flow of the wells, or to a greater extent than 30 inches of constant flow. The lands of the plaintiff and a part of block 192 are all situated over the same body of underground percolating water. Concerning this body of water the finding is that underneath all the said lands, and extending to the foot of the mountains, three or four miles northerly thereof, are water-bearing strata of varying depths of sand, boulders, and coarse material, and lying over each stratum is an impervious stratum of clay or cement, extending towards, but not entirely to, said mountains; that across the said strata, and running through the southerly portion of block 192, which lies immediately south of block 191, there is a dyke of material impervious to water; that the subterranean waters in the water-bearing strata are supplied by rains falling on the mountains to the north and east which, descending the surface of the mountain slopes to the base of the mountains, there find their way into the coarse material, and from thence into said water-bearing strata, through which they percolate underneath the overlying strata of clay or cement, and under the lands of plaintiff and the northern portion of block 192, "down to the said dyke, by means of which the movement of the said water is arrested, and the waters impounded, forming a subterranean basin, wherein the said subterranean waters are retained." The seven wells of the defendant are all situated on the part of block 192 north of this dyke, and pierce the said water-bearing strata and subterranean basin. The water pumped therefrom is all taken away to lands lying south of the dyke, a large portion of it being several miles distant therefrom, and none of it overlying the subterranean basin aforesaid. The lands of the interveners lie from two to four miles south of said dyke.

The plaintiff acquired block 191 in 1886, and ever since January, 1887, he and his family have resided thereon. In that year he began planting orchards thereon and gradually increased the area thereof until 1897. In 1896 he bored five wells along the southern line of the block, and put a pumping plant therein, from which, until the defendant began to pump on block 192 in June of the year 1902, he pumped water to the amount of 25 miner's inches for six full days, consecutively, each month, using the same to irrigate said block, and the same being necessary for that purpose. This water was taken into his pumps in the wells at a depth of 24 feet below the surface, and it appears from the findings that his wells and pumps, as constructed, cannot take the water at a lower depth. He has no other water supply, and the water is, of course, necessary to prevent the destruction of his orchards. In June, 1902, the defendant began pumping from its wells on block 192, over the basin aforesaid, about

125 miner's inches of water, and, until the suit was begun, continued to do so, transporting the water to the distant lands above mentioned and there distributing the same for irrigation and other purposes. Prior to this excessive pumping the water in plaintiff's wells had usually stood at a general level of 9 feet below the surface. The consequence of the operation of the defendant's pumps as stated was that, during the remainder of the year 1902, while the pumps were so operating, the level of the water in plaintiff's wells was reduced to 27 feet, and during the year 1903 to 30 feet, below the surface. The trial occurred in May, 1904. At such times as the defendant did not operate its said pumps the water level in plaintiff's wells stood at 14 feet below the surface in the year 1902, and at 16 feet in the year 1903. While the defendant is operating its pumps it is impossible for the plaintiff to obtain any water from his wells by means of his pumps.

It is necessary to consider, briefly, certain contracts mentioned in the findings. All the land affected by this action is included in a tract of 20,000 acres, formerly owned by Charles Maclay, from whom all the parties, and all the owners of lands to which the defendant supplies water from its wells, derive title. On September 9, 1885, Maclay conveyed this tract to five trustees, who were to subdivide and sell it. They were to expend, and did expend, \$20,000 in subdividing and marketing the land and in constructing dams, reservoirs, and conduits, and in boring artesian wells. In the fall of 1885 they bored the seven wells aforesaid, and obtained an artesian flow of 30 miner's inches of water therefrom, which, with water from other sources, they thenceforth distributed to some of the lands in the tract. From these wells the defendant is now pumping the 125 inches in controversy. In all the deeds made by the trustees, including those to the plaintiff and the interveners, there was a clause reserving to the grantors "all artesian water that may be developed on said land, and not used thereon." The defendant has succeeded to all the rights of the trustees in the water thus reserved. Some importance seems to have been attached to this reservation in the court below, but we do not think it affects the rights in controversy in the case. It does not extend to the artesian water that may be necessary for use on the land from which it may be obtained, nor to any water except artesian water. It reserved no right to enter on the land to develop artesian water. Conceding that the word "artesian" has the meaning sometimes given to it, and refers to underground water which, by reason of pressure, will rise above its natural level, though not to the surface of the ground, when the stratum in which it lies is pierced by a well, the reservation does not restrict the right of the plaintiff to take such water from the

underground strata and use it on his land, situated as it is, over the strata. This is all that the plaintiff claims. The only limitation it would appear to impose is that, where different blocks are obtained by separate deeds, each containing this reservation, it does not, in terms, give the right to take water from the basin by wells situated on one of his blocks and use it upon the other. If the first tract had, and the second had not, underground water of the kind reserved, this would clearly be a substantial violation of the rights reserved. But the plaintiff's respective blocks of land are all situated over the basin in question, and each block is entitled to sufficient water from the basin for the necessary use thereon. The taking of it all by means of wells on one lot, instead of boring wells on each and obtaining for each the necessary water from its own well, would be a mere technical and wholly unsubstantial departure from the terms of the reservation, unless some special injury results from the location of the respective wells. If the pumping by the plaintiff of all the necessary water for his three blocks from the wells on block 191, so near to the defendant's wells, would materially lower the water level in its wells, there might be the substance of an injury to the defendant. But the findings show that the lowering of the water level is caused by the excessive pumping of the defendant, and not by the pumping done by the plaintiff. Even the simultaneous pumping of 25 inches by the plaintiff and a considerable quantity by the defendant, the amount not being stated, but presumably as much as the original 30 inches, which was customary prior to June, 1902, did not materially affect the water level. But at all events the most that the defendant could claim is that the plaintiff be required to take upon each block, separately acquired, the water used thereon, if the other method proves injurious.

So far as the use of the water upon block 191 is concerned, the case seems to be within the rule established in *Katz v. Walkinshaw*, 141 Cal. 116, 135, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35. In that case it was decided that two owners of separate tracts of land, situated over common strata of percolating water, may, each upon his own land, take, by means of wells and pumps, from the common strata such quantity of water as may be reasonably necessary for beneficial use upon his land, or his reasonable proportion of such water, if there is not enough for all, but that one cannot, to the injury of the other, take such waters from the strata and conduct the same to distant lands not situated over the same water-bearing strata. The court there said: "In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such landowners: those who have used the water on their land before the

attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. Under the decision in this case the rights of the first class of landowners are paramount to that of one who takes the water to distant land; but the landowner's right extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus." In the case at bar the defendant, with respect to its injurious pumping of the water, is in the situation of an appropriator for use on distant land. With respect to plaintiff's block 191, it is attempting to begin such appropriation after the plaintiff has been for many years using the water on his land. Under the rule stated, therefore, the right of the plaintiff to the quantity of water necessary for use on block 191 is paramount to that of the defendant to take the water to the distant land of the interveners and others similarly situated. The defendant is entitled only to take of the surplus after block 191 is supplied.

With respect to plaintiff's block 153, and that part of 190 upon which he has not used the water, but upon which he claims the right hereafter to use it, a question is presented which was expressly left undetermined in *Katz v. Walkinshaw* and which was not therein involved. The plaintiff, with regard to this land, stands in the position of the second class mentioned in the above quotation. The plaintiff, when the defendant began pumping the 125 inches in June, 1902, gave it notice that the pumping was lowering the water level and impairing his rights. The suit was begun in July, 1903, and the facts found by the court show that no estoppel in pais exists in favor of the defendants to prevent the plaintiff from asserting, protecting, and enforcing such rights as he may have to the water for use on blocks 153 and 190. The question is therefore fairly presented whether or not, after an appropriator of water from a common water-bearing strata has begun to take the water therefrom to distant lands not situated over the strata, for use on such distant lands, the owner of other overlying land, upon which he has never used the water, may invoke the aid of a court of equity to protect him in his right to thereafter use such water on his land, and thus prevent the appropriator from defeating such landowner's right, or acquiring a paramount right, by adverse use, or by lapse of time. It appears from the findings that the existence of this underlying water was known before the lands were conveyed to the trustees by Maclay, and that the plaintiff bought his tracts from the trustees because of its situation with respect to that water, and relying upon said natural water supply, and that without this water the land is of little value. Under these circumstances it does not seem reasonable or just to adopt a rule that would deprive the buyer of such land of the

principal benefit of his purchase and the land of its chief element of value. The land being so situated that it has the natural advantages afforded by the underlying water, the conditions are analogous to those affecting land riparian to a stream, which, because of its situation with reference to the stream, is given rights to the waters thereof, so far as necessary for use thereon, which are paramount to the right of another riparian owner to divert the water to lands not riparian. The reasonable rule here would be to hold that the defendant's appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply, particularly in the hands of persons who have acquired it because of these natural advantages, and we therefore hold this to be the law of the case with respect to the lands upon which no water has been used by the plaintiff.

In the case of either class of owners of overlying lands, the appropriator for use on distant land has the right to any surplus that may exist. If the adjoining overlying owner does not use the water, the appropriator may take all the regular supply to distant land until such landowner is prepared to use it and begins to do so. It is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to water, to prevent another from using it, while he himself does not desire to do so. The established and settled law of riparian rights in running streams, which have become vested rights, may compel a different rule with regard to such waters in some instances, but these rules of law do not, of necessity, control rights in percolating waters. The most that should be allowed in such circumstances is to give a party the aid of the courts to protect his right and prevent the destruction of his source of supply by excessive use or other cause. The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right, and to prevent its ultimate destruction.

The judgment of the court below, with respect to block 191, was apparently based upon the rule established in *Katz v. Walkinshaw*, supra, and was made with the design to allow the defendant to take as much of the water, and no more, as should be compatible with the paramount right of the plaintiff. In view of the findings, however, we think the judgment, in its present form, might eventually prove insufficient for the protection of plaintiff's right. The watershed supplying the underground strata is of limited area, and in some years but little water

is contributed to the subterranean basin, because of the light rainfall. The effect of the defendant's pumping for a period of a little over 18 months was to lower the permanent water level, as it stood when the pumps were idle, as much as 7 feet. By reason thereof the plaintiff is compelled to lift the water 7 feet higher than before the defendant began its present appropriation. Perhaps, in view of the extreme necessity for water, and the great benefit derived therefrom, this additional burden upon the plaintiff may not be unreasonable. But if the judgment permitting this pumping by the defendant is affirmed without modification, it will be final between the parties, and the defendant will have a perpetual right to continue the drain upon the limited supply. This climate is subject to occasional periods of several successive years of comparative drought. We have recently had a 10-year period of that kind, which was just closing at the time this pumping of defendant began. It is probable that, if another such period, or even a shorter one, should occur, or possibly with a normal rainfall, the continuous pumping of 125 inches of water from this limited supply will continue to lower the permanent water level of the basin until the plaintiff will be unable to reach it with his pumps. It is not impossible that ultimately the basin will thereby be entirely emptied of water. The findings do not show the quantity of water that will be annually supplied to these underground strata by the average annual rainfall upon the watershed from which it comes. They are silent on this point. It is manifest that, if the quantity taken therefrom exceeds the average annual amount contributed thereto, the underground store will be gradually depleted and eventually exhausted. This should not be permitted. The judgment should be so modified as to provide for or permit the prevention of such a catastrophe, and to limit the amount taken by all the consumers to a quantity, as near as may be, equal to the average constant supply from the rainfall. It should also be framed so as to prevent the lowering of the permanent level to such an extent that the plaintiff will be unable to obtain by his pumps sufficient water therefrom for use upon his lands. These observations apply with equal force to the right of the plaintiff to have the supply protected for future use upon the portion of his lands not hitherto supplied with water. The judgment makes no provision whatever for the protection of the right of these lands to share in the water.

It is therefore ordered that the judgment of the superior court be modified by adding thereto, immediately preceding the date line thereof, the following clauses: "(10) Provided, however, that in no event shall the defendant be allowed to take of the waters in the strata pierced by its wells, a quantity

greater than is supplied thereto from the average annual rainfall upon the watershed contributing thereto, and from other sources; nor shall it be allowed to take therefrom a quantity that will reduce the water level in plaintiff's wells, during the periods when the plaintiff is herein given the right to pump therefrom, to such an extent that the plaintiff, with pumps operating at the depth of his present pumps, and with equal capacity, will be unable to obtain therefrom enough water to properly irrigate his said block 191 during such period, not exceeding the quantity hereinbefore stated. It is further adjudged and declared that the plaintiff, as the owner of said blocks 153 and 190, has the right to take and use of the said waters underlying said blocks, respectively, a sufficient quantity for irrigation, and other uses thereon, or his due share, in case there is not enough for all equally entitled therefrom, at such reasonable times as it may be necessary and convenient to do so, and that such right is parcel of said lands; that he may take such water through and by means of wells situated thereon, and that he must, when he desires to use the same, give the defendant 10 days' notice of the time or times when he will begin such use, and the defendant must thereupon at such times cease pumping its wells for a sufficient time to allow plaintiff to obtain enough water for one irrigation of so much of the particular block as may then require irrigation; that the continued pumping of said water in future by said defendant, as herein permitted, shall not be deemed adverse to the rights of plaintiff herein declared, whether such rights are, or are not, used by plaintiff, and that defendant be forever enjoined from asserting or claiming rights in such water paramount to those of plaintiff herein declared."

As thus modified, the judgment shall stand affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.

On Rehearing.

PER CURIAM. The petition for a rehearing is denied. The modification of the judgment of the superior court herein, as ordered in the decision of this court hereinbefore filed, is amended by adding thereto the following additional clause: "Nothing in this judgment shall be construed to prevent the defendant from pumping from its said wells on block 192, at the times when by this judgment it is allowed to pump therefrom, a quantity of water which, when added to the natural flow, if any, of said wells, will equal a flow of 30 inches of water measured under a 4-inch pressure, and using the same on distant lands."

154 Cal. 503

In re VOGT'S ESTATE. (S. F. 4,947.)

(Supreme Court of California. Nov. 13, 1908.

Rehearing Denied Dec. 10, 1908.)

1. WILLS (§ 490*)—PRESUMPTION AS TO KNOWLEDGE AND INTENT.

Testator is presumed to have known when he made his will that, without his wife's consent, he could dispose of only one-half of the community property, and also, unless the contrary appears from the terms of the will, that he did not intend to devise or bequeath an interest in the community property which he could not dispose of, but the intention of the testator to dispose of the entire community estate, if clearly appearing from the will, must prevail over these presumptions.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 490.*]

2. WILLS (§ 782*)—RIGHTS OF DEVISEES—ELECTION.

Where the intention of a husband in making his will, to dispose of the whole of the community property, and not a moiety thereof, is clearly shown by the terms of the will, and the disposition so made is such that the widow cannot take the moiety given her by law, without to that extent defeating the plain intent of the testator, she will be required to choose between the provisions of the law, and those of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2031; Dec. Dig. § 782.*]

3. WILLS (§ 782*)—RIGHT OF DEVISEE—ELECTION—CONSTRUCTION—COMMUNITY PROPERTY.

Testator in one paragraph of his will bequeathed to his wife certain real property described therein. In a second paragraph he bequeathed the rest and residue of his estate, real, personal, or mixed, wherever situated, to his wife, and four of his children named, giving an undivided one-fifth share to the wife and to each child. In the third paragraph he declared "that all of my estate is my separate property except a portion thereof equal to a value of eight thousand dollars, that is to say, only eight thousand dollars of my estate is community property." The fourth and fifth clauses of the will named the executors and gave them power to dispose of all or any part of "my estate," and there were no other dispositions of property. *Held*, that it was the intention of the testator to dispose of his separate estate and the whole of the community property; and his widow was put to her election between her share of the community estate and the provision made for her by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2031; Dec. Dig. § 782.*]

4. WILLS (§ 458*)—CONSTRUCTION—LANGUAGE.

A word or phrase in a will occurring more than once is presumed always to be used in the same sense unless the context shows a different meaning, and the meaning of an ambiguous part, under Civ. Code, § 1323, "may be explained by a reference thereto or a recital thereof in another part of the will."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 977; Dec. Dig. § 458.*]

5. APPEAL AND ERROR (§ 934*)—PRESUMPTIONS.

Where the will of a husband disposes of the entire community interest, and it does not appear on appeal from an order distributing the estate that the widow chose to take under the statute, all presumptions are in favor of the action of the court below, and, no objection being made that the court disregarded her choice, it will be presumed that, when required

to elect, the widow chose the provisions of the will, although the record does not expressly disclose whether she made any election.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 934.*]

Department 1. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

In the matter of the estate of Frank C. Vogt, deceased. Appeal by Theresa Vogt from an order making final distribution of the property of said estate. Order affirmed.

A. Morgenthal, for appellant. A. F. St. Sure and Charles C. Boynton, for respondents. Mrs. E. Foley, in pro. per. D. W. Martin, in pro. per.

SHAW, J. This is an appeal by Theresa Vogt, widow of Frank C. Vogt, deceased, from an order making final distribution of the property of the estate of said decedent.

The sole question for decision is whether, under the terms of the will of the deceased, the widow was entitled to take the one-half of the community property which devolved upon her by law, and, in addition thereto, her interest in the other moiety thereof, and in the separate property, as given to her by the will, or whether she was put to an election between the provisions of the will and of the law in respect to such property. The court below held that she was required to elect, and distributed to her only the property given to her by the will. The testator is presumed to have known, when he made his will, that by the law he had no power to dispose, by will, of his wife's interest in the community property, an interest existing only in expectancy at the time, and that, without her consent, he could dispose of only one-half of the community property by the will. It is also presumed, unless the contrary appears from the terms of the will, that he did not intend to devise or bequeath that interest in the community property which he did not have power thus to dispose of. Estate of Gilmore, 81 Cal. 242, 22 Pac. 656; King v. Lagrange, 50 Cal. 331; Estate of Silvey, 42 Cal. 212. "A purpose to attempt the disposition, by will, of property which by statute would pass to the wife, as survivor of the matrimonial community upon his death, is not to be readily inferred, especially where the words employed by the testator may have their fair and natural import by applying them to that moiety of which he had, by law, the testamentary disposition." Estate of Silvey, supra. "It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome these presumptions that the wife can be put to her election either to take under the will or to take what she is entitled to by law." Estate of Gilmore, supra. These rules necessarily imply the qualification that where the intention to dispose of the whole of the

community property, and not of a moiety thereof only, is clearly shown by the terms of the will, and the disposition so made is such that the widow cannot take the moiety given her by law without, to that extent, defeating the plain intent of the testator, she will be required to choose between the provisions of the law and those of the will and may take either, but not both. The intention of the testator to dispose of the entire community estate, if clearly appearing from the will, must prevail over all these presumptions. Estate of Smith, 108 Cal. 119, 40 Pac. 1037. Upon applying these principles to the will in question, we think it clearly appears that the widow was under the necessity of choosing between the inconsistent provisions of the will and the law.

The parts of the will pertinent to the question are as follows:

"Firstly, I give, devise and bequeath to my wife, Theresa Vogt, the following described real property" (describing a lot in the city of Alameda).

"Secondly. The rest and residue of my estate, real, personal or mixed, wheresoever situated, I give, devise and bequeath the whole thereof to my said wife, Theresa Vogt, and to my children, Frederick August Vogt, Charles John Vogt, Henry Frank Vogt and Emilie Marie Schmitt, wife of Frederick Schmitt, that is to say, an undivided one-fifth (1-5th) share thereof to my said wife, and an undivided one-fifth (1-5th) share thereof to each of my said children.

"Thirdly. I hereby declare that all of my estate is my separate property, except a portion thereof equal to a value of eight thousand dollars, that is to say, only eight thousand dollars of my estate is community property."

The fourth and fifth clauses named the executors and gave them power to sell and dispose of all or any part of "my estate." There were no other dispositions of property. The deceased was 69 years old at the time he made the will, April 17, 1903, and he died on April 5, 1905. The widow was a second wife by whom he had no children, those named in the will being children of his first marriage. The value of the entire estate was \$11,460.03. The value of the lot devised to the widow was \$2,350. The residue, after paying the debts and expenses of administration, amounted to \$8,109.25. The lot aforesaid had been occupied by the testator during his lifetime as a home, and it is admitted by appellant that it was his separate property, a fact which does not appear from the record, except by inference. The expense of administration was \$712.82. The language of the will clearly shows that the testator believed that he was thereby disposing of his entire estate, including both his separate estate and the whole of the community property. The intention of the testator in this

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

respect is to be determined by the rules which apply generally to the interpretation of wills; a proper effect being given, of course, to the presumptions aforesaid. A word or phrase occurring more than once therein is presumed always to be used in the same sense, unless the context shows a different meaning. *Le Breton v. Cook*, 107 Cal. 417, 40 Pac. 552. The meaning of an ambiguous part "may be explained by a reference thereto, or a recital thereof in another part of the will." Civ. Code, § 1323. The testator is presumed to have known that his absolute testamentary power extended only to an undivided one-half of the community property. With this knowledge he was careful, when he came to dispose of the property other than the homestead, to describe it as "the rest and residue of my estate, personal or mixed wheresoever situated," and to say that he gave "the whole thereof" to his wife and the four children, in equal parts, one-fifth to each. This, alone, indicates his intention to give the whole of the community property in that manner, and to that extent it is inconsistent with a design to affect or dispose of only a one-half thereof. Next, he shows what was in his mind by declaring, "all of my estate is my separate property, except a portion thereof equal to a value of eight thousand dollars," and then, to make it more certain by a different form of expression, he reiterates the fact by saying: "Only eight thousand dollars of my estate is community property." If he had been referring to only one-half of the community estate, it would not have been true that it would have equaled eight thousand dollars in value. He thus makes it clear that in this part of the will the phrase "my estate" was used to describe and include both moieties of the community property. It would be presumed to have been used for the same purpose in the second clause where he disposes of the residue of "my estate," unless the contrary was indicated. But he puts this beyond doubt by the express statement, as to this residue, that he there disposes of "the whole thereof," thus excluding the idea that he was dealing with one-half only, or with any undivided portion. Manifestly to his mind, as it appears from the will, his estate embraced both his separate property and the entire interest in the community property, and the will must be deemed to have disposed of it accordingly.

She was not compelled to accept this provision. She might have repudiated the will entirely, and could then have insisted upon the share of the estate which the law allowed her. The court rightly held, however, that she was put to her election. It does not appear that she chose to take under the law. The distribution was made in accordance with the will, as we have interpreted it. All presumptions are in favor of the action of the court below. No objection is made that the court

disregarded her choice, and we therefore presume that, when required to elect, she chose the provisions of the will, although the record does not expressly disclose whether she made any election or not.

The order of distribution is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

154 Cal. 513
ANGLO-CALIFORNIAN BANK, Limited, v.
FIELD et al. (S. F. 4,729.)

(Supreme Court of California. Nov. 13, 1908.)

1. MORTGAGES (§ 199*)—MORTGAGEE IN POSSESSION UNDER DEED OF EQUIT OF REDEMPTION—RIGHT TO RENTS AND PROFITS.

A mortgagee in possession under a deed of the equity of redemption from the mortgagor is not liable as mortgagee in possession to account to junior lien holders for rents and profits received after he took possession under the deed, since by his deed he succeeds to all the rights of his grantor in the land, including the right to possession thereof and the use and profits until legally dispossessed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 523; Dec. Dig. § 199.*]

2. PLEADING (§ 258*)—TRIAL—AMENDMENT—DISCRETION OF COURT.

No abuse of discretion in the allowing of an amendment to the answer after the case was closed was shown where the adverse party was fully protected in its right to meet the amendment and the testimony offered in support thereof.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 776; Dec. Dig. § 258.*]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The erroneous admission of immaterial evidence which does not prejudice a party is harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

Department 1. Appeal from Superior Court, Monterey County; M. T. Dooling, Judge.

Action by the Anglo-Californian Bank, Limited, against T. J. Field, administrator, the Bank of Monterey, and others. There was a judgment, and, from an order denying its motion for a new trial, the Bank of Monterey appeals. Order affirmed.

See, also, 146 Cal. 644, 80 Pac. 1080.

Zabala & Wyatt, for appellant. J. W. Lillenthal and Dougherty & Lacey, for respondents.

ANGELLOTTI, J. This is an appeal by defendant the Bank of Monterey from an order denying its motion for a new trial.

The action was instituted by plaintiff in February, 1898, to foreclose a mortgage, in the form of an absolute deed, executed on March 10, 1894, by George and Elsie Brandt, the owners of the property therein described, and duly recorded March 22, 1897. Defendant Bank of Monterey is the holder of a junior mortgage, also in the form of a deed, covering the same property, executed

by the Brandts on April 16, 1897, which it here seeks to foreclose. While this action was pending on January 24, 1899, the cross-defendant, Thomas W. Cowan, purchased from plaintiff its promissory notes and mortgage for \$8,000. On February 28, 1899, he purchased the mortgaged property from the Brandts, receiving a deed of that date, conveying the property to him for an expressed consideration of \$5, subject to the mortgages held by plaintiff and the Bank of Monterey. This deed was not recorded until January 2, 1902. Immediately upon receiving this deed the grantee Cowan entered into possession of the property, and has ever since been in such possession. George Brandt died on November 20, 1899, and T. J. Field is the administrator of his estate. The action was first tried in the superior court on March 11, 1902, and the lower court held that the lien of the mortgage to plaintiff assigned to Cowan was extinguished and merged in the fee by the conveyance of the mortgaged property by the Brandts to Cowan, the assignee of plaintiff, and that the lien of the mortgage of the Bank of Monterey was therefore superior thereto. Judgment was given accordingly. Upon appeal to this court, it was held that there was no merger; the court saying: "It is true that, under ordinary circumstances, where the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest is merged in the fee and the mortgage is extinguished. This is the ordinary legal effect of the transaction, and ordinarily the intention is presumed to accord with the act accomplished. But this rule is never applied where there is an intervening lien on the property, which it is to the interest of the purchaser to keep on foot, and where there is no evidence, direct or circumstantial, of an express intention to extinguish the first mortgage and hold subject only to the second. In such a case the legal title and first-mortgage lien will be considered as separate interests whenever necessary for the protection of the just rights of the purchaser." See *Anglo-Californian Bank v. Field et al.*, 146 Cal. 644, 653, 80 Pac. 1080, 1083. The judgment was therefore reversed, and the cause remanded for a new trial.

On the retrial in the lower court, the principal claim of defendant Bank of Monterey was that it was entitled to have the value of the use and occupation of the premises during the time that Cowan occupied the same from February 28, 1899, accounted for and applied to the payment of the senior mortgage held by him. The answer and cross-complaint of said bank do not allege that Cowan entered into possession as mortgagee, or otherwise than under his deed from the Brandts conveying the property to him. It was alleged that the consideration for such deed was nominal; that Cowan refrained from recording the deed until January 2, 1902, for the purpose of deceiving

said defendant as to the nature of his occupation; and that the rents and profits of the land during all the time Cowan has been in possession were \$100 per month. The trial court found that there was a substantial consideration for the execution of the Brandt deed, and under the allegations of such answer and cross-complaint as to the value of the property there can be no claim that any substantial consideration was inadequate or unfair, in view of the amount of incumbrances on the property. The court further found that the delay in recording the deed was not for the purpose of deceiving the Bank of Monterey, and also that the value of the use and occupation of such property was \$75 per month. It further expressly found that Cowan entered into and has held possession of said property solely by virtue of the conveyance from the Brandts, and has never occupied the same as a mortgagee. This finding is not attacked. Further finding against the claim of merger, it concluded that the Bank of Monterey was not entitled to have the value of the rents and profits or the value of the use and occupation of the land set off against the Cowan mortgage, and that Cowan was entitled to be paid from the proceeds of the foreclosure sale, before anything was paid to the Bank of Monterey therefrom, the full amount of principal and interest due under the terms of the notes originally held by plaintiff and transferred to Cowan, without deduction or credit on account of rents and profits or value of the use and occupation. Judgment was given accordingly, decreeing the amounts due the respective parties, and directing a sale of the mortgaged property, and the application of the proceeds after payment of costs of sale, etc., first, to the payment of the amount due Cowan on such notes and mortgage; and, second, any surplus then remaining to the payment of the amount due the Bank of Monterey.

The ruling of the trial court to the effect that the rents and profits of the land or the value of the use and occupation thereof could not be charged against Cowan's mortgage was undoubtedly correct. It being established that Cowan never entered into possession under his mortgage, but has been in possession solely under the deed of the mortgagors conveying to him the land subject to the mortgages, no foundation exists for any liability on his part on account of rents and profits or the value of the use and occupation of the land. It is well settled that a mortgagee in possession under a deed of the equity of redemption from the mortgagor is not liable as mortgagee in possession to account to junior lienholders for rents and profits received after the time he took possession under the deed. See *Jones on Mortgages*, §§ 1118, 1118a; *Gaskell v. Viquesney*, 122 Ind. 244, 23 N. E. 791, 17 Am. St. Rep. 364; *Gault v. Eq. Trust Co.*, 106

Ky. 578, 38 S. W. 1065; *Rogers v. Herron et al.*, 92 Ill. 583, 588; *Gray v. Nelson*, 77 Iowa, 63, 41 N. W. 566. This is necessarily true. By virtue of his deed such mortgagee succeeds to all of the rights of his grantor in the land, including the right to remain in possession thereof and enjoy the use and profits until legally dispossessed, occupying the same position in this regard that the grantor would have occupied had he not conveyed, or that any purchaser not holding a senior mortgage would have occupied. He is in possession solely as the owner of the property subject to the existing mortgages, and there is no liability to account to any one for the value of the use and occupation thereof. As owner he is entitled to such possession and the fruits thereof. See *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006. The reason underlying the rule requiring a mortgagee in possession to account for the rents and profits is that the mortgage does not entitle him to possession, and the profits of the possession are consequently received by him as a trustee for the mortgagor and not for himself. Where, therefore, he has no other right to possession, he must account for the value of such profits. Where, however, he has succeeded to the rights of the mortgagor in the land, and, as such successor, has become entitled to such profits as owner, the whole foundation for the application of the rule is taken away. The right of a junior mortgagee to compel such an accounting does not rest upon any obligation of the senior mortgagee to him, for there is no contract between them, but it rests solely on the fact that the senior mortgagee is under obligation to the mortgagor to account, and, by reason of his junior lien, he has the right in equity to stand in the place of the mortgagor and enforce an accounting to the same extent only that the mortgagor could have enforced it. *Gaskell v. Viquesney*, supra; *Gault v. Eq. Trust Co.*, supra. Where no such obligation to account exists in favor of the mortgagor, it cannot exist in favor of a junior encumbrancer.

We do not think that there was any abuse of discretion in allowing Cowan to amend his answer after argument commenced by inserting a denial of the allegation that the deed of the Brandts to him was given for a purely nominal consideration, and an averment that there was a substantial consideration therefor, and in allowing testimony to be given thereon. The only objection made thereto was that the case had been closed. The mere fact that the testimony had been closed did not preclude the court from taking this action if it deemed it to be in the interest of justice, and if the defendant bank was fully protected in its right to meet the amendment and the testimony offered in support thereof with such evidence as it desired

to present. Such matters are largely within the discretion of the trial court. Defendant bank would undoubtedly have been granted time, if necessary, to contest the matter thus set up by amendment, but expressed no wish in that behalf.

No ground of objection appears to have been specified in the objection to the evidence given by Cowan to the effect that since he entered into possession of the property he has made improvements thereon of the value of \$2,000. The objection urged in appellant's brief is simply that it was immaterial. It does not appear to us that the evidence could have prejudiced it in the slightest degree, even if we assume it to have been immaterial.

This disposes of all the points made for reversal.

The order denying a new trial is affirmed.

We concur: SHAW, J.; SLOSS, J.

(154 Cal. 527)

In re HALL'S ESTATE.
CROCKER et al. v. HALL.
(S. F. 4,992.)

(Supreme Court of California. Nov. 13, 1908.)

1. GIFTS (§ 5*)—INTER VIVOS—REQUISITES.

Where an instrument recited that it was made in consideration of the sum of \$5, and of the love and affection of the donor, the recital of a nominal consideration did not prevent the transaction from operating as a gift, within Civ. Code, § 1146, defining a gift as a transfer of personal property without consideration.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3084-3087; vol. 8, p. 7670.]

2. GIFTS (§ 18*)—INTER VIVOS—DELIVERY—NECESSITY.

Under Civ. Code, § 1147, requiring a delivery to the donor in case of a verbal gift, where a gift inter vivos is evidenced by writing, there need be no actual delivery.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 32; Dec. Dig. § 18.*]

3. GIFTS (§ 15*)—INTER VIVOS—INTENT—NECESSITY.

No gift of personal property, whether verbal or evidenced by writing, except a gift causa mortis, is effectual unless the owner intends to completely divest himself of dominion over the property.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 3, 14; Dec. Dig. § 15.*]

4. GIFTS (§ 50*)—INTENT—QUESTIONS FOR JURY.

Whether a donor intended to divest himself of dominion over personal property is a question of fact to be determined upon all the evidence by the trial court or jury like other questions of fact.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 101; Dec. Dig. § 50.*]

5. GIFTS (§ 48*)—EVIDENCE—ADMISSIBILITY.

In determining whether the owner intended to make a gift of property, declarations of the donor, both before and after the transaction, are admissible.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 91; Dec. Dig. § 48.*]

6. APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE—FORMER DECISIONS—SCOPE.

A former decision holding that an instrument was not a will, but a deed, which transferred to the grantee the property described, did not decide the question of the grantor's intent to make a completed gift of the property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370, 4373; Dec. Dig. § 1099.*]

7. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF TRIAL COURT—CONCLUSIVE-NESS.

The finding of the trial court that there was no valid gift of the property will not be disturbed on appeal if based on substantial evidence warranting the inference that the owner did not intend to immediately divest his dominion over the property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

8. GIFTS (§ 49*)—INTER VIVOS—EVIDENCE—SUFFICIENCY.

The evidence held sufficient to support a finding of the trial court that an alleged donor did not intend that title and dominion over the property should pass.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

9. TRUSTS (§ 34*)—EXPRESS TRUSTS—DEPOSIT OF MONEY IN BANK—INTENT OF DONOR.

Where the evidence was insufficient to establish a gift inter vivos of money deposited in bank, in order that the depositor or the bank might be declared a trustee thereof, the money must have been deposited with intent to create a trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 44; Dec. Dig. § 34.*]

10. TRUSTS (§ 44*)—CREATION—EVIDENCE TO ESTABLISH TRUSTS—SUFFICIENCY.

Evidence held insufficient to require a finding that money was deposited in a bank with the intention of making the bank or the depositor a trustee for another.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

11. EXECUTORS AND ADMINISTRATORS (§ 465*)—SETTLEMENT—JURISDICTION.

The superior court had jurisdiction, in settling the accounts of an administrator, to determine the amount of money or property of the estate which had come into his hands, and to charge him therewith.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1990; Dec. Dig. § 465.*]

12. EXECUTORS AND ADMINISTRATORS (§ 510*)—SETTLEMENT—REVIEW—NATURE OF REMEDY.

If an administrator is improperly charged with funds as belonging to the estate, his remedy is by appeal from the decree settling his final account.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 510.*]

Department 1. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Helena Crocker and others against Louisa Hall, administratrix of the estate of George D. Hall, deceased. From an order charging defendant with a certain sum as administratrix, and denying a motion for

a new trial, the administratrix appealed. Affirmed.

See, also, 149 Cal. 143, 84 Pac. 839.

Nowlin & Fassett and Wm. H. H. Hart (Aylett R. Cotton, of counsel), for appellant. S. C. Denson, for respondents.

SLOSS, J. George D. Hall died on March 15, 1904, survived by his widow Louisa Hall, Helena Crocker, his sister, and Henry A. Hall, his brother. He left no other heirs. The widow applied for letters of administration upon the estate, and such letters were issued to her on April 4, 1904. On November 2, 1904, she filed, in the matter of said estate, a paper claimed by her to be the will of George D. Hall, together with a petition that it be admitted to probate, and that letters of administration with the will annexed be issued to her. A contest was filed by the brother and sister of the decedent, respondents herein, and the court rendered judgment denying probate. An appeal to this court by the proponent resulted in an affirmance of the judgment refusing to admit the alleged will to probate. Estate of Hall, 149 Cal. 143, 84 Pac. 839. This paper is quoted in full in the opinion of this court on that appeal. It will be sufficient at this time to state that it is an instrument in the form, generally speaking, of a deed, executed by George D. Hall in his lifetime, and purporting to convey to Louisa Hall, his wife, all personal property which he possessed at the date of the instrument, or might thereafter own or possess, with the proviso, however, that the conveyance was to remain null and void during his lifetime, but to become effective upon his death, the party of the second part being authorized at that time to take full possession. At the time of Hall's death, there was on deposit in his name, in a San Francisco bank, the sum of \$13,822.72, and that amount, or more, had so stood to his credit at all times after the execution of the paper just referred to. On April 2, 1904, the administratrix had filed an inventory, in which she included the money in bank as assets of the estate. After the decision determining that the paper offered by her for probate was not a will, she asked and obtained from the court leave to amend her inventory by excluding all of said money therefrom. Subsequently she filed in the superior court her final account, in which she stated that "no property, either personal or real, has been discovered or found by the above administratrix belonging to the estate of George D. Hall, deceased, and no money or other personal property is now or has been in the possession of this administratrix belonging to said estate." Objections to the account were filed by Henry A. Hall and Mrs. Crocker, and upon a hearing it was determined by the court below that the administratrix

should be charged with the sum of \$13,822.72 in money belonging to the decedent at the time of his death, and an order was made that she be so charged, and that the account be settled accordingly. From this order, and from an order denying a motion for a new trial the administratrix appeals.

The main point in controversy between the parties turns upon the legal effect of the instrument offered for probate as the will of the deceased. On the part of the respondents it is contended that the paper evidences on its face an intent to dispose of property only upon the death of the signer, and that it is accordingly testamentary in character. On the other hand, the appellant urges that the proper construction of the document is that it is a present conveyance of the grantor's interest in the property described, with a postponement of the right of actual enjoyment. On the appeal from the order denying probate, the respective parties took positions directly opposed to those now assumed. The widow insisted that the paper was testamentary; the other heirs that it was not. In affirming the order there under review, this court said: "The * * * instrument is certainly not in form a will. It does not contain any of the usual words of devise or bequest, nor any words equivalent thereto. It is in form and substance a deed between two parties by which one grants and transfers to the other certain property. * * * The instrument in question here is clearly a deed granting and transferring in present to the grantee named therein the property described, but reserving its enjoyment until the happening of a future contingency, and this was clearly the purpose of the grantor." Defeated in her effort to secure probate of the paper as a will, the widow is now, naturally and properly enough, seeking to establish its effectiveness as an immediate transfer of title. To this end she relies upon the above-quoted declarations in the opinion in 149 Cal. as the "law of the case." The matter then before the court was an appeal from an order denying probate. The record of the proceeding in the superior court (a part of which was offered in evidence on the hearing of the account) shows that the refusal to admit the alleged will to probate was based upon a finding that the paper had not been published as a will. This want of one of the statutory requisites to the making of a will is also referred to in the opinion of this court, and might well be treated as the true basis of the ruling there made. We may assume, however, for the purposes of this case, that the ground, or at least one of the grounds, of the earlier decision, was that the paper was on its face a present transfer, rather than a testamentary disposition. It may also be assumed, though we do not decide, that after an appeal from an order denying probate, an appeal from an order settling an administrator's account is so far a second appeal in the same case that the

doctrine of the law of the case may be deemed applicable.

Taking it as established, for the purposes of this appeal, that the paper in question purports to effect a present transfer, subject to a postponement of enjoyment, of the grantor's interest in certain property, the question whether or not it was so executed and delivered as to accomplish this purpose, still remains. The former opinion did not undertake to dispose of this issue. Indeed the court expressly declined to dispose of it by saying, at the close of the opinion, "whether or not the instrument is effective for the purpose intended is not in question here. If it should be held to be inoperative for that purpose, that fact would not turn the deed into a will." The paper recites that it is made in consideration of the sum of \$5, "as also for and in consideration of the love and affection, and for the better maintenance of Louisa Hall." It is not pretended that any money or other thing of value actually passed between the parties, and the recital of a nominal consideration does not conflict with the obvious conclusion that the transaction, if valid at all, was intended to operate as a gift. "A gift is a transfer of personal property, made voluntarily, and without consideration." Civ. Code, § 1146. Where a gift *inter vivos* is evidenced by a writing duly executed by the donor, the property need not be actually delivered. The requirement of delivery has application only to verbal gifts. Civ. Code, § 1147; Ruiz v. Dow, 113 Cal. 490, 496, 45 Pac. 867; Driscoll v. Driscoll, 143 Cal. 523, 77 Pac. 471. But no gift of personal property (except a *donatio mortis causa*) is complete and effectual unless there exists an intent, on the part of the owner, to completely divest himself of dominion over the property. Denigan v. Hib. S. & L. Soc., 127 Cal. 137, 59 Pac. 389; Robinson v. Mutual Sav. Bank (Cal. App.) 95 Pac. 533. In this respect there is no distinction between verbal gifts and those evidenced by a writing. "To constitute such a gift [i. e., one *inter vivos*]," as is said in Zeller v. Jordan, 105 Cal. 143, 38 Pac. 640, "there must be an immediate transfer of the title, and the donor must relinquish all present right to or control over the thing given." If such right or control be immediately surrendered, the gift may be complete, although possession is not taken, or intended to be taken, by the donee until some future time. Ruiz v. Dow, *supra*; Driscoll v. Driscoll, *supra*. But in every case, although the writing may by its terms purport to presently pass the title, the validity of the attempted gift will depend upon the intention of the alleged donor. Knight v. Tripp, 121 Cal. 674, 54 Pac. 267. If he intended to and did divest himself of all control over the property, the gift is complete. What the intent was is a question of fact, to be determined, like other questions of fact, by the trial court or the jury, upon all the evidence in the case. In determining it, declarations of the donor,

made before or after the transaction, are admissible. *Ruiz v. Dow*, supra.

It is clear that, on the appeal from the order denying probate, this court did not assume to decide whether or not Hall in fact intended to make a complete gift of the property to his wife. What was there said regarding the "purpose of the grantor" had reference to the construction of the writing itself. We are therefore here confronted, for the first time, with the question of intent, in so far as such intent is a factor in the validity of the alleged gift. The evidence contained in the record shows that Hall did not do any act whatsoever to transfer his said bank account to his wife except to execute and deliver said document. He did not give or make any assignment, check, or order to his wife, and never at any time gave her any possession, delivery, or control of the said deposit. On the contrary, he at all times retained in his own possession the passbook, and retained and exercised the absolute and exclusive management and control of his said bank account, depositing to and drawing from the same from time to time. It appears that the instrument was drawn by an attorney under instruction from Mr. Hall; that at the time of its execution and delivery Hall said that he wanted his wife to have what was left of his property at the time of his death. There can be no question that on these facts the court was fully justified in concluding, as it did, that the money on deposit did not pass to Mrs. Hall, but that it was a part of Hall's estate. The intent of the alleged donor being a question of fact, the determination of the lower court must stand on appeal, if based upon any substantial evidence warranting the inference that an immediate divesting of ownership and dominion over the property was not intended. The declaration of Hall that he wanted Mrs. Hall to have all that might remain at his death was certainly consistent with an intent on his part to retain the absolute ownership during his lifetime and to have title pass only upon his death. This interpretation of the circumstances attending the execution of the paper is supported by his subsequent conduct. While a contrary conclusion would probably have been justified by the evidence, the one that was reached was in no degree unreasonable or contrary to the showing made. It might be suggested that Mrs. Hall's title could be upheld on the theory that the transaction had the effect of making Hall or the bank a trustee for her benefit. *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370. But to accomplish this result it is essential that there be an intent to create a trust, and the evidence above recited certainly did not require a finding of such intent. *Noble v. Learned* (Cal.) 94 Pac. 1047.

Some doubt is suggested by the appellant as to the power of the court, in a proceeding

of this kind, to adjudicate, as between the estate and the administratrix, the title to property claimed by the latter adversely to the estate. Whether or not the order here appealed from could be regarded as conclusively determining this question of title, there can be no doubt that the superior court has jurisdiction, in settling the accounts of an administrator, to determine the amount of money or property of the estate that has come into his hands, and to charge him therewith. "If he is improperly charged, his remedy is to appeal from the decree settling his final account. I know of no other way in which it can be reached." *In re Burdick*, 112 Cal. 387, 44 Pac. 734.

The orders appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

9 Cal. App. 177

MERCED BANK v. PRICE et al.

(S. F. 4796.)

(Supreme Court of California. Dec. 3, 1908.)

1. APPEAL AND ERROR (§ 867*)—NEW TRIAL—DENIAL—SCOPE OF APPEAL—SUFFICIENCY OF COMPLAINT—FINDINGS.

The sufficiency of the complaint, or of the findings to support the judgment cannot be reviewed on appeal from an order denying a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3480; Dec. Dig. § 867.*]

2. APPEAL AND ERROR (§ 867*)—REVIEW—DENIAL OF NEW TRIAL—BILL OF EXCEPTIONS.

On appeal from an order denying a motion for a new trial, the court may examine the bill of exceptions to determine whether the evidence sustains the findings and whether any prejudicial errors of law were committed at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3480; Dec. Dig. § 867.*]

3. APPEAL AND ERROR (§ 231*)—OBJECTIONS IN TRIAL COURT—SUFFICIENCY—ADMISSION OF EVIDENCE.

A mere objection to evidence offered and allowed, unaccompanied by any ground or reason, is insufficient to present reviewable error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1299; Dec. Dig. § 231;* Trial, Cent. Dig. §§ 194-210, 223-227.]

4. BANKS AND BANKING (§ 74*).

In an action, by the pledgee from a bank of a note and mortgage, to foreclose the mortgage, evidence *held* to show that an absolute assignment of the pledge by the bank to the pledgee, made in settlement of the bank's debt to the pledgee, and while the bank was in liquidation under the bank commissioners, was not fraudulent as against the bank's creditors.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 74.*]

5. BANKS AND BANKING (§ 74*)—LIQUIDATION—ASSIGNMENT OF ASSETS—ACTION BY ASSIGNEE—OBJECTION BY CREDITORS.

Where a note and mortgage pledged by a bank were assigned to the pledgee while the bank was in liquidation, the mortgagor, even if a general creditor of the bank, could not attack the assignment in an action to foreclose the mortgage.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 74.*]

6. PLEDGES (§ 25*)—REDELIVERY OF PROPERTY—LIEN—EXTINGUISHMENT—THINGS IN ACTION.

Civ. Code, § 2913, provides that the voluntary restoration of property to its owner by the holder of a lien thereon, dependent on possession, extinguishes the lien, etc. *Held*, that, a note and mortgage pledged by a bank being things in action, and therefore subjects of a lien without change of possession, their redelivery by the pledgee to the bank for collection did not extinguish the pledgee's lien.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 55-57; Dec. Dig. § 25.*]

7. PLEDGES (§ 58*) — PLEDGOR'S RIGHTS TO SUE.

Where a bank pledged a note and mortgage, it was still the owner, subject to the pledgee's lien, under Civ. Code, § 2888, providing that a lien, or contract for a lien, transfers no title to the property subject thereto, notwithstanding an agreement to the contrary, and was therefore entitled to sue thereon.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 191; Dec. Dig. § 58.*]

8. BANKS AND BANKING (§ 73*)—LIQUIDATION—PLEDGED SECURITIES.

Where a note and mortgage, payable to a bank as a corporation, was pledged by the bank, it was entitled to sue thereon in its corporate name, though it was in course of liquidation.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 73.*]

9. BANKS AND BANKING (§ 73*) — LIQUIDATION—ACTIONS—ASSIGNED SECURITIES—COMPLAINT.

Where a bank in process of liquidation, sued on securities, payable to it as a corporation, which it had pledged, and which had been reassigned to it by the pledgee "for collection," allegations of intermediate assignments, or that the bank was in liquidation, were unnecessary.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 73.*]

10. BANKS AND BANKING (§ 73*)—LIQUIDATION—TRANSFER OF ASSETS—STATUTES.

St. 1895, p. 172, c. 167, creates a bank commission, and section 11 (page 175) requires the commissioners to control a bank in liquidation until the court shall order the commissioners to surrender the property in their possession to the corporation for liquidation, and that the directors or trustees shall be permitted to manage the bank's affairs during liquidation. The corporation is also required to report its affairs to the commissioners, and with amounts realized for property sold since any previous report. *Held*, that the officers of a bank in process of liquidation had power, with the knowledge and acquiescence of the bank commissioners, to make an absolute assignment of pledged securities to the pledgee, in a final settlement of the bank's transactions with such pledgee.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 73.*]

11. PARTIES (§ 59*)—NEW PARTIES—SUBSTITUTION—ASSIGNEES.

Code Civ. Proc. § 473, provides that the court may allow a party to amend any pleading or proceeding by adding to or striking out the name of any party, etc. *Held* that, where an action to enforce pledged securities was properly brought by the pledgor, and during its pendency the securities were absolutely assigned to the pledgee, the court properly permitted an amendment, substituting the pledgee as plaintiff: the action not being thereby changed.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 90-94, 165; Dec. Dig. § 59.*]

12. PARTIES (§ 59*) — CAUSE OF ACTION — ASSIGNMENT — EFFECT.

Where an action on pledged securities was properly brought by the pledgor, and pending suit the securities were absolutely assigned to the pledgee, the action might have been continued in the name of the original plaintiff for the assignee's benefit, or she might have been substituted as sole plaintiff, as expressly provided by Code Civ. Proc. § 385.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 90-94, 165; Dec. Dig. § 59.*]

13. LIMITATION OF ACTIONS (§ 125*)—SUBSTITUTION OF PARTIES.

Where an action to enforce pledged securities was properly brought by the pledgor before limitations had run, and pending suit, the securities were absolutely assigned to the pledgee, who was thereupon substituted as plaintiff by an amendment of the complaint after the limitation period had expired, the amendment did not constitute a new action, and the action was therefore not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 542; Dec. Dig. § 125.*]

14. PLEADING (§ 237*) — AMENDMENT — CONFORMITY TO PROOF.

Where, pending suit on pledged securities by the pledgor, the securities were absolutely assigned to the pledgee, it was not an abuse of the trial court's discretion to permit the filing of a supplemental complaint to conform to the proof, merely alleging such assignment, and the agreement by which the pledgee held the securities, and how and why she came to redeliver them to the pledgor in addition to the matters already pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

15. APPEAL AND ERROR (§ 959*) — REVIEW — DISCRETION—SUPPLEMENTAL PLEADINGS.

An order permitting plaintiff to file a supplemental complaint will be reversed only on a showing that the trial court's discretion was abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.*]

On Motion for Rehearing.

16. APPEAL AND ERROR (§ 867*)—SCOPE OF REVIEW—ORDER DENYING NEW TRIAL—MATERIAL ISSUES—FAILURE TO FIND.

Failure of the trial court to find on a material issue renders the decision one against law, which is therefore reviewable on appeal from an order denying a motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

In Bank. Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Action by Merced Bank, a corporation, and Sophie A. Ivett, substituted plaintiff, against James D. Price and others. A judgment for plaintiff was affirmed by the appellate court, and appellants applied for a rehearing in the Supreme Court. Application denied.

The following is the opinion (filed October 5, 1908) of CHIPMAN, P. J., in the District Court of Appeal, with whom concurred BURNETT and HART, JJ.

"Action to foreclose a mortgage. Plaintiff had judgment. Defendants appeal from the order denying their motion for a new trial. There is no appeal from the judgment. Neither the sufficiency of the complaint nor the

sufficiency of the findings to support the judgment can be reviewed on this appeal. *Jenkins v. Frink*, 30 Cal. 586, 596, 89 Am. Dec. 134; *Shepard v. McNeil*, 38 Cal. 72; *Roberts v. Eldred*, 73 Cal. 394, 398, 15 Pac. 16. It was said in *Moore v. Douglas*, 132 Cal. 399, 64 Pac. 705: "The appeal from the judgment, not having been taken in time, cannot be considered; and the appellant's contention that the complaint failed to state a cause of action, and that the demurrer to the same should have been sustained, also that the judgment is not supported by the findings, and that the findings are contradictory and inconsistent with the pleadings, cannot therefore be considered, there being no appeal from the judgment,"—citing cases. We may, however, look into the bill of exceptions to determine whether the evidence is sufficient to sustain the findings, and also to determine whether any prejudicial errors of law were committed at the trial. *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791.

"The promissory note in question was executed by defendants the Prices, and was secured by mortgage executed by them, and also by defendant Mary Wilson, the husband of Mrs. Wilson being joined in the action. The note was executed January 31, 1894, and matured October 1, 1894, and was made payable to the Merced Bank or order. The action was commenced by the Merced Bank on September 30, 1898. It appeared that on January 31, 1895, the plaintiff bank and Sophie A. Ivett, as administratrix of the estate of John L. Ivett, deceased, entered into an agreement, which recited that the bank is indebted to Mrs. Ivett as administratrix, certain sums aggregating \$20,198.45, and also to the Bank of British Columbia, which holds certain notes and securities of said Merced Bank; that the Merced Bank was desirous of releasing said securities, and to that end agreed to transfer and assign the same to Mrs. Ivett upon her advancing and paying to said Bank of British Columbia the sum of \$4,000; that upon said payment by her she was to release to Merced Bank all securities held by her in excess of \$15,148.84 'in face value of the principal thereof'; that the Merced Bank was to issue to her a certificate of deposit for \$15,148.84 and another certificate for \$6,049.61, 'now due her as aforesaid; said certificates to show on their face that they are issued for moneys due before liquidation, and its promissory note for said sum of \$4,000.' To secure this note the directors of the bank were to guarantee its payment, and to secure the said sum of \$15,148.84, Mrs. Ivett was to retain the securities turned over by the Bank of British Columbia, in face value of that sum, 'if sufficient thereof are satisfactory to her,' and if not, 'then a sufficient amount of other securities to make up said sum.' Mrs. Ivett made the payment to the Bank of British Columbia, and received from plaintiff bank certain securities, among which were the

note and mortgage sued on in this action. It was testified that plaintiff bank failed to deliver to Mrs. Ivett all the securities agreed to be delivered to her, but that they were retained by the bank and collected, and the proceeds were not paid to her, and that the \$4,000 advanced by her was to be repaid out of the assets of the bank other than said securities, which was thereafter done. This payment, together with \$450 and \$600, collected from securities held by her, was all she had received from said securities up to October 2, 1900. On September 10, 1898, Mrs. Ivett addressed a letter to plaintiff bank, in which she said: 'As the \$6,500 Price note dated January 31, 1894, which I hold as collateral security will outlaw Oct. 1, 1898, and I do not care to be put to the trouble of collecting the same, or be held responsible for not collecting the same, I hereby authorize you to proceed to collect the said note and mortgage, and for that purpose herewith send you note indorsed "For collection." Sophie A. Ivett.' Thereafter, on September 30, 1898, the present action was commenced by the plaintiff bank, in the usual form of complaint on foreclosure, duly verified. On September 27, 1899, defendants answered, alleging the transfer of said note and mortgage to Mrs. Ivett, and that she, and not the plaintiff, is the owner and holder thereof, praying judgment that plaintiff is not the owner and holder of said note and mortgage. The execution of the note and mortgage was admitted by failure to deny, as also was nonpayment. An amended complaint, correcting the description of the land, was, by leave of court, filed on July 18, 1901. On October 2, 1900, plaintiff bank and Mrs. Ivett entered into an agreement of final settlement of their transactions, and mutually released each other from further liability each to the other, in consideration of which plaintiff bank assigned and transferred 'absolutely all those securities still uncollected which said Sophie A. Ivett has heretofore held as collateral under agreement, * * * dated January 31, 1895, together with all notes, mortgages, trust deeds, relating to the same, judgments recovered upon the same, rights of action pending or existing on the same, and every right, title and interest of said Merced Bank in and to the same.' This assignment included the present cause of action. On July 28, 1901, defendants served their notice to dismiss the action on the ground of want of prosecution, and on August 7, 1901, the plaintiff bank served and on August 10, 1901, filed in court notice of motion 'for an order permitting said action to be continued in the name of the original plaintiff, or that said Sophie A. Ivett may be substituted as plaintiff in said action.' This motion was based upon the said agreement of October 2, 1900. On October 1 and 2, 1901, said motion to dismiss was heard by the court and granted. Thereafter an appeal from the order was taken to the Supreme Court, and

the order was reversed. *Merced Bank v. Price et al.*, 145 Cal. 436, 78 Pac. 949. On April 13, 1905, the court made an order substituting Sophie A. Ivett as plaintiff in said action. At the beginning of the trial of the action, to wit, on June 19, 1905, defendants filed their first amended answer, alleging the transfer of the cause of action to Mrs. Ivett; the distribution to her of all the estate of J. L. Ivett, deceased, on September 16, 1895; denying indebtedness to plaintiff bank, and pleading the statute of limitations (section 337, Code Civ. Proc.); that the action was not commenced by any person or corporation having the right to maintain the same within four years after the date of said note. Defendants also thereafter moved to dismiss the action 'on the ground that no allegation of assignment from Merced Bank to Sophie A. Ivett is made by said amended complaint,' and said motion was denied, defendants excepting. Thereupon, and on June 19, 1905, defendants filed a second amended answer, alleging, in addition to what had been previously alleged, that when the original complaint was filed the Merced Bank was not a corporation existing and doing business, etc., but 'had ceased to do business as a corporation, prior to the filing of said original complaint,' and 'had no power or authority to maintain this action'; denied the alleged assignment of the cause of action to Mrs. Ivett 'at any time subsequent to the commencement of the action'; denied the power of the bank to make any assignment thereof, or that it had any assignable interest in said cause of action in the month of October, 1901. It further appears that at the trial the said note and mortgage 'were proved and admitted in evidence * * * over defendants' objections and exceptions,' but no grounds of objection are stated. The letter of Mrs. Ivett of September 10, 1898, to plaintiff bank was admitted in evidence, and there was testimony that at that time Mrs. Ivett held the note and mortgage as collateral security, and she turned them over to the bank for collection only; that they were part of the securities referred to in the agreement of January 31, 1895; 'that she held said note and mortgage as collateral security up to October 2, 1900, and that on October 2, 1900, she made a complete settlement with the Merced Bank, and received the assignment and transfer of said note and mortgage absolutely, as set out in said assignment of October 2, 1900,' which latter was duly proved and admitted in evidence.

"The decree of distribution of the estate of J. L. Ivett to Mrs. Ivett was also admitted in evidence. It appeared at a later stage of the case, and was found by the court, that on the petition of the bank commissioners, in an action commenced October 12, 1895, under the act approved March 30, 1878, and amended January 25, 1895, the said bank was adjudged insolvent, and prohibited from transacting any further business, 'except for

the purpose of liquidation.' Resuming the history of the trial, it appears that the bank commissioners extended the period for liquidation, from time to time, and on February 7, 1902, caused an order to be entered in its records reciting that all the assets of the bank have been sold, and the proceeds paid to the creditors of the bank, and the affairs of said bank are fully administered and wound up, concluding as follows: 'It is ordered that said bank be dropped from the list of banks.' The order of substitution, filed April 13, 1905, was admitted in evidence 'over the defendants' objections and exceptions,' the grounds of which are not stated. Thereupon defendants 'moved for a nonsuit, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, which motion for a nonsuit was denied by the court, to which defendants excepted.' The cause was thereupon submitted, with leave to the parties to file briefs, and thereafter, 'and before said matter had been finally submitted to the court for its decision,' the plaintiff served and filed notice of motion for permission to file a supplemental complaint to 'conform to the facts established by the evidence at the trial of said cause on June 19, 1905.' A copy of the proposed supplemental complaint was duly served with said notice. This proposed complaint is similar to the original complaint as amended, but sets forth the assignment to plaintiff, before the commencement of the action, as collateral security, certain notes and mortgages, among them those sued upon, the delivery of the same to plaintiff bank for collection, before the commencement of the action, the subsequent absolute transfer and assignment to her, on October 2, 1900, and her substitution as plaintiff. At the hearing defendants objected to the filing of said supplemental complaint on several grounds, among which are the following: 'That at the trial defendants pointed out the necessity of filing a supplemental complaint; that upon the trial plaintiff failed to make sufficient proof to entitle her to recover, such as is contemplated by section 471, Code Civ. Proc.; that where an assignment is relied upon, it cannot be pleaded for the first time after trial; that plaintiff has been guilty of gross laches in not sooner amending the complaint; that to permit the amendment would be to allow plaintiff to change her position to defendants' prejudice; that the proposed amendment shows upon its face that the action is barred by the statute of limitations, for that Mrs. Ivett's right of action accrued to her by assignment October 2, 1900, and is barred by sections 337, 443, Code Civ. Proc. On July 22, 1905, the court made an order permitting the filing of said supplemental complaint "and granted defendants permission to demur to and answer said supplemental complaint, and to introduce any evidence thereon that defendants might desire, and also permitted plaintiff to intro-

duce further evidence if she so desired, and that all evidence heretofore introduced, and all proceedings taken, should stand, and said supplemental complaint was thereafter, on July 22, 1905, filed and served, to which defendants excepted." A general and special demurrer was interposed to the supplemental complaint and overruled, and defendants thereupon answered, reiterating their former defenses and pleading the statute of limitations, and alleging that the assignment was fraudulent and void as to creditors of plaintiff bank, and, further, that plaintiff Ivett had long since collected all moneys stipulated and agreed to be paid by the Merced Bank to her under the agreement of January 31, 1895.' Later, March 13, 1906, defendants, by leave of court, filed an amended answer to the supplemental complaint, denying the corporate existence of plaintiff bank after it was adjudged insolvent, in 1896; that it was not a licensed corporation under the act of March 20, 1905, and that it failed to pay the tax prescribed by section 20 of the act, and thereby forfeited its charter under section 6 of the act, set up the contract of January 31, 1895, and averred that the indebtedness of plaintiff bank, to secure which the securities in said contract mentioned were pledged to Mrs. Ivett, has been fully paid, and that she has appropriated to her own use, in fraud of other creditors of said bank, other securities; that Mrs. Ivett never commenced any action upon the principal obligation of said bank to her under the contract of January 31, 1895, and all right of action thereon is barred, and her lien as pledgee was entirely extinguished under section 2911, Civ. Code, and her lien thereon ceased February 1, 1899; that defendants were stockholders and creditors of said bank at all times mentioned in the plaintiff's supplemental complaint, and were pecuniarily interested in the collection and distribution of the assets of said bank, and averred that Mrs. Ivett voluntarily surrendered the note and mortgage sued upon to the said bank, and lost her lien thereon, under sections 2988, 2913, Civ. Code, and that plaintiff is not now, and never has been, the owner of said note and mortgage; that said note and mortgage were not specifically mentioned in the decree of distribution of Mrs. Ivett's husband's estate, and she took no interest therein by said decree, denied that the board of directors of said bank had authority to make the assignment of said note and mortgage to Mrs. Ivett, and the same was fraudulent and void, and denied that said assignment of October 2, 1900, was ever delivered to Mrs. Ivett; that it was never recorded, but was secret; that said note and mortgage were not delivered to her, but remained in the hands of the attorney of said bank, and there was no actual and immediate delivery thereof; that the action is barred by the statute of limitations for reasons already stated; that a new cause of action is set up by the amended and sup-

plemental complaint which is barred by the statute, Code Civ. Proc. § 337.

"The cause came on to be heard on March 13, 1905. By the order of the court the evidence, documentary and oral, was to be considered as before the court, as well as the record of all prior proceedings. It appeared from the testimony, without contradiction, that the note and mortgage in question were held by Mrs. Ivett as collateral security under the agreement of January 31, 1895, and were given to the bank for the sole purpose of collection, the proceeds, less costs and charges, to be applied to its debt due Mrs. Ivett; that upon payment by her to the Bank of British Columbia of the \$4,000 agreed upon, in addition to the \$20,198.46 then due her from plaintiff bank, the latter delivered to her certain securities, among them the note and mortgage sued upon; that plaintiff bank did not deliver to her all the securities it had agreed to deliver, and some were retained by it and collected, and the proceeds not turned over to her; that the \$4,000 was to be paid to her out of the assets of the bank other than said securities, but was afterwards repaid out of a portion of said securities, and not out of other assets of the bank; that she had received from said securities only repayment of said \$4,000 and \$1,050 on two notes; that prior to October 2, 1900, she had been paid nothing except as above, and prior to that date she had made no use of any of the said securities, except as above stated; that she never converted any of said securities to her own use, except as above shown, toward the payment to her of the \$20,198.46 due her from said bank; that after receiving the assignment of October 2, 1900, she used it, wherever necessary, in foreclosing mortgages; that the assignment was not recorded, but was 'an open transaction, and had been public to every one interested, especially to the defendants, ever since the fall of 1900, and especially during the summer of 1901, when the defendants were moving to dismiss this action for want of prosecution.' There was also undisputed evidence that plaintiff bank was, at all times mentioned in the complaint, a corporation, and that said bank had never been dissolved or ceased to exist, 'but that all licenses required by law of said bank, up to the time of trial, had been paid'; that the assignment of October 2, 1900, was made by the plaintiff bank in good faith, and in the ordinary course of liquidation of its affairs, 'and in order to expedite the settlement of its affairs, and was an open and public transaction, and was considered, by all parties interested as for the best interest of the creditors.' There was evidence submitted in support of a statement showing the amounts realized by Mrs. Ivett upon the securities held by her. By this statement it appears that there was still due on the indebtedness of the bank to her the sum of \$3,799.92. The record does not purport to contain all the

evidence, and it is manifest from the findings that all the evidence was not included in the transcript. Such as is before us has been substantially set out in the foregoing history of the case and of the trial, and is without conflict. The defendants submitted no evidence in support of their answer. The findings are quite lengthy and cover every material issue, and some issues not material. They support the judgment and plaintiff's contention upon all points, and negative the allegations set up by defendants in their defense to the action. The briefs discuss numerous questions, as arising upon the record—chiefly by way of challenge to the sufficiency of the evidence to support the findings—some of which are either not properly here for review, or are not pertinent to any material issue.

"1. The order denying the motion for nonsuit was made upon the sole ground of the insufficiency of the complaint. But the sufficiency of the complaint cannot be inquired into. Cases *supra*. For like reason we cannot consider the demurrer, as that goes to the sufficiency of the complaint.

"2. In no instance was any ground stated in support of objections to the evidence offered by plaintiff and allowed by the court. The mere objection to some proceeding in the course of the trial, unaccompanied by any ground or reason for the objection, presents no reviewable error, for error must be made affirmatively to appear; and, in the absence of any ground for the objection, we cannot say there was error in the ruling, and the objection must be disregarded.

"3. All question of actual fraud is unsupported by any evidence, and all claim that the creditors of the plaintiff bank were injured must disappear, for there is no evidence that the creditors generally were injured, and the bank commissioners found and declared 'that all the assets of the Merced Bank (in liquidation) have been sold, and all the proceeds therefrom paid to the creditors of the bank, and the affairs of the bank are fully administered and wound up.' This order was entered by the bank commissioners February 7, 1902, and could not have been true if the note and mortgage in suit had been regarded by the bank commissioners as assets of the bank in which the creditors generally were entitled to share. The transfer to plaintiff, October 2, 1900, was made while the bank commissioners were performing their duties. It was an open and well-known transaction, and must have come to the knowledge of the commissioners, and the undisputed evidence is that the transfer was in due course of liquidation of the bank's affairs. We must assume, in the absence of evidence to the contrary, that the bank commissioners sanctioned the transaction as done in process of liquidation, for, having knowledge of it, they were in position, and it was their duty, if disapproved, to have arrested its consummation. Besides,

we do not see how in this action objection can be made on behalf of the creditors generally, or by the defendants as such creditors.

"4. The claim that there is a failure to make findings upon material issues, and that the findings are conflicting, must be disregarded. Cases *supra*.

"5. The securities held by Mrs. Ivett, being "things in action," are subjects of lien without change of possession (*Kings v. Roberts*, 31 Pac. 620); and, not being dependent upon possession, the redelivery to the bank for the purposes of collection did not extinguish the lien (*Civ. Code*, § 2913).

"6. Plaintiff bank had a right to commence the action, as it was the owner of the note and mortgage, subject to Mrs. Ivett's lien and was equally interested with her in enforcing collection. *Civ. Code*, § 2888; *Graham v. Light*, 4 Cal. App. 400, 88 Pac. 373.

"7. The action was properly commenced in the corporate name of the Merced Bank (*Union Savings Bank v. Dunlap*, 135 Cal. 628, 67 Pac. 1084; *Argues v. Union Savings Bank*, 133 Cal. 139, 65 Pac. 307); and, the note being payable to it as a corporation by the defendants, no allegation of the intermediate assignments was necessary, or that the bank was in course of liquidation.

"8. We see no reason for holding, under the bank commission act (*St. 1895*, p. 172, c. 167) that the plaintiff corporation was without authority to absolutely transfer the cause of action to Mrs. Ivett, the transaction avowedly and in fact being in course of liquidation, and being untainted by fraud, and, so far as appears, for the best interest of the creditors. Section 11 of the act makes it the duty of the commissioners to take control of the corporation and all its property until the order of the court which 'shall order the commissioners to surrender to the corporation the property thereof in their possession, for the purpose of liquidation. The directors or trustees of all banking corporations in liquidation shall be permitted to continue the management of the affairs of such corporations during the process of liquidation.' The assets of the bank transferred by the agreement of October 2, 1900, were in pledge to Mrs. Ivett by the agreement of January 31, 1895, and before the commissioners took control of the bank. Her right to realize upon them in payment of the bank's indebtedness to her was fixed and determined. The bank did not keep faith with her in the matter of securing her claims. It was thought best that a full settlement between her and the bank should be made, and such settlement was necessary in order to wind up the affairs of the bank. Instead, therefore, of having these securities outstanding and in an unsettled condition as collateral, an agreement was made by which the bank was discharged from all liability to Mrs. Ivett, and she became the absolute owner of the assets. This was accomplished while the

bank directors were acting under the control and supervision of the commissioners, and while the present action was pending. The act provides that the corporation (section 11) 'shall make reports of the condition of its affairs to the bank commissioners in the same manner as the solvent banks mentioned in the act, and, in addition thereto, shall state the amount of dividend paid, debts collected, and the amounts realized on property sold, if any, since the previous report.' The court found: 'That full reports of the business of said bank in liquidation had been regularly made to the bank commissioners, as required by law, and all moneys collected by said bank in liquidation have been accounted for and reported to the board of commissioners.' We must assume that the commissioners performed their official duty (Code Civ. Proc. § 1963), and, doing so, they must have had knowledge of and approved the transaction now in question. They could not otherwise have truthfully certified that the affairs were finally wound up. The act forbade the transaction of the usual banking business of the corporation—such as receiving deposits, loaning money, and the like—but it had express statutory authority 'to continue the management of the affairs of such corporation during the process of liquidation, under the direction of the bank commissioners.' In *Union Savings Bank v. Dunlap*, supra, it was held that the corporation might levy an assessment upon the unpaid capital stock, for the purpose of liquidating the bank's indebtedness, and in its corporate name could sue the stockholders to make the collection. The court said: 'The assets belonged to the corporation, and though not a going concern for all purposes, it is a going concern for purposes of liquidation. The cause of action for unpaid subscription accrues to the corporation, and the action is properly brought in its name.' See, also, *Union Savings Bank v. Leiter*, 145 Cal. 696, 706, 79 Pac. 441.

"9. Appellants contend, also, that the action was commenced by the wrong party, or in the wrong capacity, and that the defect is fatal, and cannot be cured by an amendment substituting the right party, citing *Dubbers v. Goux*, 51 Cal. 153; *Sterrett v. Barker*, 119 Cal. 495, 51 Pac. 695; *Renwick v. Garland*, 1 Cal. App. 238, 82 Pac. 89. In *Dubbers v. Goux*, the action was commenced by the husband, who afterwards made a motion that his wife be substituted as plaintiff because she was the real party in interest. The lower court allowed the substitution, and defendant appealed. The Supreme Court said: 'The court erred in permitting Mrs. Dubbers to be substituted for her husband as plaintiff. It is not pretended that she had succeeded to any interest held by her husband pending the action, nor that she had any joint interest with him in the subject-matter. On the contrary, she was substituted as plaintiff on the theory that she was

the only party in interest at the commencement of the action, and had ever since been so. She was permitted to become the sole plaintiff, not to prosecute the same cause of action stated in the complaint, on the ground that she had succeeded to it, but another and distinct cause of action in her separate right. In effect, it was permitting her to prosecute a new suit, for another cause of action, by merely substituting her as sole plaintiff in the former action. It is scarcely necessary to say that section 473, Code Civ. Proc. affords no warrant for such a proceeding.' The difference between that case and the one here is obvious. The very conditions in the case cited which the court found to be wanting to justify the substitution are here present. Both the corporation and Mrs. Ivett were interested in the cause of action, and either could sue upon it—the former as owner, and the latter as pledgee (Civ. Code, § 3006). This common or joint interest after the action was commenced became centered in Mrs. Ivett by assignment, and in her substitution she became plaintiff in this same cause of action. We do not doubt the propriety or legality of substituting her as plaintiff after the assignment. The action might have been continued in the name of the original plaintiff for her benefit, or she might have been substituted as sole plaintiff. Section 385, Code Civ. Proc., and numerous cases cited in *Kerr's Cyc. Code*. There is nothing in the other cases above cited, as relied upon by defendants, to support their contention.

"10. The point that the statute of limitations had run against the note and mortgage before the assignment to Mrs. Ivett, and that her substitution made her plaintiff in an action barred by the statute, is without merit. Appellants' contention is that the filing of the complaint in the name of the Merced Bank as an existing corporation, without disclosing that it had been adjudged insolvent, was unauthorized and unlawful, and was also unlawful because commenced to enforce a lien for the benefit of the lien claimant; that the running of the statute of limitations was not stopped because the action was unlawfully commenced, and therefore, when Mrs. Ivett was substituted, the action was barred by section 337, Code Civ. Proc. It is a sufficient answer that the action was legally and properly commenced in the name of the payee of the note, the Merced Bank, and that Mrs. Ivett was substituted as plaintiff in the same and not in a different cause of action in which at all times she had an interest—ultimately the sole ownership.

"11. The order granting plaintiff's motion to file a supplemental complaint was within the discretion of the court, and will be reversed only upon a showing that this discretion was abused. *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348; *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955; Code Civ. Proc. § 473. As was said in *Yordi v. Yordi*, the question whether the court abused its discretion 'must

be answered in the negative, unless the amended complaint introduced new issues substantially different from those presented by the complaint under which the evidence was submitted, and unless it appears that the rights of the defendants were prejudiced by the amendment.' The facts embodied in the supplemental complaint, to conform to which the leave to amend was granted, had fully appeared in the course of the trial. No new facts or matters of surprise were suggested by the proposed amendment, and no fact not already known to defendants and already matter of proof was alleged therein. Full opportunity was given defendants to demur to or answer the complaint, and they did both. In point of fact the only material issue not already pleaded was the assignment to plaintiff, and this, as well as the agreement by which she held the note and mortgage, and how and why she came to redeliver it to the bank, had been made subjects of proof. It is clear to our minds that defendants were deprived of no substantial right by the order of the court, and that it acted within its discretion.

"The foregoing disposes of all the questions which appear to call for examination. We discover no prejudicial error in the record, and the order is therefore affirmed."

Geo. G. Goucher, W. H. Larew, and J. S. Larew, for appellants. J. W. Knox, for respondent.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal for the Third District is denied. In so far as the opinion of that court may be held to intimate that an objection that the trial court has failed to find upon a material issue cannot be considered upon a motion for a new trial, or on an appeal from an order denying such a motion, it is erroneous. It is well settled that such a failure renders the decision one against law. But we have been unable to ascertain from the record that there was any such failure in this case.

BEATTY, C. J. (dissenting in part). I concur in the foregoing modification as far as it goes. I also think there should be a rehearing.

NOTE BY CHIPMAN, P. J.—The point referred to by the Supreme Court, in denying hearing of the cause in that court, was suggested in the briefs of counsel for appellants, and upon the authority of *Churchill v. Flournoy*, 127 Cal. 355, 59 Pac. 791, where it was distinctly stated that "the failure to find upon a material issue is no ground for granting a new trial." The District Court of Appeal held that the error could not be reviewed upon appeal from the order denying a new trial, there being no appeal from

the judgment. As all the material issues in the case were in fact found upon the point passed without further investigation. In the later case of *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828, it was held, in conformity with the cases cited, "that where the court below fails to find upon a material issue raised by the pleadings, the decision is 'against law,' and may be reviewed upon a motion for a new trial, for the alleged reason that the question raised involves a re-examination of an issue of fact." Attention is called to the matter that there may be no further misapprehension as to the rule of practice. See, for a clear exposition of the rule, *Swift v. Occidental Mining, etc., Co.*, 141 Cal. 161, 74 Pac. 700.

154 Cal. 554

ATHEARN v. RYAN. (S. F. 4,827.)

(Supreme Court of California. Nov. 20, 1908.)

EXECUTORS AND ADMINISTRATORS (§ 222*)—ACTIONS—PRESENTATION OF CLAIM—FORECLOSURE OF LIEN—"LIEN."

A deed of trust on a homestead is not a lien, within Code Civ. Proc. § 1475, requiring the presentation of the claim against the estate as a condition precedent to enforcing a lien or incumbrance on the homestead, so that a trust deed executed by a husband and wife on the homestead was enforceable without presenting a claim to the husband's administrator for the debt secured thereby.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 222.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 414-4152; vol. 8, p. 7707.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Charles H. Athearn against Annie Ryan. From a judgment for plaintiff, defendant appealed. Affirmed.

George A. Connolly, for appellant. Garoutte & Goodwin and E. F. Treadwell, for respondent.

SHAW, J. This is an action to quiet title. On August 31, 1899, the defendant was the wife of Timothy Ryan and resided with her husband on the premises described in the complaint; the same being community property. On that day the defendant executed and caused to be recorded a declaration of homestead in due form, claiming the said property as a homestead. Afterwards, on June 20, 1902, the defendant and her said husband executed to the plaintiff a note for \$680, and, in order to secure the same, executed to certain other persons, as trustees, a deed of trust to the said property. Thereafter, on December 27, 1902, the said Timothy Ryan died, and in due course of time administration was granted on his estate, and notice to creditors given by the administrator. On March 11, 1904, an order was made in said administration proceeding, setting apart

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

the said property to the defendant as a homestead. Afterwards, and before the commencement of this action, the note aforesaid being due and unpaid, the trustees named in said deed of trust, in pursuance of the power conferred upon them by the terms of said deed of trust, sold and conveyed the property to the plaintiff.

The plaintiff claims title by reason of the deed from the trustees, and the defendant claims that the said deed is void because of the fact that, after the giving of notice to creditors and prior to making the sale, no claim for the debt secured by said deed of trust was ever presented for allowance to the administrator of the estate of said Timothy Ryan. It will be seen from this statement of facts that the case comes exactly within the scope of the decision in *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706. It was held in that case that, under circumstances precisely similar to those in the case at bar, it was unnecessary to present a claim for debt secured by a deed of trust to the administrator of the estate of the deceased husband, and that a deed by the trustees in the execution of the power contained in the deed of trust, made upon a failure to pay the debt when due, was valid and effectual to convey the title to the husband, notwithstanding the failure to present such claim. The only difference between the facts in that case and the facts above stated is that in that case the deed of trust was executed by the husband alone prior to the declaration of homestead, while in this case the homestead was filed first and the deed of trust was thereafter executed by both husband and wife. The principle on which that case rests is that a deed of trust is not a lien or incumbrance on the homestead within the meaning of those terms as used in section 1475 of the Code of Civil Procedure, which requires a presentation of a claim against the estate as a condition precedent to the enforcement of a lien or incumbrance on the homestead. There is no difference in the legal effect of the deed of trust considered in that case and that here involved. Upon the principle of that case, the judgment of the lower court was correct.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

(154 Cal. 540)

Ex parte JOUTSEN. (Cr. 1,469.)

(Supreme Court of California. Nov. 20, 1908.)

1. CONTEMPT (§ 21*) — ACTS CONSTITUTING CONTEMPT—DISOBEDIENCE OF ORDER.

Where a demurrer to a complaint is sustained, with leave to file an amended complaint, and the time for amendment has not expired, the action is still pending, so that an order made

therein will warrant contempt proceedings for disobeying it.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 63-65; Dec. Dig. § 21.*]

2. DIVORCE (§ 210*)—ALIMONY—TEMPORARY ALLOWANCE.

By the express provisions of Code Civ. Proc. §§ 405, 1049, and Civ. Code, § 137, an order for alimony pendente lite may be made at any time after the filing of the original complaint and before the termination of the action, if the court has obtained jurisdiction over defendant's person.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 610-611; Dec. Dig. § 210.*]

3. HABEAS CORPUS (§ 4*)—NATURE AND GROUNDS—REMEDY BY APPEAL—CONTEMPT.

For an error in the exercise of the court's discretion in granting an order for alimony pendente lite in an action in which the court has acquired jurisdiction over defendant's person, the proper remedy is by appeal from the order, and it cannot be collaterally attacked by habeas corpus to obtain release from imprisonment for contempt in disobeying the order.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

4. DIVORCE (§ 214*)—ALIMONY—TEMPORARY ALLOWANCE—APPLICATION AND PROCEEDINGS THEREON.

To justify an order for alimony pendente lite, the marriage must be admitted or proved, and must be determined on the motion in the same manner as any other question of fact.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 629-631; Dec. Dig. § 214.*]

5. HABEAS CORPUS (§ 4*)—REMEDY BY APPEAL.

Error in granting an order for alimony pendente lite without proof of marriage can be reviewed only by appeal from the order, and habeas corpus will not lie to obtain release from imprisonment for contempt in disobeying the order.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

6. CONTEMPT (§ 78*)—PUNISHMENT.

A party cannot be imprisoned until he obeys an order requiring the payment of money, unless he is able to pay; imprisonment for debt having been abolished.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 269; Dec. Dig. § 78.*]

7. DIVORCE (§ 269*)—ALIMONY—ENFORCEMENT OF ORDER—CONTEMPT PROCEEDINGS—IMPRISONMENT.

A judgment directing defendant's imprisonment until he complies with an order for the payment of alimony pendente lite when he is able to obey the order is authorized by Code Civ. Proc. § 1219, providing that contempt in refusing to perform an act within the person's power may be punished by imprisonment till he have performed it.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 756; Dec. Dig. § 269.*]

In Bank. Application by Herman Joutsen for writ of habeas corpus to be directed to F. Barnet, sheriff of Alameda county. Writ discharged.

Austin Lewis, for petitioner. Walter J. Burpee, Asst. Dist. Atty., for respondent.

ANGELLOTTI, J. The petitioner seeks his discharge from the custody of the sheriff of

Alameda county, by whom he is held under a judgment of the superior court of that county, adjudging him guilty of a contempt of court in failing and refusing to pay to Selma Joutsen certain sums ordered paid by said court in a divorce action instituted by said Selma Joutsen against him as alimony pendente lite, counsel fees and costs, and directing that he be imprisoned in the county jail of said county "for the term of five days and until he comply with said order by paying plaintiff said sums." The divorce action was instituted January 23, 1908, the complaint alleging that plaintiff and defendant intermarried in March, 1894, but failing to allege in terms that the parties were husband and wife at the date of the commencement of the action. On the same date, on the affidavit of plaintiff, an order was made requiring Joutsen to show cause why an order should not be made directing him to pay the plaintiff \$50 per month alimony pendente lite, \$30 costs, and \$75 attorney fees. Summons in said action and the order to show cause having been duly served on petitioner, he on January 27th filed in said court his demurrer to the complaint of plaintiff, based on various grounds, including that of want of facts to state a cause of action. The demurrer and order to show cause came on for hearing January 31, 1908. Thereupon an order was made sustaining the demurrer, with leave to plaintiff to amend within 10 days. The court then proceeded with the hearing on the order to show cause and a motion of petitioner to vacate the same, and, after argument and before any amended complaint had been filed, made its order that petitioner pay the plaintiff on or before February 10, 1908, and on the 10th day of each month thereafter, the sum of \$50 alimony, and that he also pay plaintiff on or before February 19, 1908, the sum of \$10 on account of costs of suit and \$50 for her attorney fees in said action. This order was duly served on petitioner. It was for his failure to comply with this order that the contempt proceedings were instituted on March 11th, and he was adjudged guilty of contempt.

The principal point made by counsel for petitioner in this proceeding is that this order was absolutely void, and could not serve as the basis of a lawful judgment in contempt proceedings, for the reasons, first, that at the time it was made there was no complaint on file, the original complaint having been abrogated by the ruling sustaining the demurrer; and, second, that it was not first established that plaintiff was then the wife of defendant.

As to the first point made against this order: Section 137, Civ. Code, in terms authorizes the court, at any time during the pendency of an action for divorce, in its discretion to require the husband to pay as

alimony any money necessary to enable the wife to support herself and her children or to prosecute or defend the action. A civil action is commenced by the filing of the complaint (section 405, Code Civ. Proc.), and is deemed to be pending from the time of such commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied. Section 1049, Code Civ. Proc. The fact that a demurrer has been sustained to a complaint does not render the action one no longer pending. Where upon such a ruling leave is given to file an amended complaint within a designated time, and the time has not expired, the action is still pending in the court that sustained the demurrer, although no amended complaint has been filed. This was expressly held in *Ex parte Barry*, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248, and is necessarily the case. So we have express statutory authority for the making of such order at any time after the filing of the original complaint and prior to the termination of the action, provided always, of course, that the court has obtained jurisdiction over the person of defendant by service of summons or his voluntary appearance. See *Baker v. Baker*, 136 Cal. 305, 68 Pac. 971. It may be that an order for alimony, costs, or counsel fees might be held erroneous if made in the absence of a complaint showing a cause of action for divorce, but as to this we need express no opinion. Certainly such an order so made during the pendency of the action cannot be held to have been beyond the jurisdiction of the court and void. At most, it was only error in the exercise of its jurisdiction. For any such error prejudicially affecting the defendant's right in such a case, the only remedy is by direct appeal from the order, which right the defendant is given by our law. On such an appeal the exercise of its discretion by the lower court can be reviewed, and, if there has been an abuse of the discretion confided to it by statute, the order may be reversed. But proceedings on habeas corpus go only to the question of the jurisdiction of the lower court, and, if such jurisdiction has not been exceeded, the petitioner can obtain no relief therein. The attack here on the order directing the payment of alimony, costs, and counsel fees is purely a collateral attack, and all that is necessary to sustain it against such an attack is that it was made in a pending action for divorce, in which the court had acquired jurisdiction of the defendant.

As to the second point made against such order: Petitioner does not here allege that there is not an existing marriage relation between himself and plaintiff in the divorce action. His claim is that this fact was not shown to the court in that action at the time of the making of the order for alimony. He

relies upon the doctrine of *Hite v. Hite*, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82, where it was held, on a direct appeal from such an order, that, to justify alimony pendente lite, marriage must be admitted or proven, and that more than the making of a prima facie case is essential, and where it was said that unless upon that question the husband has had his day in court and a hearing, if alimony is allowed, his property is taken without due process of law. What we have said in discussing the first point would appear to be applicable here. It is recognized by the *Hite* Case, and is manifestly true, that the question of fact whether there is an existing marriage between the parties to the divorce action is addressed to the court hearing the motion for alimony, and it is to be determined by it on that motion in the same manner as any other question of fact is determined. Its order in the case at bar granting the alimony was a determination among other things that there was such an existing marriage between the parties. If the court so determined without sufficient or even any evidence, it simply erred in its conclusion, and such an error can be reviewed only on appeal from the order. There was no excess of jurisdiction in making the order. As we have said, *Hite v. Hite*, supra, was an appeal from such an order. The same is true of every case cited by petitioner on this subject, and also of every case we have been able to find.

It is said that an order in a contempt proceeding directing a party to be imprisoned until he has complied with the order requiring the payment of money is unlawful unless the party is able to make such payment. This may be conceded. We have no imprisonment for debt in this country. But, in the contempt proceeding under review, the court in terms found that the petitioner "at all times has been and now is able to pay such sums and the whole thereof." His offense for which he is being imprisoned is his failure to obey the order of the court when he has the ability to comply with it. His case is covered by section 1219, Code Civ. Proc., which provides: "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it." The case of *Ex parte Todd*, 119 Cal. 57, 50 Pac. 1071, is not at all in point.

There is no other point made in the brief of counsel for petitioner that requires notice here. Many of the points so made relate to matters that can be considered on an appeal from the order, and not on habeas corpus. We have considered each of the 27 points made in the petition, and all those made in the brief, and find no reason to doubt the validity of the judgment in the contempt proceedings.

The writ heretofore issued is discharged and the petitioner remanded to the custody of the sheriff of Alameda county.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

9 Cal. App. 215

BROOKS v. ARDIZZONE et al. (Civ. 542.)

(Court of Appeal, Second District, California.

Oct. 14, 1908. Rehearing Denied by Supreme Court Dec. 8, 1908.)

1. APPEAL AND ERROR (§ 867*)—REVIEW—EXTENT OF REVIEW—APPEAL FROM ORDER DENYING NEW TRIAL.

In an action for the value of legal services, where the court found that no services were rendered within the period of limitations, on appeal from the order denying a new trial, but not from the judgment, only the sufficiency of the evidence to support the findings can be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3476; Dec. Dig. § 867.*]

2. PAYMENT (§ 63*)—PLEADING—NECESSITY.

Payment may be shown in an action for services under the general issue.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 158; Dec. Dig. § 63.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by J. Marion Brooks against Steven Ardizzone and others. From an order denying a motion for a new trial upon judgment for defendants, plaintiff appealed. Order affirmed.

J. Marion Brooks, in pro. per. (Clara S. Foltz and Henry E. Wills, of counsel), for appellant. Gray, Barker & Bowen, for respondents.

ALLEN, P. J. Appeal by plaintiff from an order denying a new trial. The action was one to recover attorney's fees on account of services alleged to have been rendered by plaintiff to defendants within two years preceding the filing of the complaint. The answer is a general denial. The court found that plaintiff performed no services of any kind for defendants within the time specified, and that no sum was due or payable to plaintiff on account thereof; that no services were rendered Steven Ardizzone by plaintiff within such time for which payment had not been made in full. There was no appeal from the judgment perfected within proper time, and the only matter which can be considered under the record relates to the sufficiency of the evidence to support the findings. There is a decided conflict in the evidence, but the trial court, having before it the witnesses, determined all of the issues in defendants' favor, and there is some testimony going to support the finding that as to all of the defendants other than Steven Ardizzone no employment of plaintiff ever existed, and no one having authority from them or either of them ever requested serv-

ices to be performed in their behalf, and that no services were in fact rendered to them or either of them by plaintiff. As to Steven Ardizzone, the evidence is uncontradicted that certain services were rendered him by plaintiff within the time mentioned, but he testifies, and the court seems to have accepted his statement as true, that for all such services performed by plaintiff he made payment to plaintiff in full. While no plea of payment is presented by the answer, the right to prove the same exists in this state where the general issue only is tendered. *Wetmore v. San Francisco*, 44 Cal. 300.

The order denying a new trial must therefore be affirmed; and it is so ordered.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 166

HUBBARD v. SUPERIOR COURT IN AND FOR SANTA CLARA COUNTY.

(Civ. 519.)

(Court of Appeal, First District, California. Oct. 3, 1908.)

1. JUSTICES OF THE PEACE (§ 106*)—CIVIL JURISDICTION—DISMISSAL.

Code Civ. Proc. § 890, which is contained in title 11 of the Code which relates to proceedings in justices' courts, permits judgment of dismissal without prejudice, where plaintiff fails to prosecute with reasonable diligence, or upon his nonappearance at the time specified in the summons or the time to which the action is postponed, or within one hour thereafter, etc. Section 581 contained in that part of the Code relating to proceedings in courts of record provides generally for the dismissal of actions, and permits an action to be dismissed, among other causes, for failure to serve summons and make return thereon within three years, which provision was inserted in the section by amendment by St. 1889, p. 398, c. 259, but a similar amendment was never made to section 890. Both sections were taken from the old practice act and occupied the same relative position in the Codes when originally adopted. *Held*, in view of the positions of the sections in the Codes, that section 581 did not apply to dismissals in justices' courts, and that a summons issued out of such court was not served and return made thereon within three years was not ground for dismissal.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 106.*]

2. DISMISSAL AND NONSUIT (§ 75*)—WITHOUT PREJUDICE—FAILURE TO PROSECUTE.

A dismissal under Code Civ. Proc. § 581, permitting a dismissal for failure to serve summons and make return thereon within three years, is without prejudice to a new action unless it operates as a retraxit.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 169; Dec. Dig. § 75.*]

Prohibition by Henry Hubbard against the Superior Court in and for the County of Santa Clara. Temporary restraining order vacated, and petition denied. See, also, 5 Cal. App. 90, 89 Pac. 865.

C. D. Wright and R. M. Wright, for petitioner. Will M. Beggs, for respondent.

HALL, J. This is a petition for a writ of prohibition to prevent the superior court of the county of Santa Clara from trying a case appealed to said court from a justice's court of said county. The matter is submitted to this court upon the petition and the answer thereto filed by respondent in response to the order to show cause.

The essential facts of the case are as follows: On the 2d day of November, 1902, an action was commenced before a justice of the peace in Santa Clara county by the Union Savings Bank of San Jose against Henry Hubbard by the filing of the complaint on said day. The summons was not served on petitioner, the defendant in that action, until December 14, 1905, which was more than three years after the commencement of the action. The summons never was returned to said justice court, but on the 10th day of April, 1906, the defendant therein specially appeared and moved for a dismissal of the action under section 581 of the Code of Civil Procedure upon the ground that the summons had not been served and return made within three years after the commencement of the action, and also under section 890 of the Code of Civil Procedure upon the ground that plaintiff had failed to prosecute the action to judgment with reasonable diligence. The justice of the peace denied the motion, and the defendant in said action (petitioner herein), without waiving the question of jurisdiction to try the case, but expressly reserving such objection, answered to the merits, and upon the trial judgment went against petitioner, who thereupon appealed from said judgment to the superior court of the county of Santa Clara. Promptly after the transmission of the case to the superior court of said county petitioner made the same motion for a dismissal of the action, which was by the said court denied, and said court now threatens to proceed to try the cause on its merits.

It is not contended that a sufficient showing was not made in answer to the motion so far as said motion was based on the failure to prosecute the action to judgment with reasonable diligence, as required by section 890 of the Code of Civil Procedure, or that any question of jurisdiction can arise out of the action of the court in that regard. But the contention that the court is without jurisdiction to proceed to try the cause upon its merits, or to take any action therein other than to dismiss the action, is based on the fact that the summons was neither served nor return made thereon within three years after the commencement of the action. Upon the admitted facts of this case the only question, therefore, presented for the determination of this court, is whether or not section 581 of the Code of Civil Procedure applies to actions brought in justices' courts. For, if the justice court had juris-

diction to try and determine an action upon its merits, the superior court would likewise have such jurisdiction on appeal.

The question as to whether or not the provisions of section 581 of the Code of Civil Procedure apply to actions brought in justices' courts has not been directly determined by any of the appellate courts. It is insisted by respondent that the dismissal of actions brought in the justice court is governed by the provisions of section 890 of the Code of Civil Procedure, and that section 581 of the same Code has no application thereto. While it is difficult perhaps to assign any good reason why the lawmaking power should make it mandatory on the court to dismiss an action brought in the superior court if the summons be not served and return made thereon within three years after the commencement of the action, and make no such provision for actions brought in a justice court, we are constrained after a careful examination of the subject to so hold. Section 890 of the Code of Civil Procedure is contained in title 11 of said Code, which deals with the proceedings in justice courts. Section 581 of the same Code is contained in another part of the Codes relating to actions and proceedings in courts of record. Both sections were contained in the Codes when originally adopted March 11, 1872, and were taken from the old practice act, in which they occupied the same relative positions that they occupy now in the Codes. The provision requiring the dismissal of an action for failure to serve the summons and to make return thereon within three years after the commencement of the action was inserted in section 581 by an amendment thereto in 1889 (St. 1889, p. 398, c. 259), but no similar amendment was then or ever made to section 890.

Although the precise question involved in this case has never before been decided by an appellate court of this state, we think that the rule which should govern has been clearly laid down in two cases. *Odd Fellows' Sav. Bank v. Banton*, 46 Cal. 604; *Weimmer v. Sutherland*, 74 Cal. 341, 15 Pac. 849. In the first of the above mentioned cases the question arose as to which of several sections governed as to the recordation of a mortgage of real estate. It was there held that sections 1213, 1214 and 1215 of the Civil Code, found in the title relating to "transfers," by virtue of section 2952 of the Civil Code, found in an article relating to "mortgages of real property," governed, as against the provisions of section 2937 of the Civil Code (as it then existed but since repealed), found in an article relating to "mortgages in general." The court followed the rule laid down in the Political Code for the interpretation of the Codes, that as between conflicting or contravening provisions of the Codes the provisions of any title, chapter, or article must prevail as to all matters arising out of the subject-matter of such ti-

tle, chapter, or article. Pol. Code, §§ 4481, 4482, 4483. The second case above cited is even more in point than the first case. In this case (*Weimmer v. Sutherland*, supra) a justice court, assuming to act under section 473 of the Code of Civil Procedure, had vacated and set aside a judgment, and the question presented for decision was whether the justice court derived any authority from section 473 of the Code of Civil Procedure, or was confined in vacating judgments to the authority conferred by section 859 of the Code of Civil Procedure. In this case, as in the case at bar, there was invoked, on behalf of the jurisdiction of the justice court, the provision of section 925 of the Code of Civil Procedure that "justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this Code which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein." The court said: "The language of section 925 is certainly of difficult construction, and cases might well arise where it would be extremely doubtful whether or not certain acts of a justices' court were justified by its provisions. It will be observed, however, that the section expressly preserves the notion of the 'peculiar and limited jurisdiction' of these courts, and, moreover, that its general character is negative rather than positive. The grant is somewhat in the shape of a parenthesis in a clause of limitation. If, therefore, that part of the Code which expressly deals with proceedings in justices' courts prescribes the powers of those courts in relation to a general subject, about which the powers of courts of record are expressly prescribed in another part, then we think that the powers of the justices' courts with respect to that subject are to be looked for in the former and not in the latter provision. Now, the power in question here—i. e., the power to relieve from a judgment taken through surprise, excusable neglect, etc.—is expressly given to courts of record by section 473, and is expressly given to justices' courts by section 859. Both sections relate to the same general subject. But while section 473 gives this power, in general terms and in all cases, within six months in some instances, and in one year in others, after judgment, section 859 confines the power in justices' courts to cases of a 'judgment by default,' and limits the time to ten days after the entry of the judgment. We think, therefore, that the latter section is determinative of the question here involved, and not section 473." A comparison of sections 859 and 473, construed in the case just cited, with sections 890 and 581, involved in the case at bar, demonstrates the controlling effect of the above cited case upon this case. Section 859 is in the title dealing with proceedings in justices'

courts and provides for the vacating by justices' courts of judgments entered in said courts. Section 473 is in that part of the Code of Civil Procedure dealing with proceedings in superior courts, and provides in general terms for the vacating of judgments under certain conditions. Section 890, like section 859, is in the title dealing with proceedings in justices' courts, and provides for the dismissal of actions in said courts. Section 581, like section 473, is in that part of the Code of Civil Procedure dealing with proceedings in the superior courts, and provides in general terms for the dismissal of actions under certain conditions. The suggestion of petitioner that the dismissals provided for by section 890 are without "prejudice to a new action," and that, therefore, the subject-matter of section 890 is different from the subject-matter of section 581, is without force. Dismissals under section 581 are also without prejudice to a new action, except when the dismissal is in effect a retraxit. *Davenport v. Turpin*, 43 Cal. 597; *Parks v. Dunlap*, 86 Cal. 189, 25 Pac. 916; *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. 121; *Westbay v. Gray*, 116 Cal. 660, 48 Pac. 800; *Hibernia S. & L. Soc. v. Portener*, 139 Cal. 90, 72 Pac. 716. For the reasons above set forth, we think the court has jurisdiction to proceed with the trial of the action in question, although the summons, issued out of the justice court, was not served and return made thereon within three years after the commencement of the action.

The temporary restraining order heretofore made by this court is vacated and discharged, and the petition for a writ of prohibition is denied.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 207

KEEGIN v. JOYCE. (Civ. 385.)

(Court of Appeal, Second District, California.
Oct. 9, 1908.)

LIMITATION OF ACTIONS (§ 180*)—DEMURRER
RAISING DEFENSE—RIGHT TO DEMUR.

Where nothing appears on the face of the complaint indicating a bar by limitation, a demurrer thereto upon that ground will not lie.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 671; Dec. Dig. § 180.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by W. C. Keegin, surviving partner, against Thomas F. Joyce. Judgment for plaintiff, and defendant appeals. Affirmed.

Bernard Potter, for appellant. J. W. McKinley, for respondent.

ALLEN, P. J. Appeal by defendant upon the judgment roll. The complaint averred employment of plaintiff by defendant to prosecute an appeal before the Commissioner of

the Land Office, and, if necessary, before the Secretary of the Interior, through which to establish defendant's ownership in certain mining property; that by the terms of such employment plaintiff was to accept, if unsuccessful, \$250, but, if finally successful, defendant would pay, in addition, the reasonable value of such services. It is alleged that by a final decision of the Secretary of the Interior, rendered upon a petition for review, defendant's ownership was established; that \$2,000 was the reasonable value of such service, and the same remains unpaid. Defendant by his answer admits the employment and the rendition of the services, but claims that when the original decision of the Secretary of the Interior was rendered against defendant it was agreed that the original employment was at an end; that the proceedings upon review were inaugurated and prosecuted under a new agreement, by which plaintiff was to receive an interest in the mining property to the extent of the value of a reasonable fee.

The court found against defendant and appellant upon the issue as to this new agreement, and found the agreement to have been as plaintiff alleges. The objections to the complaint raised by defendant were untenable. A cause of action was stated, and nothing appeared upon the face of the pleading indicating the bar of the statute, and a demurrer upon that ground would not, therefore, lie. *Kraner v. Halsey*, 82 Cal. 209, 22 Pac. 1137. The court, in addition, found against appellant upon the issue raised by the plea of the statute. The judgment is supported by the findings. The findings, as a whole, are conclusive as to appellant's claim that \$250 was to constitute the full consideration for the services, and under all of the findings the issue as to the tender of the deed was of no consequence and no special finding in relation thereto was required.

We find no error in the record, and the judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 209

STEWART v. TORRANCE, Judge. (Civ. 578.)

(Court of Appeal, Second District, California.
Oct. 12, 1908.)

EXCEPTIONS, BILL OF (§ 53*) — COMPELLING
SETTLEMENT—JURISDICTION.

A divorce suit being an equity suit, and the Supreme Court having, under Const. art. 6, § 4, exclusive appellate jurisdiction in equity, the appellate court will not compel settlement by the trial court of a bill of exceptions refused as not presented in time, though an appeal to the appellate court is under consideration, as the appeal, if taken, will have to be transferred to the Supreme Court, and a review of the question whether the bill was presented in time would be an invasion of the province of the Supreme Court.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 80; Dec. Dig. § 53.*]

Petition by Gertrude E. Stewart for mandamus to E. S. Torrance, Judge of the Superior Court in and for the County of San Diego. Denied.

L. E. Dadmun, for petitioner. Wadham & Pritchard, for respondent.

PER CURIAM. Mandamus to compel settlement of a bill of exceptions. Petitioner filed an action for a divorce in the superior court for San Diego county, against Elmore Stewart, who answered the complaint, and filed a cross-complaint for divorce against petitioner. Respondent, as judge of said court, tried the cause, and on June 4, 1908, rendered judgment in favor of the defendant on his cross-complaint. Notice of decision was served June 5, 1908, and on June 13, 1908, petitioner gave notice of her intention to move for a new trial. An order extending time was made by respondent at the request of petitioner's attorney on June 15, 1908, where it was recited that good cause had been shown to the court why time should be granted to plaintiff and cross-defendant, in which to file her bill of exceptions in the above-entitled action, in support of her appeal to the District Court of Appeal of the state of California, Second district, and ordered "that the time * * * in which to prepare, serve, and file her proposed bill of exceptions in the above-entitled action, in support of her appeal to the District Court of Appeal of the state of California, Second district, be and the same is hereby extended up to and including the 20th day of July, 1908," etc. On the date last mentioned petitioner served on attorneys for defendant, and delivered to the clerk of the court for respondent a copy of her proposed bill of exceptions. On July 30, 1908, defendant served upon petitioner's attorney his objections and amendments to the proposed bill, and within 10 days thereafter the proposed bill, objections, and amendments were left with respondent, as judge of said court, and by said judge regularly set for hearing on September 15, 1908. At the hearing defendant objected to the settlement of said bill, on the ground that it had not been prepared, served, or filed within the time allowed by law, which objection was sustained by respondent, who refused to settle the bill for that reason. On petition to this court an alternative writ was issued, and a return thereto made to this court. The matter was presented orally by attorneys for the respective parties, and heard upon its merits, and now only awaits the filing of briefs to be regularly submitted. We are of opinion, upon an examination of the record, that the writ was inadvertently issued, and that this court is without jurisdiction to de-

termine the matters presented by the application.

By the provisions of section 4, art. 6, of the Constitution, which defines the powers of the Supreme and Appellate courts, the Supreme Court has appellate jurisdiction in all cases in equity, except such as arise in justices' courts. This includes actions for divorce, as they are proceedings in equity. *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; *Harron v. Harron*, 123 Cal. 508, 56 Pac. 334. The petition and the order extending time, upon which petitioner bases her right to have her bill of exceptions settled, both recite that an appeal to this court was under consideration. While the power of transfer given to this court in relation to cases which should have been appealed to the Supreme Court authorizes us to certify the record in a divorce case to the Supreme Court, no other authority is conferred upon this court to do anything else in connection with such a case. The writ of mandamus has two uses; one to acquire original jurisdiction, and the other as an aid in the exercise of appellate jurisdiction. *Marbury v. Madison*, 1 Cranch, 137-180, 2 L. Ed. 60; *Hyatt v. Allen*, 54 Cal. 353. Its use as here invoked is of the latter class, and the power of the appellate court is asked to be exercised for the purpose of compelling the settlement of a bill of exceptions, on the ground that it may ultimately be used as a basis for presenting the merits of a case upon an appeal to the Supreme Court. *Douglas v. Southern Pac. Co.*, 151 Cal. 242, 246, 90 Pac. 538. To grant the petition, or to assume to determine the rights of the parties before the court, would be, in effect, to review the action of the trial judge for the purpose of determining whether or not he correctly construed the order extending time to prepare and serve the bill. The preparation of the record and the settlement of bills of exception are primarily for the trial court, and subject to review only by the court to which an appeal lies. The objection that the bill was not presented in time often depends upon a question of fact, in which event the finding of the trial court, like other findings of fact, presents a question for review on the appeal, and not for collateral consideration. *Moultrie v. Tarpio*, 147 Cal. 376, 81 Pac. 1112; *Dernham v. Bagley*, 151 Cal. 216, 90 Pac. 543. For this court to issue a writ having for its object the compulsory making up of a record by a superior judge on an appeal to the Supreme Court would be to review a matter not within our jurisdiction, and to invade the province of the Supreme Court.

For this reason it is ordered that the alternative writ be dismissed, and the petition denied.

(154 Cal. 473)

In re RICHARDS' ESTATE.**GRANGER v. RICHARDS et al.** (Sac. 1,592.)
(Supreme Court of California. Nov. 4, 1908.)**1. NEW TRIAL (§ 123*)—MOTIONS—NOTICE—SERVICE.**

Under Code Civ. Proc. §§ 659, 1010, 1013, 1015, requiring a party intending to move for a new trial to serve within 10 days after notice of the decision a notice of his intention, and providing for service of notice on parties or their attorneys, etc., to set the time in motion within which a party must serve and file notice of intention to move for a new trial, the adverse party must serve on the attorney for such party a written notice of the decision.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 277, 278; Dec. Dig. § 123.*]

2. NEW TRIAL (§ 123*)—NOTICE—NOTICE OF DECISION—WAIVER.

The statutory requirement of written notice of decision to fix the time within which a no-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tice of intention to move for a new trial must be served may be waived, and such waiver may appear from some act of the party in open court or in the proceedings in the case, as disclosed by the records or by the minutes of the court, when his conduct is inconsistent with any theory other than that he had formal notice of the decision.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 279; Dec. Dig. § 123.*]

3. NEW TRIAL (§ 123*)—NOTICE—NOTICE OF DECISION—WAIVER.

The rule that the statutory requirement of written notice of decision, essential to fix the time within which a notice of intention to move for a new trial must be served may be waived, does not apply where a written notice has in fact been given.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 279; Dec. Dig. § 123.*]

4. NEW TRIAL (§ 123*)—NOTICE—NOTICE OF DECISION—WAIVER.

Application by a party for a stay of execution, made on the day but subsequent to the service of written notice of the decision on his attorney, does not amount to a waiver of such notice, so as to affect the time within which notice of his intention to move for a new trial must be served.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 123.*]

5. NEW TRIAL (§ 123*)—NOTICE—NOTICE OF DECISION—WAIVER.

Application by a party for a stay of execution, made on the day but subsequent to the service of written notice of the decision on his attorney, does not operate as a taking of notice of the decision, and does not affect the time within which notice of his intention to move for a new trial must be served.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 123.*]

6. NEW TRIAL (§ 123*)—NOTICE—NOTICE OF DECISION—WAIVER.

If service of notice of the decision was made after the defeated party had applied for a stay of execution, such service would operate as a waiver of the waiver which might otherwise have been claimed by reason of the application for the stay.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 123.*]

7. EXECUTORS AND ADMINISTRATORS (§ 138*)—SALES BY EXECUTORS—CONFIRMATION—NECESSITY.

Executors in a will, providing for the payment of enumerated legacies, devising the residue to persons named, and empowering the executors, after the expiration of a fixed time, to sell any portion of the real estate at public auction without any order of court or without being required to account to any court, must, on making a sale, report the sale to the court and have the same confirmed, to pass the legal title.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 575; Dec. Dig. § 138.*]

8. ADVERSE POSSESSION (§ 51*)—CHARACTER OF POSSESSION.

Executors empowered to sell real estate sold certain real property in May, 1891, and executed a deed to the purchaser. In 1895, the purchaser conveyed the premises to a third person, who two days thereafter commenced an action to quiet her title thereto against the executors and the residuary legatee, to which they answered, denying her title. Subsequently and pending the action, the third person reconveyed

the premises to the purchaser, who had full knowledge of the action. *Held*, that the purchaser did not establish adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 51.*]

9. EXECUTORS AND ADMINISTRATORS (§ 138*)—SALES BY EXECUTORS—CONFIRMATION—PROCEEDINGS.

A residuary legatee sought by petition to have the executors account for the rents and profits of real estate which they had sold to a third person. The executors answered, and the court, after settling their account, entered a judgment by which their deeds conveying the real estate were adjudged valid. *Held*, that the judgment was not a confirmation of the sale; the law providing a method for the return of sales of real estate and the confirmation thereof.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 138.*]

10. ESTOPPEL (§ 27*)—DEED BY EXECUTORS—AFTER-ACQUIRED TITLE.

Testator devised his residuary estate to his brothers, A. and B., and appointed B. and a son of A. and another executors, and empowered them to sell any portion of the real estate at public auction. The executors sold real property and executed a deed to the purchaser which purported to convey only the title of the testator. The purchaser had succeeded by conveyance from B. to his title as residuary legatee, and the son of A. had succeeded to the interest of A. *Held*, that the son of A. was not estopped from asserting the invalidity of the conveyance because of the failure of the executors to report the sale to the court and obtain a confirmation thereof.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 27.*]

11. WILLS (§ 856*)—CONSTRUCTION—DEATH OF LEGATEE.

A will provided for the payment of enumerated legacies, and "after the payment of all legacies herein enumerated," gave the residue of the estate to testator's brothers, W. and F., equally, and provided that, in the event of the death of "any one or more of the legatees herein named," before receiving their bequests, the share of such deceased legatee or legatees should be paid to W. *Held*, that the provision relating to the death of a legatee did not apply to the residuary legatees, W. and F., and, on the death of F. before distribution, his residuary share did not pass to W.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 856.*]

12. WILLS (§ 472*)—CONSTRUCTION—ESTATES CREATED.

Where the words of a will in the first instance indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provisions which are of indefinite or doubtful expression.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 990; Dec. Dig. § 472.*]

13. APPEAL AND ERROR (§ 302*)—PRESENTING QUESTIONS IN LOWER COURT—MOTIONS FOR NEW TRIAL—STATEMENT OF GROUNDS.

A specification of insufficiency of the evidence to sustain a finding, which states that there is no evidence that a sale by executors had not been confirmed does not challenge the finding that confirmation of the sale was refused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1752; Dec. Dig. § 302.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

14. EXECUTORS AND ADMINISTRATORS (§ 149*)
—SALES—PURCHASE BY COEXECUTOR—VALIDITY.

A purchase by one of three executors empowered to sell real estate is voidable only at the instance of those interested in the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 604; Dec. Dig. § 149.*]

15. EXECUTORS AND ADMINISTRATORS (§ 149*)
—SALES—PURCHASE BY COEXECUTOR—VALIDITY.

Where executors empowered to sell real estate sold certain real property, and a coexecutor became the purchaser, and no return of the sale was made to the court, the executors might at any time sue to rescind the sale for fraud of the coexecutor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 602-605; Dec. Dig. § 149.*]

16. EXECUTORS AND ADMINISTRATORS (§ 144*)
—SALES—PURCHASE BY COEXECUTOR—VALIDITY.

Where executors empowered to sell real estate sold certain real property to a coexecutor, those interested in the estate, on a return of the sale, could elect to have the sale confirmed or rejected.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 580; Dec. Dig. § 144.*]

17. EXECUTORS AND ADMINISTRATORS (§ 148*)
—SALES—PURCHASE BY COEXECUTOR—VALIDITY.

Where a sale by executors to a coexecutor was refused confirmation, the executors were required to return the purchase price paid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 601; Dec. Dig. § 148.*]

18. EXECUTORS AND ADMINISTRATORS (§ 149*)
—SALES—PURCHASE BY COEXECUTOR—VALIDITY.

Where executors empowered to sell real estate sold certain real property to a coexecutor, and the sale was confirmed without the knowledge of those interested in the estate that the coexecutor was the purchaser, those interested might sue to rescind the sale or to have it declared that the coexecutor held title in trust for the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 602-605; Dec. Dig. § 149.*]

19. EXECUTORS AND ADMINISTRATORS (§ 149*)
—SALES—PURCHASE BY COEXECUTOR—VALIDITY.

Where an action was brought to rescind a sale by executors to a coexecutor or to have a trust declared after the sale had been confirmed, the estate would not be entitled to possession of the property without returning or offering to return to the coexecutor the purchase money after an accounting between them in which the purchase price would enter as a factor.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 149.*]

20. EXECUTORS AND ADMINISTRATORS (§ 149*)
—SALES—PURCHASE BY COEXECUTOR—VALIDITY.

In an action by a purchaser from executors for the possession of real estate, brought after the court had refused to confirm the sale, the executor and residuary legatee assailing the sale is not entitled to the possession without restoring the purchase price paid, after an accounting between the parties.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 149.*]

In Bank. Appeal from Superior Court, Nevada County; F. T. Nilon, Judge.

Action by Samuel Granger against W. G. Richards and others, executors of Philip Richards, deceased. From a judgment for defendant W. G. Richards, as surviving executor and residuary legatee, and from an order denying a new trial, plaintiff appeals. Reversed.

Thos. S. Ford, for appellant. C. W. Kitts, J. M. Walling and Fred Searls, for respondents.

LORIGAN, J. This is an action to quiet title in which judgment went for the defendant W. G. Richards as surviving executor and residuary legatee. The plaintiff appeals therefrom and from an order denying his motion for a new trial.

On the hearing here the respondent moved to dismiss the appeal from the order denying the motion for a new trial on the ground that the notice of intention to move therefor was not served or filed within the time allowed by law or any order of the superior court. The case was tried in the superior court of Nevada county; the then attorney for the plaintiff being a resident of and having his office in Berkeley, Alameda county. The showing upon which the motion to dismiss is based is that the findings of the court were signed and filed upon April 18, 1906, and the judgment filed and entered on July 23d of that year. On July 25, 1906, the attorneys for defendant mailed to the attorney for plaintiff at his residence in Berkeley a copy of the judgment which contained a statement of the filing of the findings and on the same day, July 25, 1906, that the attorneys for defendant mailed a copy of the judgment and notice to the attorney for plaintiff, the plaintiff, who resided in Nevada county, personally applied to the court there for an order staying the issuance of execution for 20 days, which was granted. On August 8th plaintiff personally applied to the court and was granted an order allowing 20 days' additional time within which to serve and file his notice of intention to move for a new trial, and on August 13th a further extension of 10 days for the same purpose was granted to plaintiff on his personal application to the court therefor. On August 29, 1906, a local attorney having been engaged by plaintiff (his former attorney residing in Berkeley having withdrawn from the case), notice of intention to move for a new trial was served that day on the attorneys for defendant and filed, and further proceedings relative to the new trial were conducted under said notice of intention. The position of respondent on this motion to dismiss is that the appellant, by voluntarily appearing and securing in person the order for a stay of execution on July 25, 1906, thereby took notice of the filing of the findings and the de-

cision of the court, and that his time within which to serve and file said notice of intention to move for a new trial commenced to run then, and on the theory that he had but 10 days to file and serve his notice of intention his time to do so expired on August 4, 1906, several days before he obtained the order of August 8th extending his time to serve and file his notice of intention, and hence the latter order was void, the court having no jurisdiction to make it after the expiration of the statutory time within which the appellant could serve and file such notice.

Upon the record before us there is no merit in this contention. In order to set the time in motion within which the appellant must serve and file his notice of intention to move for a new trial, it was necessary for the respondent to serve upon the attorney for the appellant a written notice of the decision. Sections 659, 1010, Code Civ. Proc.; *Mallory v. See*, 129 Cal. 356, 359, 61 Pac. 1123; Code Civ. Proc. § 1015. This latter section requires that, when a party has an attorney in an action, "the service of papers when required must be made upon the attorney instead of the party. * * *" Conformable to these provisions of law the attorneys for respondent mailed to the attorney for appellant what was in effect and intended to be a notice of decision. The service of this notice was complete when the deposit was made in the post office (Code Civ. Proc. § 1013), and, as the distance from Nevada City to Berkeley is conceded to be 150 miles, the attorney for appellant was, under the terms of the section last quoted, entitled to 16 days after the day of deposit, or until the 8th day of August, 1906, to serve and file his notice of intention. It is true that, while the statute requires written notice of decision to be served upon the attorney for the adverse party, it may be waived. Such waiver may appear, as declared in *Mallory v. See*, supra, from some act or acquiescence of the party in open court or in the proceedings in the case as disclosed by the records, or files of the case, or the minutes of the court, when the conduct of the party in the case, as appears from such records or minutes, is inconsistent with any theory other than that he had formal notice of the decision. Under such circumstances, he is deemed to have waived written notice. But this rule has no application to the matter at bar. It only applies when a written notice has not been given. It does not apply when written notice has in fact been given, because there is then nothing to waive.

Now, as far as is disclosed by the record before us, the attorney for appellant was on July 25, 1906, served with written notice of the decision, and on the same day appellant personally applied for and obtained the order for a stay of execution. This application by appellant, personally, did not amount to a waiver, or "to taking of notice" of the decision, as it is characterized by respondent, so as to affect the time within which notice of

intention to move for a new trial must be served and filed. It did not amount to a waiver of notice, because there was nothing to waive, as at that time, as far as the record discloses anything to the contrary, the appellant had written notice of the decision by the service of it on his attorney. Neither did his application for a stay operate as a "taking of notice" of the decision, because he had that already, by the service of it on his attorney. Nor really would it be of any consequence, as far as the matter is presented here, whether the application for a stay was made before or after the service of the notice of decision. If before, and thereafter written notice of the decision was actually served as the statute requires, such service would operate as a waiver itself of the waiver which the respondent might otherwise claim was effected by the application for a stay made prior thereto. If after, it certainly could not operate to curtail the time which service of notice gave. By such service of written notice of decision the right of appellant to give notice of intention to move for a new trial, within the time which the law allowed by reason of the residence of his attorney in a different place from where the attorneys for respondents resided, was fixed, and his mere application for a stay of execution, made either before or after such service, and which had no relation whatever to the matter of moving for a new trial, could not affect the time within which he might serve and file his notice of intention to do so.

We dispose of this objection of the respondent to the consideration of the appeal from the order denying the motion for a new trial as being entirely untenable upon the record, without discussing the proposition whether an application for a stay of execution would in any case itself constitute a waiver of written notice of decision, or the further proposition whether such application by the appellant personally would constitute a waiver in face of the statutory requirement that the notice of decision must be served on the attorney for appellant, and not upon the appellant himself, or whether, as the statute prescribes that service shall be made upon the attorney, any other person save the attorney could waive the right to have it made as the statute requires. It is unnecessary to consider these propositions, because here written notice of decision was actually given the attorney for appellant, and within the time allowed by law, and the additional time given by orders of the court, the notice of intention to move for a new trial was regularly served and filed. Some other points are made in support of the motion to dismiss, but, as there is clearly nothing in them, we neither mention nor discuss them.

Now as to the appeal on its merits:

Philip Richards died in the year 1887 in Nevada county leaving a will, in which, after providing for the payment of certain annu-

merated legacies, he devised the residue of his estate to his two brothers William S. Richards and Francis Richards, or, as the latter is more commonly designated in the record, Francis S. Richards. As his executors he appointed his nephew, William G. Richards, son of said William S. Richards, said Francis Richards, and James Bennallack, and empowered them, after the expiration of two years from his death, to sell any portion of his real property at public auction "without any order of court whatever or being required to account to any court," and upon a sale thereof provided that all legacies which then remained unpaid should be paid at once in full. The clauses of his will relative to the payment of legacies and the disposition of the residue of his estate declared that: "After the payment of all legacies herein enumerated I give and bequeath all the rest, residue and remainder of my estate of whatever kind and character to my brothers William S. Richards and Francis Richards, share and share alike. In the event of the death of any one or more of the legatees herein named, before they or either of them shall have received their bequests, the share of such deceased legatee or legatees shall be paid to my brother William S. Richards." On May 11, 1891, under the power conferred by the will, the executors sold at public auction to plaintiff, as the ostensible purchaser thereof, a lot in Nevada City belonging to the estate, and on the same day made him a deed purporting to convey to him as executors, under the power conferred by the will, the title of the estate to said property. The land was sold for \$3,365, an amount considerably in excess of the amount at which it had been appraised shortly before the sale, and the plaintiff was immediately placed in possession of the property by the executors, and he and his successors have remained in possession ever since. The full amount of the purchase price was paid to the executors by the plaintiff on the day of the sale and the execution of the deed, and was shortly thereafter used and paid out by said executors for the use and benefit of the estate of Philip Richards, deceased, in the payment of legacies and the expenses of administration, and accounted for by them and their accounts approved by the court. The executors, deeming that they had sufficient authority under the will to convey title to the property without any confirmation of the sale by the court, made no return thereof or sought confirmation thereof until many years later, and as a result litigation arose between the plaintiff and his successor in interest, and the executors of the estate of Richards, respecting the title to the property; the matter having been here for consideration in the cases of *Bennallack v. Richards*, 116 Cal. 406, 48 Pac. 622; *Bennallauck v. Richards*, 125 Cal. 423, 58 Pac. 65, and *Granger v. Richards*, 126 Cal. 635, 59 Pac. 118.

This present action was brought by plaintiff in 1897 against the executors and the residuary legatees under the will to quiet his title to the property. In his complaint the plaintiff alleged generally ownership of the property by him, and also set up the facts surrounding the sale to him by the executors, payment of the purchase price, and delivery of possession of the property to him, and alleged facts upon which he based a claim of title to the property by adverse possession. He also alleged proceedings in the matter of the estate of Richards under which he claimed that a certain order of court made on February 19, 1895, in effect amounted to a confirmation by the court of the sale of May 11, 1891. He set up further an estoppel by deed of the executors, and an estoppel in pais; the latter based on the alleged fact that he had made large improvements and repairs on the property and expended money thereon with the knowledge and acquiescence of the executors and without any objections on their part. The executor James Bennallack made no appearance in the case, and while it was pending died.

The executor Francis S. Richards answered admitting that plaintiff was the owner of an undivided one-half of the property in question by virtue of a conveyance thereof made by said executor in his individual capacity as residuary legatee under the will to one-half of the estate of the said Philip Richards, deceased. He further set up that the conveyance of executors to plaintiff made on May 11, 1891, was made in good faith and for full value, that the money derived as the purchase price had been used by the executors to pay legacies enumerated in the will, and that as a residuary legatee he elected to treat the deed made by the executors to plaintiff as good and valid and declined to rescind said sale or deed or to return to plaintiff any part of the purchase price. This executor, Francis S. Richards, also died pending the trial of the cause. The other executor, William G. Richards, who in behalf of the estate has all along contested the claim of plaintiff, filed an answer and cross-complaint, and in the former denied all the allegations upon which plaintiff based his claim of ownership. He then averred: That at the time the property was offered for sale by the executors it was the property of the estate of Philip Richards, deceased; that James Bennallack, one of the executors, desiring to purchase said property, caused the plaintiff to attend said sale and bid in said property for him, which he did; that no return of the sale of the property by the executors was ever made, nor was said sale ever confirmed by any court; that within 10 days after the conveyance by the executors to plaintiff plaintiff conveyed said property to said James Bennallack, who thereafter conveyed it to his wife, Mary A. Bennallack, who on May 18, 1895, brought an

action in the superior court of Nevada county against these same defendants to quiet her title to said premises, which action is now pending and undetermined; and that about two months prior to the bringing of the present action by plaintiff said Mary A. Bennallack conveyed said property to him. It is then alleged that plaintiff had received large sums of money over and above the expenses of said property, and that plaintiff and his grantees had ever since said sale by the executors received from the income and proceeds of said property a net amount far exceeding what was paid as the purchase price thereof. The prayer of the cross-complaint was that it be decreed that plaintiff has no title to the property, and that it be adjudged to be the property of the estate of Philip Richards, deceased. The answer of the plaintiff to the cross-complaint denied any agreement between himself and James Bennallack to purchase the property for the latter, alleged that the said sale was in fact made to plaintiff, that the purchase money was distributed and paid out in said estate by the executors for the benefit of the persons entitled to the estate, that the executors had never paid or offered to pay back to the plaintiff the money which he had paid as the purchase price of said property, and denied that plaintiff or his grantees had received from the income or proceeds of said property a net amount equal to or in excess of what he paid as the purchase price thereof. Upon the trial the court found: That plaintiff was not the owner of any portion of the lot in question; that W. G. Richards, as the surviving executor of the estate of Philip Richards, deceased, was entitled to the possession of the premises; and that said W. G. Richards, as the successor in interest of his father, W. S. Richards, residuary legatee of said Philip Richards, deceased, was entitled to any residue thereof remaining after closing said estate. The court further specifically found that plaintiff did not purchase or pay for said property in his own behalf, but in making such purchase and payment was acting as agent of James Bennallack, one of the executors of the estate, and that the purchase price was received and paid over by the executors for the benefit of the estate and accounted for in the accounts approved by the court. There are other findings made by the court which, to avoid repetition, will be referred to in considering the points made relative to them.

The appellant attacks the findings made in so far as they are against his claim of title, and they all practically bear against it in that regard. The appellant does not insist that he acquired any legal title to the lot under the sale itself made by the executors, and, of course, he could not, because it was decided in *Bennallack v. Richards*, 116 Cal. 406, 48 Pac. 622, that, while the will of Philip Richards empowered the executors to sell, still it was necessary to have the sale re-

ported and confirmed by the court in order to convey the legal title. His claim is that the evidence established title in him by adverse possession, that aside from this the sale was in effect confirmed by the court by the order of February 19, 1895, and, further, that his claim of estoppel—both by deed and in pais—was supported by the evidence, and the court should have so found. The court found against him on all these matters, and we think the evidence justified the findings.

The claim of adverse possession was not sustained, because it appeared that subsequent to the conveyance to plaintiff by the executors and on February 9, 1895, he conveyed the property to Mrs. Bennallack, wife of James Bennallack. She, two days thereafter, and much less than five years after the deed to plaintiff from the executors, commenced an action against these identical defendants as executors and residuary legatees, to quiet her title to this same property, to which they answered denying her title, and that action is still pending and undetermined. Mrs. Bennallack and her husband, James Bennallack, reconveyed the property to plaintiff on May 8, 1897; but when plaintiff took such reconveyance the evidence shows, and the court so found, that he did so with full knowledge and notice of the pendency of the action to quiet title brought by Mrs. Bennallack. Under these circumstances, plaintiff could not sustain his claim of adverse possession in himself and his grantor for the requisite period, because, while he and she might otherwise have been in possession for the requisite time, they were not in the peaceable and undisputed possession, as the title and right of possession were being then actually litigated in court.

Neither is there any merit in the claim that by virtue of certain proceedings in the estate of Richards, eventuating in the order of February 19, 1895, alleged in the complaint, the court should have found that the sale to plaintiff was in that proceeding confirmed, or at least the judgment of the court therein operated as a bar against any claim of the executors that the sale by them was not valid so as to convey the legal title. The proceeding referred to was one relating to the settlement of an account in the estate of Philip Richards, wherein W. S. Richards, one of the residuary legatees, sought by petition filed September 5, 1894, to have the executors account for the rents and profits of the property in question. An order of court was made requiring them to do so, which was served personally on two of the executors, James Bennallack and F. S. Richards. The executors appeared and answered the petition, and the court, after settling their account, entered a judgment as follows: "That each of said deeds of real estate as executed and delivered by said executors * * * be and they are hereby adjudged

and decreed to have been absolute and valid on the date when so executed and delivered without confirmation of court." It is this quoted judgment which the appellant claims was in effect a confirmation of the sale, or at least operated as a bar against any question as to the validity of the deed; but we do not think it had either effect. The proceeding in which this purported judgment was entered was the settlement of an account, and the court had no jurisdiction to determine a matter which was not involved in the settlement. The law provides a particular method for the return of sales of real estate, and the confirmation thereof, and provides the character of notice which shall be given in order to confer jurisdiction on the court in the proceeding to confirm. The proceeding in question here did not pretend to relate to a confirmation of sale, and was not noticed as provided by law so as to confer jurisdiction on the court to confirm. In fact, the court did not assume to confirm the sale but to declare the deeds valid without confirmation, a matter which is not committed to the jurisdiction of the court sitting in probate in the settlement of an account.

As far as the estoppels asserted by plaintiff are concerned—by deed and in pais—they require no particular consideration. The special point as to the deed of May 11, 1891, by the executors, is that it purported to convey to plaintiff title in fee simple absolute, without qualification or condition, and that both the Richards as residuary legatees are estopped to assert any claim to the property against plaintiff, and he reasons out an estoppel—particularly against W. G. Richards, as successor to his father, W. S. Richards, one of the residuary legatees, on the following consideration: Plaintiff had succeeded by conveyance from Francis S. Richards, one of the executors, to whatever title he had as residuary legatee of an undivided one-half of the property, and his claim is, as to the other executor, W. G. Richards, who subsequently succeeded to the interest of his father, W. S. Richards, the only other residuary legatee, that such after-acquired title inured to the benefit of plaintiff under the deed from said W. G. Richards as executor which was absolute in form. The answer to this claim, however, is that the deed of the executors as found by the court was not absolute in form, but purported to convey only the title which the estate of Philip Richards had in the property and no more. It is unnecessary to say anything further on this point. As to the alleged estoppel in pais by reason of improvements, maintenance, and repair of the premises by plaintiff with the knowledge and acquiescence of the executors and residuary legatees, and without objection on the part of any of them, it is sufficient to say that the court found that there was no evidence pre-

sented as to the amount of such expenditures, and no proof made of any of the other elements of estoppel pleaded, and this appears to be true. This disposes of the points made by plaintiff under his attack on the findings, as far as they are against his asserted title, based upon alleged possession, confirmation of sale, or estoppel. The evidence warranted the court in finding against him on all these matters.

But while this is true, we are satisfied that, upon the other findings as made, the judgment of the court that W. G. Richards, as surviving executor of the estate of Philip Richards, is entitled to the possession of the property in dispute, and further that said W. G. Richards, as the successor in interest of said W. S. Richards, residuary legatee of Philip Richards, deceased, is entitled to any residue thereof remaining after closing said estate, were wrong. Addressing ourselves first to the matter of the judgment as to the right of W. G. Richards, as successor to W. S. Richards, one of the residuary legatees: While the question of who would be entitled to take as residuary legatee under the will might well have been left to be determined on distribution in the matter of the estate of Philip Richards, and was not necessarily involved in the case at bar, it stands as a determined matter under the judgment appealed from, and it is necessary to review the accuracy of the conclusion of the court on the subject. The conclusion of the court as made was evidently based on the construction it placed on the clauses of the will as first hereinabove quoted. The court construed those provisions of the will giving to W. S. Richards, one of the residuary legatees, all legacies which had not been paid before the death of any of said legatees to apply to the share of the estate given to Francis S. Richards, his co-residuary legatee, and that by the death of said Francis S. Richards prior to distribution his residuary interest vested in said W. S. Richards and passed to W. G. Richards, his successor in interest, to the residuary estate; but we think the construction so given was incorrect. The testator had provided in his will for the payment of certain enumerated legacies, and it was as to such legacies that he provided, in the event of the death of any legatees, that such legacies should go to W. S. Richards. He did not speak of the brothers as "legatees" of the residue of his estate. In effect, though not so designated, they were under the provisions of the will to be residuary legatees, or residuary devisees, depending upon the character of the residuum of the estate when distribution of it was to be made—whether personal or real property. But the testator did not designate them as either legatees or devisees, but bequeathed, "after payment of all legacies herein enumerated," the residue of the estate to them by name. He did, however, speak

about legacies "herein enumerated," and "legatees herein named," and provided, in the "event of the death of the legatees," that the share of such "legatees" should be "paid to his brother W. S. Richards." This mention of "legacies enumerated" and "legatees herein named" had reference to legacies as such, payment of which he had specially provided for, and which payments would be made during the administration of the estate, and had no reference to the residue of the estate which could only be received by the residuary legatees or devisees on distribution. The purpose of the testator was doubtless to provide that, in the event of the death of a legatee entitled to any of the legacies enumerated, his legacy, instead of going to the heirs of the legatee, should go to the brother of the testator, W. S. Richards. This intention is evidenced also by the use of the word "payment" and "paid," in this connection; words which are quite apt when used concerning legacies which are generally of money, but would be quite inapt when applied to the disposition of the residue of an estate which might consist of both real and personal property of which the legatee or devisee could only obtain possession by "distribution." Had the testator intended the provisions of his will relative to the death of legatees to apply to the residuary legatees, he would have used more characteristic words than "payment" or "paid," which apply strictly to monetary transactions as provisions for legacies and their payment generally are. While we are satisfied that this is the proper conclusion, still, if the matter were open to construction by reason of the language used in the provisions of the will, under familiar rules this would be the construction that must be given to it. By the first-quoted provision of the will both brothers are undoubtedly made residuary legatees or devisees of the residue of the estate without limitation or qualification, and by the subsequent section it is at least rendered doubtful whether it applies to all legacies special or residuary, or only to the specially enumerated legacies. Under this condition, it is a well-established rule of construction of wills that, when the words of a will in the first instance indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provisions which are of indefinite or doubtful expression. *Am. & Eng. Ency. of Law*, vol. 30 (2d Ed.) p. 687. It follows therefore that, as F. S. Richards was a legatee or devisee of one-half of the residue of said estate of Philip Richards, and his bequest unaffected by the provision as to deceased legatees, the plaintiff, as his successor in interest, would, instead of W. S. Richards, be entitled to one-half of the property upon distribution of the estate.

Now, upon the proposition that the judgment declaring the surviving executor enti-

tled to the possession of the property in question: This is based on one of two views taken by the court, either that from the finding that the purchase was made by Bennallack for himself as administrator, through the interposition of plaintiff, the contract of sale was absolutely void, or that as the sale was subject to confirmation, and confirmation had been refused, the legal title never passed from the estate and the executor was entitled to a judgment for possession of the property. The plaintiff attacks both the findings made as to these facts. He insists that the evidence is entirely insufficient, and in fact does not warrant the finding that Bennallack was the real purchaser at the sale, or that plaintiff purchased the property for the benefit of any one other than himself, and further insists that there was no evidence to support the finding that in the proceedings in the estate of Philip Richards the court had on June 19, 1900, refused confirmation of the sale; but appellant is in no position to attack this latter finding, because it is not embraced in his specifications of insufficiency as to the findings. His specification, which at all bears on the matter, is that there is no evidence that the sale had not been confirmed by the court. This could only apply to the finding that the order of February 19, 1895, made on the settlement of the account of that date, was not a confirmation, and not to the other finding that confirmation had been refused on June 19, 1900. A finding that there was no confirmation, and a finding that confirmation was refused, are entirely different, and the specification of appellant did not reach the latter. Hence the finding that confirmation was refused must stand as unchallenged.

As to the finding that James Bennallack, one of the executors, was in fact the purchaser at the sale of May 11, 1891, it is unnecessary to determine whether the evidence sustains it or not, because, assuming it to be sustained (which is only an assumption for present purposes), still we are satisfied that the judgment based upon either or both of these findings (and there are no others which could support it) cannot be sustained. If plaintiff was not the purchaser, he at least succeeded to whatever rights James Bennallack had by the conveyance from himself and wife to plaintiff on May 8, 1897. If Bennallack was in fact the purchaser at the sale of this property in question, the purchase by him was not void but voidable only at the instance of those interested in the estate. *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146; *O'Connor v. Flynn*, 57 Cal. 203; *Burris v. Kennedy*, 108 Cal. 341, 41 Pac. 458.

Without making any return of sale at all, the executors might, at any time during the many years which elapsed before confirmation of the sale was refused by the court, have brought an action to rescind such sale for fraud on the part of Bennallack. Or upon a return of sale, those interested in the

estate, if they had knowledge of the facts, could elect to have it confirmed or rejected as they might deem it most advisable for the interests of the estate. Had confirmation been rejected, it would have been the plain duty of the executors to have returned the purchase price which had been paid. Had the sale been confirmed without knowledge on the part of those interested in the estate that Bennallack was himself the purchaser, they might have maintained an action to rescind the sale, or to have it declared that Bennallack held the title in trust for the benefit of those interested in the estate. But whether an action was brought to rescind the sale, or to have a trust declared after confirmation, the estate would not be entitled to recover possession of the property in which they had placed the purchaser after receiving from him the full purchase price thereof, without returning or offering to return to him the purchase money after an accounting between them in which the purchase price would enter as a factor. *O'Connor v. Flynn*, 57 Cal. 293; *Burris v. Kennedy*, 108 Cal. 341, 41 Pac. 458. This is in harmony with plain principles of equity, as it would be unjust to allow one to retain the proceeds of a sale which, as in this case, were devoted to the use and benefit of the estate as the will provided upon a sale of the property they should be, and likewise obtain possession of the property itself. This rule finds its application in the cases cited where confirmation had been made, the proceeds of the sale applied for the benefit of the estate, and actions subsequently brought to recover the property on the ground of fraud upon the part of the administrator in purchasing through the interposition of a third party the property of the estate for himself; but the principle can be no different where an action is brought to recover possession of property after refusal of the court to confirm its sale. In fact, that was the theory upon which the issues in the case at bar were framed. The cross-complaint of the surviving executor, in which he sought a decree establishing the title of the estate to the property and for its possession, alleged that plaintiff and his grantees had received from the income and proceeds of said property a net amount far exceeding what they paid therefor, which by answer the plaintiff specifically denied. In so pleading the surviving executor recognized the equitable rule that he was not entitled to recover possession of the property unless upon a restoration of the purchase price or an accounting which would involve it, but avoided the necessity of any tender of such purchase price by alleging the reception by plaintiff and his grantees of more than sufficient money from the income of the property to reimburse him. The court, however, made no finding upon this issue, but assumed that from the findings that the sale was in fact for the benefit of Bennallack, and confirma-

tion refused, the plaintiff was not entitled to reimbursement of the purchase price which had been received by the estate or to any accounting relating to it. This case, even assuming that Bennallack was the purchaser and the sale was refused confirmation, practically calls for the application of the same rule as applies where a sale is, in fact, confirmed and an action subsequently brought to recover the property on account of fraudulent conduct on the part of the administrator in having the property sold to himself. In such cases, as we have seen, the rule is that reimbursement should be had of the purchase price before the property can be recovered by those setting up the fraud of the administrator to defeat his title. There is no good reason why the same rule should not be applied here, and all equitable considerations are in favor of its application. Here the property was sold under a belief on the part of the executors that their power of sale rendered confirmation unnecessary. Full value was paid for the property, and the purchaser given possession. No return of sale was made until, according to the findings, nearly nine years had elapsed, and during that period the purchaser had made large improvements upon the property at the same time that he had received the income thereof. The money which he had paid had been used for the benefit of the estate in paying the legacies which the will declared should be paid out of the proceeds from the sale of the real property of the estate, and some of it likewise used in paying the expenses of administration. It does not appear directly what the present condition of the estate is, but it may reasonably be inferred from the pleadings and evidence that a considerable amount due on the legacies remains unpaid as well as the expenses of administration. Be that as it may, however, the estate had the benefit of the money paid, and it would be inequitable to permit it to recover the property in question from the plaintiff without restoring to him the consideration he paid for it, or at least determining upon an accounting the equitable rights of the parties. The mere fact that confirmation of the sale was rejected should, under the circumstances, make no difference in the application of the general equitable rule which obtains when confirmation is actually made and the sale subsequently declared void for fraud on the part of the administrator in procuring it to be made for his own benefit. There restitution of the purchase price must be made, or, if necessary, an accounting between the parties had, and it should be made or had here.

Applying this rule, there should be little difficulty in settling this controversy. As the sale was refused confirmation, it is not of much importance whether the property was purchased by Bennallack or plaintiff. Neither had any title to it as against the estate of

Philip Richards. At least, none is disclosed by the record here. The interest of plaintiff as successor to F. S. Richards, one of the residuary legatees, is properly a matter for consideration by the court in the probate proceedings in the estate of Philip Richards, on distribution. All that is necessary on the going down of this case is to try the cause on the theory adopted by the parties in their pleadings, namely, that plaintiff is entitled to have restored to him the purchase price which he paid the estate for the property. Of course, considering the long time that has elapsed since the attempted sale to plaintiff, and the fact that he has been in the possession of the property and in the receipt of the rents, issues, and profits during that time, it will be necessary that an accounting between the parties be had, in which necessarily the amount received by the estate as the purchase price of the property will be an element. This the court will have to do in order to adjust the rights of the parties, and it can be done upon the basis as suggested in a supplemental opinion in *O'Connor v. Flynn*, supra, as the basis for the accounting in that action, as far as it may apply to this one.

Several other points are made by appellant, both as to findings and alleged errors in the reception and rejection of testimony. The point that the finding of the court had the property in May, 1891, was producing a large income, and has ever since produced a large income which has exceeded the amount expended for improvements, repairs, maintenance, and taxes, is not sustained by the evidence. In fact there was no evidence as to income during the period referred to. As far as the claim of error in the rulings as to the admission of evidence is concerned, we do not find anything of a prejudicial nature.

The judgment and order appealed from are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.; HENSHAW, J.

154 Cal. 545

DE MERRITT v. WELDON et al.[†]
(S. F. 5,010.)

(Supreme Court of California. Nov. 20, 1908.
Rehearing Denied Dec. 17, 1908.)

1. MUNICIPAL CORPORATIONS (§ 183*) — OFFICERS—SALARIES—POWER TO FIX—JUDICIAL INTERFERENCE.

Under General Municipal Corporation Act (Gen. Laws 1906, pp. 895, 896, 910), §§ 851, 852, 855, 880, vesting the government of cities of the sixth class in a board of trustees and enumerated officers, including a marshal, and providing that the marshal shall have such salary as shall be fixed by ordinance, the power of the trustees to fix the salary of the marshal is absolute, free from judicial interference, subject only to the limitation that the salary cannot be fixed at so low a sum that no competent person can be found to perform the duties of the office.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 183.*]

2. CONSTITUTIONAL LAW (§ 73*)—LEGISLATIVE POWER—JUDICIAL INTERFERENCE.

Where the state confers on a board of public officers jurisdiction to exercise their discretion on matters within their power, the courts cannot review the question whether the discretion was properly exercised, especially in the absence of fraud or bad faith on the part of the body to whom the power is confided.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 134-137; Dec. Dig. § 73.*]

3. CONSTITUTIONAL LAW (§ 70*)—LEGISLATIVE POWER—JUDICIAL INTERFERENCE.

The courts refuse to consider legislative motives, except as they may be disclosed on the face of enactments or are inferable from their operation and effect, considered in the light of those matters of which judicial notice may be taken.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 129; Dec. Dig. § 70.*]

4. MUNICIPAL CORPORATIONS (§ 184*) — OFFICERS—POWER TO CREATE.

General Municipal Corporation Act (Gen. Laws 1906, p. 910), § 880, providing for the election of a marshal of a city of the sixth class who shall have control of the department of police, execute all process issued to him, collect taxes and licenses, etc., and empowering the trustees to appoint such police and other subordinate officers as may be required, empowers the trustees to create an office with power to exercise the duties of a police officer subject to the limitation that such officer cannot be required to collect license fees and taxes imposed by the act on the marshal.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 184.*]

5. MUNICIPAL CORPORATIONS (§ 183*)—OFFICERS—SALARIES—VALIDITY.

An ordinance of a city of the sixth class having a population of about 1,800 inhabitants, which fixes the salary of the marshal at \$10 a month for the performance of his statutory duties, is not invalid on the ground that the salary fixed is so small that no competent person can be found to fill the office; the Municipal Corporation Act (Gen. Laws 1906, p. 632) not requiring that the marshal shall devote all his time to the duties of his office, and there being nothing warranting the inference that a proper discharge of the duties of the office will materially interfere with the conduct by him of other business.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 183.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Warren De Merritt against T. J. Weldon as president and another as clerk of the Board of Trustees of the Town of Ukiah City. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendants appeal. Reversed.

Rehearing denied in bank; BEATTY, C. J., dissenting.

Arthur J. Thatcher, for appellants. J. W. Preston, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from a judgment in favor of plaintiff and an order denying defendants' motion for a new trial in a proceeding brought by plaintiff to obtain a writ of mandate requiring defendants to issue and deliver to plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For dissenting opinion, see 98 Pac. 671.

"tiff" a warrant for the sum of \$60, alleged to be due him as marshal of Ukiah City for salary for the month of April, 1907. The judgment directed the issuance of such writ.

Ukiah City, the county seat of Mendocino county, is a municipal corporation of the sixth class, organized under the provisions of the general municipal corporation act, and having, according to the last federal census, something over 1,800 inhabitants. Sections 851 and 852 of that act (Gen. Laws 1906, p. 895) provide that the government of such a city or town "shall be vested in a board of trustees of five members; a clerk, who shall be ex officio assessor; a treasurer, a marshal, who shall be ex officio tax and license collector," etc., to be elected by the qualified electors at general municipal elections. By section 855, it is provided that "the clerk, treasurer, marshal and recorder shall severally receive, at stated times, a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." Section 880 prescribes the duties of the marshal substantially as follows: "He shall have direction and control of the department of police of the town, execute all process issued and directed to him, collect all taxes and licenses, have charge of the prison and prisoners and any chain-gang which may be established by the trustees, and perform such other services as this act and the ordinances of the board of trustees shall require." It further provides that he "shall receive such compensation as shall be fixed by ordinance." On January 20, 1896, the board of trustees enacted an ordinance providing that the city marshal shall perform all the duties required by law or any ordinance, "shall devote his entire time and attention to the duties of his office, shall see that the streets and sidewalks are kept free from obstructions, and that all the ordinances of said town are strictly enforced." It further provided: "He shall receive as salary for all services rendered by him as marshal and ex officio tax collector the sum of \$60 per month, and for collecting licenses such fees as are now or may hereafter be allowed by law or prescribed by ordinance." Prior to February 15, 1904, plaintiff was elected and qualified as marshal, and has ever since been the marshal of said town, having been last elected at the general municipal election in April, 1906. On February 15, 1904, the board of trustees, acting under the power given by the act to appoint "such police and other subordinate officers as in their judgment may be deemed necessary and fix their compensation," enacted an ordinance creating a new office, the incumbent to be known as the "executive officer," and prescribing his duties to be to exercise the duties of a police officer, to have charge of all town property and work and repairs thereon, including streets, to collect all license fees and license taxes, to collect all sums due the town

from patrons of the electric light system or other public utilities, to assist the night watchman and town marshal in the performance of their duties, to patrol the streets of the town each day from 10 a. m. to 10 p. m., and to perform such other duties as might be required by the trustees, and fixing the compensation of such officer at \$75 per month. On the same day, the board enacted another ordinance relative to salary of the marshal, providing that "the salary of the marshal shall be fixed at and declared to be the sum of \$10 per month, payable as other salaries are paid." Plaintiff was appointed by the board of trustees as such executive officer and continued to hold such office until March, 1907. He was re-elected as marshal in April, 1904, and again in 1906. From the time of his appointment as executive officer to March, 1907, he received the combined salaries of marshal and executive officer, viz., \$85 per month; a single warrant "for salary of marshal and as executive officer" being issued to him each month. In March, 1907, the board of trustees revoked his appointment as executive officer. Plaintiff thereupon claimed that his salary as marshal is fixed by the ordinance of January 20, 1896, and that he is therefore entitled to receive the salary of \$60 per month. The defendants refusing to comply with his demand that such a warrant be issued for his salary for the month of April, 1907, he instituted this proceeding to compel such issuance.

In view of the fact that the marshal can receive only such compensation as is fixed by the board of trustees, plaintiff's claim in this behalf is necessarily based on his contention that the subsequent ordinance of February 15, 1904, fixing the salary of such office at \$10 per month, adopted prior to the election under which he now holds office, is absolutely void, leaving the former ordinance in full force. The absolute right of the board of trustees under the law to fix the compensation of the marshal at any sum it deems proper, free from supervision or review on the part of the courts, is admitted, subject to a single limitation. It is urged: That the effect of the provisions of the municipal corporation act is to require that the trustees shall fix a reasonable compensation; that, while it is for them to determine what is a reasonable compensation, they are at least precluded from fixing it at so small an amount that their action results in the destruction of the office of marshal, a co-ordinate department of the government of the town, by reason of the fact that no competent person would seek the office or perform the duties thereof for the compensation fixed; that any ordinance fixing the compensation at such a low figure is in conflict with the provisions of the general municipal corporation act, and therefore void; and that for this reason the ordinance fixing the compensation at \$10 per month is void. The lower court found that the amount of salary attempted

to be fixed by the ordinance was an unreasonable and arbitrary amount, and tantamount to the destruction of the office of marshal, that no competent person would seek the said office or perform the duties thereof for any such amount, and that the duties of the office as prescribed by law and ordinance would consume the whole time of a competent person. It further found that a reasonable compensation would be at least 10 times the amount prescribed by the ordinance. Adopting the view of petitioner before stated, it therefore held the ordinance void, and held that the provision of the former ordinance fixing \$60 per month as the salary was still in force.

It may be conceded that where the state Legislature has seen fit to determine by lawful act that a municipality shall have a certain designated officer to perform duties specified in the act, who shall be paid for his services a compensation, which compensation shall be fixed by the legislative body of the town, in this case the board of trustees, such legislative body of the town may not effectually provide that there shall be no compensation at all, or practically destroy the office by fixing the compensation at so low a figure that no one will discharge the duties thereof for the compensation fixed. Such a provision by the trustees would appear to be in conflict with the act of the state Legislature, and therefore void. Upon the first point, the case of *State v. Mayor*, 15 Lea (Tenn.) 697, 54 Am. Rep. 427, is in point. It was there held that where the legislative charter provided that the mayor should receive compensation, but authorized the city council to change the amount fixed by the charter as it deemed proper, except that no change should be made to affect an incumbent during his term of office, an ordinance of the council, adopted in the exercise of the power to change the compensation, providing that the next mayor should receive no compensation, was in conflict with the charter and therefore void. The court expressly declined to decide what the situation would have been had the council fixed any compensation, however small, though its reasoning seemed to imply that the requirement of the charter would not be complied with by the fixing of a mere nominal consideration. The case of *County v. Westbrook*, 64 Miss. 312, 1 South. 352, is in point on the latter proposition. It was the duty of the supervisors of the county to fix the compensation of a health officer appointed by a state officer under a legislative act. They had fixed it at \$15 per month. Subsequently concluding that they did not need a health officer, and having no power to abolish the office or discharge the incumbent, they fixed the salary at \$1 per month. It was held that this action was a nullity on the ground that it was practically an attempted abrogation of the state law. The court said: "What the salary should be was a matter within their

discretion provided they did not exceed the maximum specified by the statute or place it so low as to virtually abolish the office in the county. * * * But the laws for the protection of the public health under which appellee was appointed are of general application and cannot be nullified in any county by the failure of the board of supervisors to fix the salary of the general health officer of the county after he has been appointed or by fixing it at a rate so far below the maximum that no competent physician will accept the office." To the same effect is a note in 2 Abbott on Municipal Corporations, p. 1644, where it is said: "General legislation cannot be nullified by fixing the salary of a public official in a particular county at such a low figure that no competent person will accept the office." But except for this limitation, the power of the body to whom the fixing of the compensation in such a case is delegated is absolute. It is required to fix a reasonable compensation for the services to be rendered, it is true; but the question what is such a reasonable compensation is addressed solely to it, and not to the courts (*Green v. Fresno Co.*, 95 Cal. 329, 30 Pac. 544), and, however much a court may disagree with the conclusion of the legislative body that a designated sum is reasonable, it may not interfere. As was said in *Porter v. Haight*, 45 Cal. 639: "When the state, by legislative act, confers upon a board of public officers jurisdiction to exercise their judgment and discretion upon matters within their power to perform, the courts cannot review the question whether that discretion was properly exercised." See, also, *San Mateo Co. v. Maloney*, 71 Cal. 205, 208, 12 Pac. 53, 55. This is certainly so in the absence of fraud or bad faith on the part of the body to whom the power is confided (see 1 *Dillon on Mun. Corp.* § 94; 28 *Cyc.* 457), and the courts refuse to consider legislative motives except as they may be disclosed on the face of the acts or are inferable from their operation and effect, considered in the light of those matters of which judicial notice may be taken. See *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145. See, also, *Dodge v. Kings Co.*, 150 Cal. 96, 88 Pac. 66. Much reliance is placed by plaintiff on the ordinance enacted on the same day as the ordinance under consideration, creating the office of executive officer and prescribing the duties thereof, which it is claimed we may consider as showing the motive of the board to destroy the elective office of marshal and devolve its duties on the appointed executive officer. That ordinance, however, does not sustain plaintiff's claim. It was one clearly within the power of the trustees to enact under their general power to appoint "such police and other subordinate officers as in their judgment may be required," and, with the single exception of the duty to collect license fees and license taxes imposed by the statute on the marshal,

the duties prescribed for such executive officer were such as the trustees had the right to annex to an office established by them, filled by their own appointee. However, neither fraud nor bad faith on the part of the trustees was alleged or found.

We are thus brought to a consideration of the question whether the amount of compensation fixed by the ordinance under consideration is so small that the act of the trustees can be held to be a practical abolition of the office of marshal, in that no competent person can be found to perform the duties thereof for that compensation. We are satisfied that no such conclusion is warranted by the facts that may be considered. It is conceded that the courts are limited in the consideration of this question to the ordinance itself and to those facts of which they may take judicial notice. Assuming that this includes all the facts heretofore stated in the opinion, and also the evidence given on the trial as to the amount of taxes and licenses collected each year, the utmost that a court is warranted in saying is that it disagrees with the trustees as to what constitutes reasonable compensation for the services to be performed, which, as we have seen, is not enough to warrant it in holding their action void. There is nothing in the record to warrant the conclusion of the trial court that the action of the trustees was tantamount to the destruction of the office of marshal, that no competent person would perform the duties thereof for any such amount, or that the duties of such office as prescribed by law and ordinance would consume the whole time of a competent person. Much reliance is placed on this last conclusion, which is evidently based solely on the provision in the ordinance of January 20, 1896, specifying the duties of marshal and fixing the compensation at \$60 per month, to the effect that he shall devote his entire time and attention to the duties of his office, which provision, it is said, has been repealed. There is nothing in the municipal corporation act requiring that the marshal devote all his time to the duties of his office, and there is nothing in the evidence warranting the inference that a proper discharge of the duties of that office in Ukiah City imposed on him by the state law would occupy all his time, or even interfere to any material extent with the conduct by him of some other business or calling. It may be doubted whether the trustees had the power to require that the marshal devote all his time and attention to the duties of the office, except in so far as the duties were additional to those prescribed by the state law and were imposed by ordinance of their own. It is manifest, however, that the ordinance relative to the executive officer was intended to change the duties of the marshal to the extent of relieving him from all the additional duties imposed by ordinance of the trus-

tees and imposing those duties on the new officer, leaving the marshal with only such duties as are imposed by the state law, and we think it must be held to have operated as a repeal of the entire ordinance of January 20, 1896. The duties of the marshal were, then, only such as were prescribed by the state law. Under this, in a town of some 1,800 inhabitants, he was in charge and control of the department of police, required to execute such process as might be delivered to him for execution; he was in charge of the city prison, if there was such a prison; he would be required to take charge of any chain gang that might be established by the trustees, but none had been established; and he was required to collect all town taxes and town licenses. The last undoubtedly constituted the principal part of his duties. These are all the duties specifically imposed by the statute. While we may feel that \$120 per annum is not a reasonable compensation for the performance of these duties, and would fix a larger sum if it were within our province to determine what would be reasonable, we cannot hold, and the trial court was not warranted in holding, that the act of the trustees in fixing that amount was tantamount to the destruction of the office of marshal, in that no competent person would perform the duties for any such amount. It must therefore be held that the action of the trustees was a lawful exercise of the power confided to them to fix the compensation of the marshal, not in conflict with any law of the state. It follows that the marshal can recover only the salary so fixed.

In view of what we have said, it is unnecessary to consider any of the other points discussed by learned counsel for plaintiff.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

I dissent: BEATTY, C. J.

154 Cal. 534

In re McCARTY. (S. F. 5,126.)

(Supreme Court of California. Nov. 16, 1908.)

1. DIVORCE (§ 269*)—ALIMONY—CONTEMPT FOR FAILURE TO PAY—AFFIDAVIT—SUFFICIENCY.

An affidavit initiating proceedings for contempt in failing to comply with an order directing the payment of alimony is sufficient where it alleges the making of the order and disobedience to it, and is not required to allege the husband's ability to pay.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 269.*]

2. DIVORCE (§ 269*)—ALIMONY—CONTEMPT PROCEEDINGS—CONDITIONS PRECEDENT—AFFIDAVIT.

An order entered on affidavit that an order awarding alimony had not been complied with, directing the husband to pay a certain amount by a time fixed, was an independent order, and,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to invest the court with jurisdiction to proceed against the husband for its violation, it was necessary that a proceeding for contempt should have been inaugurated by an affidavit showing his failure to comply with its terms, and affording him an opportunity to show cause why he should not be punished.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 269.*]

3. DIVORCE (§ 269*) — ALIMONY — CONTEMPT PROCEEDINGS—CONDITIONS PRECEDENT—AFFIDAVIT.

A contempt in failing to pay alimony is not a contempt committed in the presence of the court for which it may deal with the husband summarily, as provided in Code Civ. Proc. § 1211, but is a constructive contempt, and an affidavit showing a failure of the husband to pay the alimony, and affording him an opportunity to show cause why he should not be punished, is required to invest the court with jurisdiction.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 269.*]

4. CONTEMPT (§ 64*) — POWER TO PUNISH — SCOPE AND EXTENT OF AUTHORITY—RECORD.

The record upon which a party is adjudged guilty of contempt should show on its face the facts upon which the judicial action is based and jurisdiction depends, as proceedings in contempt are criminal in character, and the court exercises but a limited jurisdiction.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 64.*]

In Bank. Certiorari by J. H. McCarty to review a judgment convicting him of a contempt of court in failing to pay certain alimony awarded in an action for divorce. Order of conviction annulled.

F. V. Meyers, for petitioner. Alfred H. Cohen and Milton Shepardson, for respondent.

LORIGAN, J. This is a proceeding to review a judgment of the superior court of the city and county of San Francisco convicting petitioner of a contempt of court in failing to pay certain alimony awarded in an action for divorce pending between his wife and himself. In that action the superior court on April 20, 1908, entered an order directing payment by petitioner to his wife of \$90 per month alimony pendente lite, which he paid for two months, and, failing to make further payment, his wife on August 14, 1908, filed and presented to the superior court her affidavit stating such neglect and failure to pay, upon which the said court issued a citation to petitioner to show cause, on a day stated, why he should not be punished for contempt in failing and refusing to comply with said order. The matter coming on for hearing on September 8, 1908, petitioner appearing in response to the citation, and evidence being taken, the court made an order directing the petitioner to pay to his wife the sum of \$150 at or before 11 o'clock a. m. on the 18th of September, 1908. The court also found that petitioner was able to

pay said sum and had ample means to do so, and directed that, in the event said sum was not paid at the time stated, petitioner should be found and adjudged guilty of contempt of court for failure to comply with the order by not making the payment.

The order before us for review, after reciting the above matters, proceeds as follows: "That on said 18th day of September, 1908, said cause coming on regularly for hearing, testimony having been offered and received by the court, and the cause having been submitted to the court, and it satisfactorily appearing to the court that said order of September 8, 1908, directing the defendant to pay plaintiff the sum of \$150, has not been complied with on the part of the defendant, and it appearing to the court that said J. H. McCarty is able to comply with said order, but willfully refuses to pay plaintiff said \$150 so ordered to be paid, and it further appearing that said defendant had ample property with which to pay the same, said J. H. McCarty is therefore hereby adjudged to be guilty of contempt of said court.

* * *

The court thereupon ordered petitioner committed to the custody of the sheriff of the city and county of San Francisco to be imprisoned in the county jail thereof until he complied with said order of September 8, 1908, by paying the sum of \$150 to his wife. It is the validity of this order that the petitioner attacks in this proceeding.

It is claimed by the petitioner that the superior court exceeded its jurisdiction in making the order adjudging him guilty of contempt and that it is void. He insists, first, that the affidavit of his wife, made on August 14, 1908, under which the proceeding for contempt was initiated, was fatally defective because it did not contain a statement that the petitioner was able to pay the amounts which it was stated therein he had failed to pay. He insists that it was not enough to confer jurisdiction upon the court to proceed to punish him for contempt to state only in the affidavit that he had failed to make payment, but that it was a prerequisite to the exercise of such jurisdiction that it should have been also stated therein that he had the then ability to pay; that nonpayment and ability to pay were both jurisdictional facts necessary to be stated in the affidavit in order to make a case of contempt and to warrant the court in exercising its jurisdiction to proceed to punish him for it. We do not think there is any merit in this position. The court in the original order of April 20, 1908, found the petitioner had the ability to pay his wife \$90 a month, and ordered him to make such payment. While to support the original order it was necessary for the court to find that the petitioner had the ability to pay alimony, the order itself, as far as it related to any affirmative duty

to be performed by the petitioner, required only the payment of such alimony by him in the amount and at the time specified in the order. The contempt for which he might be proceeded against consisted in disobeying the only thing that the order required, namely, payment of the sum awarded. It is for this nonpayment that the proceedings in contempt are authorized, and it is only necessary that the affidavit, which constitutes the basis for judicial action in such a proceeding, should show the making of the order for alimony and the fact of the refusal of a husband to make payment as so ordered. It is not necessary for a wife on the hearing of a contempt proceeding for nonpayment of alimony to prove anything more than the making of the order and disobedience of it by her husband in refusing to pay the amounts which the court found he had the ability to do when it made the order. She makes a prima facie case at the hearing by producing the original order, and by proof of the refusal of her husband to make payment according to its terms, and, this being true, she is not required to set forth in her affidavit anything more than she is required to prove. The proceeding in contempt is designed to punish the delinquent husband for disobeying the order of the court and to enforce obedience to it, and at the same time an opportunity is given him to purge himself of contempt by presenting any legitimate excuse he may have, and, if his excuse is that since the making of the original order he has become unable to pay the alimony required by it, it is incumbent upon him to prove that fact. He is in the best position to show why for any reason he has not obeyed the order, and it is his duty to do so as a matter of defense. It is not necessary for the wife to allege his ability to comply with the original order. The court had originally found that he had such ability, and the only jurisdictional facts required to be stated in the affidavit were the making of the order and disobedience to it by refusal to pay. These the affidavit contained and were all that it was requisite jurisdictionally that it should contain.

But, while there is no merit in this first contention of petitioner, we are satisfied that another point urged by him is fatal to the validity of the order adjudging him guilty of contempt. It will be observed that the order of September 8, 1908, directed the petitioner to make payment of the sum of \$150 by 11 o'clock on September 18th of the same year; the court then finding that the petitioner had the ability to pay this amount. It is to be assumed that this lump sum, which was ordered paid by the 18th of September, represented a portion of the amount for which the petitioner was delinquent in payment under the original order of April 20,

1908. However, while it would not affect the integrity of the order of April 20th, this order of September 8th for the payment of \$150 was an independent order, and is the one for the alleged disobedience to which the respondent adjudged the petitioner guilty of contempt on September 18th. But it is quite clear from the record presented here, and upon the face of which the validity of the judgment of contempt must be determined, that the court had acquired no jurisdiction on September 18th to proceed against the petitioner for the violation of the order of September 8th. That order, as we have said, was a new one directing payment to be made at a future date. It was no different from any other order directing the payment of alimony at a time or times subsequent to its making, and, in order to invest a court with jurisdiction to proceed against the petitioner for its violation, it was necessary that any proceeding for contempt should have been inaugurated in the same manner that the law requires as to the violation of all orders for alimony, namely, by an affidavit showing the failure of the petitioner to comply with its terms, and affording him an opportunity, after a citation, to show cause why he should not be punished for disobeying the order. The contempt of which the court undertook to adjudge the petitioner guilty was not a contempt committed in the presence of the court for which it might deal with the petitioner summarily, as provided in section 1211 of the Code of Civil Procedure, but it was a constructive contempt—one committed without the presence of the court—and consisting of a failure to pay to the plaintiff herself in a given time the amount ordered to be paid. The order did not require payment in court but payment outside of it. The court could have no knowledge of the disobedience of its order save upon an affidavit showing the fact of nonpayment. In such a case, where the contempt is a constructive one, in order to invest the court with jurisdiction to proceed to punish for it, it is essentially a prerequisite to the exercise of such jurisdiction that an affidavit setting forth the fact of noncompliance with the order should have been presented to the court. This is so clearly the law that section 1211 of the Civil Code of Procedure (Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409, and Otis v. Superior Court, 148 Cal. 129, 82 Pac. 853), need only be referred to as establishing it. When the court proceeded on September 18th to investigate the matter of contempt on the part of petitioner in failing to comply with its order of September 8th, and adjudged him guilty of contempt therefor, no affidavit had been made showing non-compliance with that order, and necessarily no citation to show cause had been issued. Under these circumstances, the court never

acquired jurisdiction to proceed in the matter, and its order for want of such jurisdiction was void. While it was conceded on the hearing that no affidavit had been filed as a jurisdictional prerequisite to sustain the judgment of conviction by the court, it is insisted by the respondent that the court had regularly continued the further hearing inaugurated under the affidavit of August 14, 1908, from the 8th day of September, 1908, when the order for payment was made, until the 18th of that month; that the petitioner on the latter date appeared in court and refused to make the payment which had been ordered.

But these are matters entirely outside the record. There is nothing in the record showing any continuance, as asserted, nor anything showing that the petitioner appeared in court on the 18th and refused to make full payment. Assuming that the petitioner had voluntarily appeared in court on the 18th of September, and upon an examination as to whether he had made payment in compliance with the order it appeared that he had not, and that he had then used language showing an intention and disposition not to do so, which might be treated as a contempt in the presence of the court, as in the case of *Ex parte Robinson*, 71 Cal. 608, 12 Pac. 794, upon which respondent relies, still it would have been necessary to have the record show the facts in order to sustain the judgment of conviction. Proceedings in contempt are in their nature criminal in character. The court exercises but a limited jurisdiction in such proceedings, and the record of the court upon which the party is adjudged guilty of contempt should show upon its face the facts upon which the judicial action is based and upon which its jurisdiction depended. *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372; *Otis v. Superior Court*, supra. The record here does not show that the court ever acquired jurisdiction to proceed against the petitioner for disobedience to the order of September 8, 1908, either by reason of the hearing having been regularly continued from that date until the 18th of the same month, or under any affidavit filed setting up the fact of his refusal to comply with the order, or in any other manner.

It follows, therefore, that the order adjudging the petitioner guilty of contempt was void for want of jurisdiction in the superior court to make it, and it is hereby annulled. The clerk of this court is directed to transmit a copy of the judgment to the clerk of the superior court in which the order of conviction was made.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; MELVIN, J.

154 Cal. 16

Ex parte McCARTY. (Cr. 1,492.)

(Supreme Court of California. Nov. 16, 1908.)

In Bank. Application by J. H. McCarty for habeas corpus against the sheriff of the city and county of San Francisco. Prisoner discharged.

F. V. Meyers, for petitioner. Alfred H. Cohen and Milton Shepardson, for respondent.

PER CURIAM. Petitioner, having been taken into custody by the sheriff of the city and county of San Francisco upon conviction for contempt in failing to comply with an order of the superior court directing him to pay alimony awarded in an action for divorce pending between himself and wife, applies to this court to be released on habeas corpus, attacking the validity of the order of conviction. Prior to his application for this writ petitioner had brought a proceeding in certiorari in this court to have the same judgment of conviction which he attacks here annulled.

Both the certiorari proceeding and this petition were heard together, and an opinion has this day been filed in the certiorari proceeding annulling the same order of conviction involved in both proceedings. The order of conviction being annulled and declared void, the petitioner is entitled to be discharged from the custody of the sheriff; and it is so ordered.

154 Cal. 556

PEOPLE v. SILVER. (Cr. 1,458.)

(Supreme Court of California. Nov. 23, 1908.)

CRIMINAL LAW (§ 998*)—JUDGMENT—SETTING ASIDE.—COLLUSION OF ATTORNEYS—EVIDENCE.

On motion to vacate judgment in a murder case in which accused pleaded guilty, evidence held to show that there was no collusion between accused's attorney and the district attorney at the time of the determination of the degree of the crime, and that accused was not forced to plead guilty because of his fear of mob violence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 998.*]

In Bank. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Ed Silver pleaded guilty to a charge of murder, and was sentenced to death. From an order refusing to amend the minutes and vacate the judgment, he appeals. Affirmed.

John D. Pitts and Chas. S. Darden, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and H. L. Dickson, Dist. Atty., for the People.

SHAW, J. The defendant pleaded guilty to a charge of murder of the first degree. The court, after hearing the evidence on the subject of the degree of the crime, determined that it was murder of the first degree without extenuating circumstances, and sentenced him to death. Some six weeks later other attorneys for the defendant were substituted in place of the attorney who represented him up to the time of the sentence. Thereafter, before the time fixed for the execution of the sentence, the defendant moved the court to amend the minutes and vacate the judgment. The court, after hear-

ing affidavits for and against the motion made an order denying it. From this order, defendant appeals.

The motion to amend the minutes asked to have inserted therein, or in the record of the final judgment, a conversation alleged to have occurred in the courtroom between the defendant, the attorney then representing him, and Charles S. Darden, who afterwards was substituted as one of his attorneys. The conversation was no proper part of the judgment, or of the minutes of the court, and the motion to amend was properly denied, regardless of whether the conversation actually occurred or not. The motion to vacate the judgment was based upon the alleged grounds, first, that by collusion between the defendant's former attorney and the district attorney at the time of the determination of the degree of the crime material facts bearing on the subject and known to the witnesses then examined were not elicited from them, that other important witnesses were not called, and that, if the facts had all been shown, it would have been demonstrated that the crime was not of the first degree; second, that the defendant, at the time of his arraignment, was terrorized by the fear of death at the hands of a mob, and was thereby forced to enter a plea of guilty and consequently deprived of a trial by jury.

Upon the hearing of the motion evidence and affidavits were introduced showing that each and every of these grounds were wholly unfounded in fact. Before making his plea and until after final judgment, the defendant consulted with and was advised by one of the leading attorneys of the county, a man of learning and good standing in his profession. There was no collusion between him and the district attorney, and all the facts bearing on the degree of the crime were fully exhibited to the court. From the time he was held to answer until the end of the proceedings there was no cause to fear mob violence, nor any exhibition or expression of such fear by the defendant. These facts were fairly established by the testimony. There was some evidence to the contrary, but this only raised a conflict which gives this court no cause to interfere.

The motion and the appeal from the order are both without merit.

The order is affirmed

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

9 Cal. App. 212

JOLLIFFE v. STEELE et al. (Civ. 516.)
(Court of Appeal, Second District, California.
Oct. 13, 1908.)

1. SPECIFIC PERFORMANCE (§ 73*)—AGREEMENTS ENFORCEABLE—PERSONAL SERVICES.

Specific performance of agreement by one to use his best endeavors to sell land cannot be

compelled, the obligation being merely to render personal services, which, under the direct provisions of Civ. Code, § 3390, subd. 1, cannot be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 73.*]

2. SPECIFIC PERFORMANCE (§ 6*)—CONTRACTS ENFORCEABLE—MUTUALITY OF REMEDY.

A contract to render personal services, not being enforceable against the promisor, will not be enforced against the other party.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 9; Dec. Dig. § 6.*]

3. QUIETING TITLE (§ 21*)—CLOUD ON TITLE—UNENFORCEABLE CONTRACT.

An option contract for purchase of land, which was unenforceable specifically by either party thereto, cannot support a valid claim of interest in the land, though it might support an action for damages for breach of the contract, and hence the owner was entitled to have his title quieted against such claim, under Code Civ. Proc. § 738, authorizing an action by any person against another claiming an interest in real property adverse to him to determine the adverse claim.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 21.*]

4. VENDOR AND PURCHASER (§ 18*)—OPTIONS—CONSIDERATION—SUFFICIENCY.

An agreement by an agent authorized to sell land that he will endeavor to sell it at a fixed net price to the owner is not a sufficient consideration for the grant of an option to such agent to purchase the land at that price within a certain time; the contract being a mere proposal to sell, and revocable by the owner at any time before the land is sold or the agent exercises his option to purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

5. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS CONSIDERED.

Where a contract to sell land for the owner was unenforceable by either party, it is unnecessary on appeal to consider the failure of the trial court to find on an issue as to whether the owner's conduct caused the agent to cease his efforts to sell the land in accordance with the contract.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 843.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Katherine E. Jolliffe against F. J. Steele and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Affirmed.

Russ Avery, for appellants. J. Wiseman Macdonald, for respondent.

SHAW, J. Action to quiet title. Defendants appeal from judgment in favor of plaintiff, and from an order denying their motion for a new trial.

On August 18, 1904, plaintiff entered into a written agreement with defendant Steele whereby she granted to him "the exclusive option to purchase or sell for her," at his discretion, the property described in the complaint, at the prices specified in the contract. The stated consideration moving to plaintiff from defendant was the covenants made on the part of Steele, as set forth in said con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tract. The only covenant contained in the contract on the part of Steele is as follows: "The said second party (Steele) hereby accepts the option to purchase or the right to sell the aforesaid property under the terms of this agreement, and agrees to do all in his power to dispose of the aforesaid property as per the terms of the agreement." By the agreement Steele was authorized to contract for certain street work and surveys of the property, the expense of which, however, was to be borne by plaintiff. For the purpose of subdividing the property, he did, as empowered, cause a survey thereof to be made for the purpose of such subdivision and sale. Plaintiff's title to the property at the time of making the contract was imperfect, which fact was known to Steele at that time. Some time in March, 1905, plaintiff's title was perfected and Steele then proposed to proceed in an endeavor to perform the conditions of the contract on his part; whereupon plaintiff revoked the contract, and notified him that she would not recognize his right to proceed under the contract, and would not be bound thereby. At the time of the revocation Steele had not sold the property, nor had he done anything towards performance of the contract, except causing the said survey of the premises to be made. On May 25, 1905, Steele caused said contract to be recorded, thus constituting a cloud upon plaintiff's title; and on the 29th of May following, and after the revocation thereof by plaintiff, Steele assigned all his interest in the contract to his codefendants, Cherry and Crenshaw, who prior to the commencement of this action offered to perform all the acts required by them to be done under the terms of the contract. By the terms of the agreement it was to remain in force until the entire property was sold, during which time plaintiff was to pay all taxes and liens, and not incumber the property except with the written assent of Steele. The defense to the action is based upon this contract, set up in a cross-complaint filed by defendants, wherein they pray the court to adjudge the agreement to be a valid agreement between plaintiff and defendants, and declare it in full force and effect. By answer to the cross-complaint plaintiff alleged that said agreement was without any consideration, and alleged a revocation thereof. The court so found.

The question involved is not necessarily the validity of the contract, but whether it is a contract supporting defendants' adverse claim to an interest in the property. It is conceded that, if there was no sufficient consideration moving from defendant Steele to plaintiff, she had the right to revoke the contract at any time before a sale of the property or an exercise of the option to pur-

chase same. It is admitted that no sale of said property, or any part thereof, was made; nor is it claimed that any of the defendants, prior to the commencement of the action, made any tender of the purchase price thereof. Assuming, as claimed by appellants, that the promise on the part of Steele to use his best endeavors to sell the property constituted a consideration for the contract, still it was not a covenant the performance of which could be specifically enforced against Steele. At most, it was an obligation to render personal services of an indefinite and uncertain character. An obligation to render personal services cannot be specifically enforced. Subdivision 1, § 3390, Civ. Code. It is a fundamental principle that "equity will not specifically enforce a contract against one party when it cannot be specifically enforced against the other." *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 677, 57 C. C. A. 428; *Cooper v. Pena*, 21 Cal. 410; *Stanton v. Singleton*, 126 Cal. 658, 59 Pac. 146, 47 L. R. A. 334. Hence the contract is one the covenants of which were, for the foregoing reasons, incapable of specific enforcement against either party. The asserted claim made by defendants of an interest in the land is under and by virtue of this contract, and, since its terms cannot be specifically enforced against the land, it necessarily follows that such adverse claim based thereon is unwarranted, and this notwithstanding the fact that such contract might constitute a basis for a claim of damages for a breach thereof. A contract for the sale of real estate which for any reason is incapable of specific enforcement cannot form the basis of a valid claim to an interest therein, and, where such claim is asserted, the owner of the real estate is entitled to a decree quieting his title thereto. Section 738, Code Civ. Proc.

Moreover, in our opinion, the express covenant on the part of an agent authorized to sell real estate that he will endeavor to sell it at a fixed net price to the owner is not a sufficient consideration for the grant of an option to such agent to purchase within a given time at such fixed price. Such contract is a mere proposal to sell, unsupported by sufficient consideration, and subject to revocation by the owner at any time before the negotiation of a sale or the exercise of such option by the agent to purchase.

As we view the case, it is unnecessary to discuss the failure of the court to find upon the issue as to whether plaintiff's conduct caused an abatement of Steele's activities in an effort to sell the property. The issue is immaterial.

Judgment and order affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 224

PEOPLE v. SMITH. (Cr. 142.)

(Court of Appeal, First District, California. Oct 19, 1908. Rehearing Denied Nov. 17, 1908; Denied by Supreme Court Dec. 14, 1908.)

1. WITNESSES (§ 267*)—CROSS-EXAMINATION—CONTROL OF COURT.

While a reluctant, evasive, or interested witness may be cross-examined with great liberality in order to elicit the truth, the trial court, in the exercise of sound discretion, may limit such examination when it becomes tedious or apparently frivolous so that time is unnecessarily consumed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 923; Dec. Dig. § 267.*]

2. WITNESSES (§ 267*)—CROSS-EXAMINATION—DISCRETION OF COURT.

Where, on a criminal trial, the court stated that too much time was being consumed in cross-examining a witness and allowed 15 minutes to finish the examination, to which counsel excepted, after which the court asked if counsel desired to further examine the witness, and the latter stated that was all, it not appearing that any question was excluded on the ground that the time for cross-examination was being exceeded, there was no abuse of discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 923; Dec. Dig. § 267.*]

3. WITNESSES (§ 387*)—IMPEACHMENT—INCONSISTENT STATEMENTS—CROSS-EXAMINATION.

Where a witness, in a prosecution for robbery, testified that the man who assaulted her was between 5 and 6 feet tall, about 5½ feet, and between 30 and 40 years old, probably nearer 40 than 30, a question, on further cross-examination, whether witness did not previously state that he was about 5 feet 4 inches high, and between 30 and 35 years old, was properly excluded as immaterial, as such prior statements were not sufficient to impeach the testimony at trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228, 1229; Dec. Dig. § 387.*]

4. INDICTMENT AND INFORMATION (§ 44*)—FILING INFORMATION—DESTRUCTION.

The destruction of the original information being shown, a full, true, and correct copy thereof could be filed in lieu of the one destroyed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 155; Dec. Dig. § 44.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

John Smith was convicted of robbery and, from the judgment and an order denying a motion for a new trial, he appeals. Affirmed.

John J. Earle and Eugene W. Roland, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The defendant was charged in the information with the crime of robbery, and with two prior convictions—one of petit larceny, and the other of burglary. The jury returned a verdict finding him guilty of robbery as charged in the information, and the judgment recites that he had theretofore been duly convicted of the crime of petit larceny and of burglary in the first degree. He was thereupon sentenced to a term of

50 years in the state penitentiary. This appeal is from the judgment and the order denying his motion for a new trial.

It is not claimed that the evidence is insufficient to sustain the verdict, or that the court erred in giving or refusing any instruction to the jury. The main point urged here is that the court improperly restricted and cut off the right of defendant's counsel to cross-examine the complaining witness, Lena Wilson, the person upon whom the robbery was committed. The direct examination of said witness was confined to a narration of the acts of defendant when he committed the robbery, the place where the money was secreted in the house, the amount of money taken, and the injuries inflicted upon the witness by defendant. It occupies eight folios of the transcript. The cross-examination appears to have been in regard to many trivial matters, consists of 140 questions, and covers 60 folios of the transcript. After several apparent repetitions of questions, the district attorney finally objected, and stated that the entire matter concerning which questions were then being asked had been gone into by defendant's counsel. Thereupon the record shows the following in regard to the matter and nothing more: "The Court: The court warns you that you have wasted too much time in the examination of this witness, and I have allowed you 15 minutes more to complete the examination. Mr. Earle: We will take an exception. The Court: If there is any other branch of the case you desire to cross-examine on, proceed. Mr. Earle: That is all. (To which ruling defendant duly excepted, and now assigns said ruling as error.)"

While the right of cross-examination in cases where it is being used in good faith for the purpose of eliciting the truth from a reluctant, evasive, or interested witness should be allowed with great liberality, still the court, in the exercise of its sound discretion, may restrain such cross-examination when time is being consumed by a tedious or apparently frivolous questioning of the witness. It may be further said that it is the duty of the trial judge to confine such examination to such questions as will tend, at least in some degree, to throw light upon the matter under investigation, and to see that the trial is not needlessly prolonged by a useless cross-examination. In this case the court did not abuse its discretion. It merely called the attention of counsel to the fact that much time had been wasted in the cross-examination. After defendant's counsel had excepted to this remark, the judge stated that, if there was any other branch of the case that counsel desired to cross-examine the witness about, they might proceed. Counsel did not see fit to proceed as to any other branch of the case, but remarked: "That is all." No question is stated in the record to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which the court sustained an objection on the ground that defendant could not be allowed further time in cross-examination, nor does it appear that defendant was prevented from asking any material question of the witness. What has been stated applies to the remark of the court and counsel during the cross-examination that they were wasting too much time in such cross-examination. The remark appears to have been justified.

In the cross-examination, in answer to questions asked by defendant's counsel, the witness Lena Wilson testified that the man who assaulted her was about the size of her son, who was apparently in the courtroom, and that he was between 5 and 6 feet tall, about 5½ feet, and that he was between 30 and 40 years of age, probably nearer 40 than 30. Counsel afterwards asked the witness in further cross-examination if she did not tell her daughter that the man who assaulted her was about 5 feet 4 inches in height, and between 30 and 35 years of age. The court sustained the objection of the district attorney to the questions so asked, and it is claimed that the court committed error prejudicial to the defendant in so doing. The questions were not material, as the statements, if made to the daughter as contended, would not be of sufficient importance to impeach the witness. Five feet 4 inches is between 5 and 6 feet, and may be said in one sense to be about 5½ feet; and between 30 and 35 years of age is between 30 and 40. The questions are illustrative of the kind of questions which counsel were asking when interrupted by the court.

There was no error in permitting a copy of the information to be filed in lieu of the one destroyed by the fire of April 18, 1906. There was evidence sufficient to show the destruction of the original by the fire, and that the copy was a "full, true, and correct copy of the original." The record does not show that any exception was taken to the order restoring the record as to the original information, but it is not necessary to place our ruling upon that ground.

There is no ruling to which our attention has been called that was prejudicial to defendant, and he seems to have had a fair trial.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

9 Cal. App. 218

PEOPLE v. PRICE. (Cr. 59.)

(Court of Appeal, First District, California.
Oct. 19, 1908. Rehearing Denied by Supreme Court Dec. 17, 1908.)

1. HOMICIDE (§ 95*)—ASSAULT WITH INTENT TO KILL—JUSTIFICATION.

Where an officer approached accused in a peaceful manner, informed him that he was an officer, and that he was performing his official

duty in arresting him, and showed his badge of office, and did not attempt in any way to injure accused, the latter had no excuse for drawing his pistol and shooting the officer, though the officer had no warrant or legal authority for arresting accused.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 95.*]

2. HOMICIDE (§ 292*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where accused charged with assault with intent to kill an officer attempting to arrest him was a wrongdoer without regard to the question of the right of the officer to arrest him, an instruction that, if accused in the presence of the officer and others drew a deadly weapon in a rude "or" angry and threatening manner, etc., the officer had the right to arrest accused, was not misleading because of the use of the word "or," instead of the word "and," though the statute expression is "rude, angry, and threatening manner."

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 292.*]

3. HOMICIDE (§ 292*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for assault with intent to kill, the jury might find that, if accused did not intend to shoot prosecutor, it was criminal negligence to draw his pistol, a requested instruction that in every crime there must exist a joint operation of act and intent was properly refused for leaving out the element of criminal negligence specified in Pen. Code, § 20.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 292.*]

4. CRIMINAL LAW (§ 860*)—TRIAL—DELIBERATIONS OF JURY—MATTERS CONSIDERED—WEIGHT OF WITNESS—APPEARANCE AT TRIAL.

The jury may use their own senses as to the weight of a witness before them, and the exclusion of the evidence of his weight is not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2060; Dec. Dig. § 860.*]

5. CRIMINAL LAW (§ 382*)—EVIDENCE—WEIGHT OF PERSON.

Where, on a trial for assault with intent to kill an officer attempting to arrest accused, there was no controversy as to who was the aggressor as between accused and a third person, and it appeared that accused a short time before the shooting of the officer had been struck by the third person, the evidence of the weight of the third person was immaterial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 382.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Carl Price was convicted of assault with a deadly weapon, and he appeals. Affirmed.

A. H. Jarman, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The information in this case charges the defendant with the crime of assault with a deadly weapon, with malice aforethought, and with intent to kill one Toomey. The jury returned a verdict finding the defendant guilty of the lesser offense of assault with a deadly weapon. He was thereupon sentenced to pay a fine of \$700, or, in default of payment, that he be imprisoned in the county jail in the proportion of one day's imprisonment for every \$2 of such fine.

His motion for a new trial was denied, and this appeal is from the judgment and order.

We have examined the evidence, and it is not deemed necessary to discuss it, but only to say that we find it sufficient to sustain the verdict of the jury.

There was no error in the court's refusal to give the defendant's requested instruction as to the law pertaining to an officer making an arrest without a warrant, and as to the right of the defendant to resist an unlawful arrest. If it be conceded that Toomey, the constable, had no warrant or legal authority for making the arrest, such fact would not in any way excuse the defendant for shooting at and wounding the said constable. It is sufficient to say that the constable approached defendant in a peaceable manner, informed him that he was a constable, and that he was performing his official duty, and at the same time showed his badge of office. He did not assault defendant in a violent manner, or attempt in any way to injure him. There was no excuse for defendant drawing his pistol and discharging it twice, one of the shots wounding the constable. In fact, it would be a pernicious doctrine to hold that an officer, known to be such, while attempting to make an arrest, could be shot down, and the defendant or person who did the shooting allowed to go free because it might, upon due investigation, be discovered that the officer did not in fact have proper authority for making the arrest.

It is claimed that the court erred in instructing the jury as follows: "If you should therefore find that the defendant on the streets of the town of Santa Clara, on February 28, 1905, in the presence of Constable Toomey, and, of course, in the presence of two or more persons, did draw a deadly weapon as defined by the court, or exhibit a deadly weapon in a rude or angry and threatening manner, and that such deadly weapon was not drawn or so exhibited in self-defense, the court instructs you that Officer Toomey had a right and authority, and it was his duty, to arrest the defendant." It is claimed that the instruction is vicious, and that its vice consists in the fact that the word "or" was used instead of "and," and, as the statute uses the words "rude, angry, and threatening manner," the instruction should have followed the language of the statute. As we have before stated, the facts of this case show the defendant to have been a wrongdoer without regard to the question as to the right of the officer to make the arrest. If, as contended, the deadly weapon could have been exhibited in a "rude" manner without the manner being "angry and threatening," it is not of sufficient importance to have misled the jury or to have injured the defendant. It will not be presumed that the jury were led astray by the use of the word "or" instead of the word "and" under the circumstances of this case.

The court refused the following instruction asked by the defendant: "I further instruct you that in every crime or public offense there must exist a union or joint operation of act and intent. If, therefore, you find from the evidence that the shot fired which injured Toomey was the result of the sudden clutching or grabbing of the defendant's right arm or hand, and that said shot was not intended by the defendant to injure said Toomey, and said injury was purely accidental and due to the sudden interference with the defendant at the time said shot was fired, then I instruct you that in law there was no operation of intent with the act, and no crime or public offense was committed, and your verdict should be for the defendant and he should be acquitted." It is the better practice for the trial court to give a requested instruction if it correctly states the law, and can logically be held to apply to the facts of the particular case in which it is asked; but it will not be held that the refusal to give such instruction is error if there is a reason which will justify such refusal. The above instruction may well have been refused for the reason that it states that "in every crime there must exist a union of joint operation of act and intent." It leaves out the element of "criminal negligence" which the statute contains. Pen. Code, § 20. The jury might well have inferred from the evidence in this case that even if defendant did not intend to shoot at Toomey or fire the shot that hit him that it was criminal negligence to draw the pistol and fire it once in the ground to frighten Toomey, and then to hold it in his hand in such position that it might be discharged in the scuffle which ensued. Not only this, but the testimony of the defendant himself, when analyzed, would not have justified the instruction. He admitted that he willfully fired the first shot which did not hit Toomey; that he did not think any one had hold of his hand when the second shot was fired; that he did not know whether his finger was on the trigger or not, and that he had the pistol in his hand. After the second shot was fired and the constable was wounded, the defendant ran. Defendant, after having admitted that he fired the first shot at an officer of the law, that he had a pistol in his hand when the second shot was fired from such pistol, that no one had hold of his hand, that he then ran away, and this all in the face of the fact that Toomey had not drawn any weapon or attempted any violence upon his person, is not in a position to urge with any great plausibility that he did not intend to fire the second shot, but that it was purely accidental. It was not error to sustain the objection of the district attorney to the question asked by defendant's counsel of his own witness Perry as to the weight of Perry. The witness was before the jury, and the jury could use their senses as to his weight if that could by any mode of reasoning have

been material; but in our opinion it was not material. There was no controversy as to who was the aggressor as between Perry and the defendant. Perry had, a short time before the shooting of Toomey, struck the defendant on the head with a bottle during a row in front of the Model saloon in the town of Santa Clara. The injury to defendant's head appears to have been slight, bleeding but little; and the weight of Perry could have thrown but little light upon a matter which was not the main issue in the case.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

9 Cal. App. 223

PEOPLE v. WETZEL. (Cr. 151.)

(Court of Appeal, First District, California.
Oct. 19, 1908.)

INDICTMENT AND INFORMATION (§ 189*)—CONVICTION OF OFFENSE—INCLUDED IN CHARGE—LESSER DEGREE.

Under Pen. Code, § 1159, authorizing the jury to find accused guilty of any offense included in that charged, a verdict finding accused guilty of petit larceny is responsive to the issue made by the information charging grand larceny and accused's plea of not guilty, since the verdict, when read in connection with the information and the plea, impliedly finds the value of the property stolen to be less than \$50, instead of \$200, as charged in the information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 594; Dec. Dig. § 189.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Samuel P. Wetzel was convicted of petit larceny, and he appeals. Affirmed.

Brennan & Love, for appellant. U. S. Webb, Atty. Gen., and John O'Gara, Asst. Dist. Atty., for the People.

COOPER, P. J. The jury returned a verdict finding the defendant guilty of petit larceny under an information charging him with grand larceny. The information charged, and defendant pleaded guilty to, two prior convictions of petit larceny, and the court upon the return of the verdict sentenced him to imprisonment in the state prison for five years. This appeal is from the judgment on the judgment roll with no bill of exceptions. No brief has been filed by appellant, and the sole point made in the oral argument is the claim that the verdict of petit larceny is not responsive to the issue made by the information and the plea of not guilty. There is no merit in the contention. The jury had the right to find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged. Pen. Code, § 1159; People v. Huntington (Cal. App.) 97 Pac. 760. The verdict must be read and construed in

connection with the plea of defendant and the information. People v. Tilley, 135 Cal. 62, 67 Pac. 42. As thus read and construed the verdict found the defendant guilty of the acts set forth in the information, but by implication found the value of the property stolen to be less than \$50, instead of \$200, as charged therein. Where a defendant is charged with the crime of murder, he may be found guilty of manslaughter. It has never been the sense of the bar nor the rule of courts to require the verdict in such cases to state the name of the person killed, nor that such killing was unlawful. The verdict is read in connection with and as relating to the information or indictment.

The judgment is affirmed.

We concur: KERRIGAN, J.; HALL, J.

154 Cal. 545

DE MERRITT v. WELDON et al.

(S. F. 5,010.)

(Supreme Court of California. Dec. 18, 1908.)

Dissenting opinion.

For majority opinion, see 98 Pac. 537.

BEATTY, C. J. The denial of a rehearing of this cause furnishes a proper occasion for a brief statement of the grounds of my dissent from the judgment. The charter of Ukiah is a general law of the state, by which the city marshal is made an elective officer, and by which varied and important duties are devolved upon him. The adoption of the two ordinances of February 15, 1904, was a transparent device by which the board of trustees—the creature of the statute—attempted to subvert the law of the state by devolving the duties of the elected marshal upon an appointee of their own; an attempt in which, with the sanction of this court, they have achieved a partial success. The resulting difficulties do not seem to have been considered. Can the board of trustees relieve the marshal of his statutory duties? Can they, for instance, confer authority upon their executive officer to receive and receipt for license and property taxes? And, if as seems not improbable, it proves difficult to find a fit person willing to perform the duties and assume the responsibilities of tax and license collector, chief of police, custodian of prisoners, etc., for \$15 a month, how are those duties to be performed without usurpation of authority by such agent of the board of trustees as may attempt their performance?

I think the ordinance reducing the salary of the marshal was void as part—an essential part—of a scheme to override the statute, and that it should have been so declared.

(154 Cal. 559)

STILL et al. v. SAN FRANCISCO & N. W. RY. CO. (S. F. 4,605.)(Supreme Court of California. Dec. 4, 1908.
Rehearing Denied Jan. 2, 1909.)**1. MASTER AND SERVANT (§ 193*) — FELLOW SERVANTS—WHO ARE.**

A fireman on one train and a conductor of another train are fellow servants, and the railway company is not liable for the death of the fireman resulting solely from the negligence of the conductor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 502, 504; Dec. Dig. § 198.*]

2. MASTER AND SERVANT (§ 169*)—DEATH OF SERVANT—INCOMPETENCY OF FELLOW SERVANT.

Where the death of a fireman on one train was caused by the failure of the conductor of another train to comply with meeting orders, and the evidence showed that the conductor was incompetent, that the railway company failed to use ordinary care in selecting him as conductor, and that the incompetency was the cause of the accident, the company was liable under the exception in Civ. Code, § 1970, relieving the employer from liability to an employé for loss suffered because of the negligence of a co-employé, unless the employer was negligent in the selection of the co-employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 334; Dec. Dig. § 169.*]

3. APPEAL AND ERROR (§ 1001*)—EVIDENCE—REVIEW.

The court on reviewing the sufficiency of the evidence to sustain the verdict can only determine whether there is evidence to support the verdict, and how the court on appeal would have found the facts is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3922; Dec. Dig. § 1001.*]

4. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—LIABILITY.

To justify a recovery against a railroad company for the death of a fireman in a collision, resulting from the failure of the conductor of the other train to comply with meeting orders, on the theory of the incompetency of the conductor, plaintiff must show that the conductor was incompetent; that the railway company at the time of his selection as conductor either knew, or by ordinary care would have known, of the incompetency, and that such incompetency caused the accident.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

5. APPEAL AND ERROR (§ 1011*)—VERDICT—CONCLUSIVENESS.

In cases of mere conflict of evidence, the conclusion of the trial jury and judge are conclusive on appeal on the question as to which party produced the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. 1011.*]

6. MASTER AND SERVANT (§ 168*)—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—"INCOMPETENCY OF SERVANT."

Incompetency of a servant connotes the converse of reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those required to associate with him in the general employment, and one who does not know the meaning of orders used on a railroad as to the movement of trains is incompetent to act

as a conductor of a train, where he will be called on to act on such orders in moving his train.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 337; Dec. Dig. § 168.*]

7. MASTER AND SERVANT (§ 279*)—DEATH OF FIREMAN—INCOMPETENCY OF CONDUCTOR—EVIDENCE—QUESTION FOR JURY.

In an action for the death of a fireman in a collision resulting from the failure of the conductor of the other train to comply with a meeting order, evidence held to justify a finding that the conductor was incompetent, and that his incompetency was the sole cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973, 975; Dec. Dig. § 279.*]

8. MASTER AND SERVANT (§ 170*) — EMPLOYMENT OF SERVANT—"ORDINARY CARE."

The term "ordinary care," as used in the rule requiring an employer to use ordinary care in the selection of an employé, means that degree of care that a man of ordinary prudence would use in view of the nature of the employment and the consequence of the employment of an incompetent person.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

9. MASTER AND SERVANT (§ 170*)—EMPLOYMENT OF SERVANT—CARE OF EMPLOYER.

Where the service in which a servant is employed is such as to endanger the lives and persons of co-employés if the servant is not competent, the employer must, in the exercise of ordinary care, make a reasonable investigation as to his character, skill, qualification, and habits of life.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*]

10. MASTER AND SERVANT (§ 287*)—EMPLOYMENT OF SERVANT—CARE OF EMPLOYER.

Whether an employer has made a reasonable investigation into the character, skill, and qualifications of an employé is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1055; Dec. Dig. § 287.*]

11. TRIAL (§ 142*) — ISSUES — QUESTION FOR JURY.

Where the conceded facts are such that reasonable minds may differ as to the conclusions to be drawn, the question is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

12. MASTER AND SERVANT (§ 279*)—EMPLOYMENT OF SERVANT—PRESUMPTIONS.

The presumption is that an employer has done his duty in investigating into the character, skill, and qualifications of an employé, and as a general rule the employer's knowledge of incompetency of an employé, or the fact that the employer would have obtained such knowledge had he made reasonable inquiry, must be shown by evidence independent of that showing incompetency.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.*]

13. MASTER AND SERVANT (§ 279*)—EMPLOYMENT OF SERVANT—PRESUMPTIONS.

The incompetency of an employé at the time of his employment, which includes the time of his assignment to a particular duty, may be such that the evidence showing it will rebut the presumption that the employer used the requisite care in his selection and make the question one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

14. MASTER AND SERVANT (§ 170*)—EMPLOYMENT OF SERVANT—PRESUMPTIONS.

An employer must institute affirmative inquiries to ascertain the qualifications of an employé whom he transfers to a more responsible position, for which special qualifications are demanded, unless the employé has given proof of his capacity in some similar position.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 170.*]

15. MASTER AND SERVANT (§ 279*)—EMPLOYMENT OF SERVANT—PRESUMPTIONS.

Proof of the incompetency of a freight conductor, arising from his want of knowledge of the meaning and effect of telegraphic orders referring to the movement of his train in relation to other trains, justifies the inference that a reasonable investigation by the railway company would have disclosed the incompetency, when it could have been remedied by proper instruction warranting a finding of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 975; Dec. Dig. § 279.*]

16. MASTER AND SERVANT (§ 170*)—EMPLOYMENT OF SERVANT—CARE REQUIRED OF MASTER.

A personal examination of one about to be employed in a responsible position as that of conductor of a train is not always essential to the exercise of reasonable care on the part of the railway company, but such investigation as will warrant the assumption, under the circumstances, that the employé has adequate knowledge and qualifications is essential, and such an assumption may be warranted by the knowledge of the employer of the experience and reputation of the employé as to work calling for the knowledge and qualifications adequate to the discharge of the duties of the place, or by the recommendation of other persons on whom he is justified in relying.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*]

17. MASTER AND SERVANT (§ 279*)—EMPLOYMENT OF SERVANT—INCOMPETENCY OF SERVANT—NEGLIGENCE OF MASTER.

In an action for the death of a fireman in a collision with a train, resulting from the failure of the conductor thereof to comply with meeting orders, evidence held to justify a finding that the railway company, at the time of the selection of the conductor, knew, or by ordinary care would have known, of his incompetency, authorizing a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 975; Dec. Dig. § 279.*]

18. TRIAL (§ 244*) — INSTRUCTIONS — GIVING UNDUE PROMINENCE TO EVIDENCE.

Where, under the general instructions, the jury must have known that all the evidence on a subject was to be considered in determining an issue, an instruction that the jury, in determining the issue, should consider specified evidence together with other evidence is improper, as singling out a portion of the evidence, and specially directing that it be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 578, 579; Dec. Dig. § 244.*]

19. TRIAL (§ 244*) — INSTRUCTIONS — GIVING UNDUE PROMINENCE TO EVIDENCE.

Instructions drawn solely for the purpose, and which simply have the effect, of emphasizing some particular portion of the evidence, are not to be commended.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 578, 579; Dec. Dig. § 244.*]

20. TRIAL (§ 191*) — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

An instruction which is misleading as applied to the facts, and which assumes facts as

to which there is a conflict in the evidence, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.*]

In Bank. Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

Action by Pura Jane Still and others against the San Francisco & Northwestern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Gillett & Cutler and F. A. Cutler, for appellant. Coonan & Kehoe and Geo. T. Rolley, for respondents.

ANGELLOTTI, J. This is an appeal by defendant from a judgment for plaintiffs, in an action brought by the surviving wife and two minor children of Charles Still, deceased, for damages resulting to them from the death of said Still, alleged to have been caused by the negligence of defendant. The principal claim of defendant is that the evidence given on the trial is insufficient to support the verdict.

Charles Still was killed on October 5, 1903, in a collision which occurred between two of defendant's trains, one known as "Extra No. 4," a special train, in Conductor Rolley's charge, which was running southerly from South Bay, near Eureka, and the other known as "Freight Train No. 5," a regular schedule train, under Peter Clark as conductor, which was running northerly from Carlotta, the southerly terminus of the road, to South Bay. He was the fireman on "Extra No. 4," and at the time of the collision was in the cab of the locomotive engaged in the discharge of his duties. His train was proceeding under an order addressed to its conductor and engineer, which was as follows: "Leave South Bay 6:45 October 5th. Take E. R. V. L. Co.'s empties to their switch. Return light to Gravel Pit. Meet P. L. Co's train at Singley's. Meet No. 5 at Cousins' switch. Exchange engines at Cousins' switch with No. 5." A special meet order had been given to the conductor and engineer of freight train 5, reading as follows: "October 5, '03. Train No. 5, Conductor Clark, Engineer Thayer. Meet Extra 4 at Cousins' switch. Exchange engines with her. Take E. R. V. Lbr. Co's train to S. Bay." It is conceded that such an order supersedes all schedules, and means exactly what it says, viz., that the trains to which it is addressed must meet at the place named, and that the one arriving first at the designated place must stay at that place until the other train arrives, or until the order is withdrawn or changed. Train 5 started from Carlotta at its scheduled time, and proceeded according to its schedule to Cousins' switch, which was almost midway between South Bay and Carlotta. Extra 4 had been delayed by an accident farther north, and had not yet arrived at Cousins' switch. Conductor Clark of train

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5, having taken on the E. R. V. Lumber Company's train as directed by his special order, proceeded north with his train, without waiting for extra 4, with the result that in the neighborhood of Fortuna, the next station north of Cousins' switch, his train came into collision with extra 4, which was proceeding south in strict accord with its orders. Concededly the failure of Clark to comply with the requirements of the meet order was the sole cause of the deplorable accident.

Under the law of this state as it was at the time of the collision, deceased and Clark were fellow servants, and no recovery could be had against defendant by the heirs of deceased for damages resulting solely from the negligence of Clark. The claim of plaintiffs, sustained by the jury that tried the case, was that Clark was incompetent to act as conductor of train 5, that defendant had failed to use ordinary care in selecting him to serve in that capacity, and that his incompetency was the cause of the accident, thus bringing the case within the rule of law that renders the employer liable to an employé for damages resulting from his failure to use ordinary care in the selection of other employés, and to select only those who are competent to properly perform the duties of the position for which they are selected—the rule declared by section 1970, Civ. Code, as it was at the time of the accident, as follows: "An employer is not bound to indemnify his employé for loss suffered by the latter * * * in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé, or unless the employer has neglected to use ordinary care in the selection of the culpable employé." In accord with this claim the jury specifically found, in response to questions submitted to them: First, that Peter Clark was incompetent to act as conductor of train No. 5 at the time of the collision; second, that the collision was caused by such incompetency of Peter Clark to act as conductor; third, that the defendant failed to use ordinary care in the selection of Peter Clark for the position of conductor for such train; and, fourth, that the defendant, prior to the accident, knew that Clark was incompetent for the position of conductor on such train, or could have known it by the exercise of ordinary care on its part. A general verdict in favor of plaintiffs was also rendered.

It must be borne in mind that the question before us in considering the attack on the verdict of the jury is not how we would find the facts to be, but whether there was enough in the evidence from which the jury might find the existence of facts which would justify the verdict they rendered. It, of course, devolved on plaintiffs to show that Clark was in fact incompetent for the position to which he was assigned, that defendant at the

time of his selection therefor either knew, or by the exercise of ordinary care would have known, of such incompetency, and that such incompetency was the cause of the accident. The verdict of the jury constituted findings in the affirmative upon all these propositions. Was there substantial evidence in support thereof? If so, the verdict must stand, however strongly such evidence may be opposed to other evidence given on the trial. In cases of mere conflict of evidence the conclusions of the trial jury and judge are conclusive on the question as to which side produced the "preponderance of evidence." See *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 151, 159, 86 Pac. 178.

As we have said, it is necessarily conceded that the failure of Clark to hold his regular schedule train at Cousins' switch until the arrival of extra 4, in accord with the requirements of the meet order, was the cause of the accident. Was this failure due to his incompetency or unfitness from any cause to act in the position to which he had been assigned, or was it due to his mere negligence in the discharge of duties which he was entirely competent to perform? The incompetency claimed is that he was not possessed of adequate knowledge of the meaning and effect of a "meet order," under such circumstances as confronted him at Cousins' switch on the day of the accident, the kind of incompetency referred to in *Nofsinger v. Goldman*, 122 Cal. 609, 617, 55 Pac. 425, 429, where it was said: "An engineer might not be careless. He might exercise extreme care within the limitations of his knowledge, and yet for lack of adequate knowledge might be unfit and incompetent for the position"—and in *Evansville, etc., R. R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. 101, 7 Am. St. Rep. 458, a case similar in many respects to this. Incompetency connotes the converse of reliability in "all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment." 1 *Labatt's Master and Servant*, § 181. It goes without saying that one who does not know the meaning of the rules or orders used on a railroad relative to the movement of trains is absolutely incompetent to act as a conductor of a train thereon, where he would be called upon to follow such rules and orders in moving his train. We are satisfied that the evidence amply warranted the jury in finding that Clark was without this knowledge, and that his ignorance in this respect was the sole cause of the accident.

Clark had been acting as conductor of this train for less than a month, having commenced on September 10, 1903. His employment on this train was practically his first experience as conductor on a schedule train, there being some testimony that between July 17, 1903, when he came to this

road, and September 10, 1903, he had acted for a few days as conductor. During the same time he had acted for a few weeks as conductor of a gravel train, an inferior unscheduled train, running under special orders. During the same interval of less than two months he had also acted for a very short time as brakeman on a passenger train on this road. For nearly two years prior to July 17, 1903, he had been a brakeman on a passenger train on the railroad running from Eureka to Arcata, a short road which had only one train and one train crew, and where, consequently, there were no rules or orders as to the meeting and passing of trains. Prior to that time he had worked for some years on the road where the accident occurred in the several capacities of sectionman, tunnel watchman, and fireman, positions in which he had not been required to know or charge his mind as to the effect of orders relative to the meeting of trains. Prior to assuming the work of conductor he had shown himself to be a reliable and competent man in the various positions in which he had been placed, which would rather tend to indicate that within the limits of his knowledge he would not be likely to make a mistake in such a vital matter as the one causing the accident. The evidence was not such as to compel the conclusion that he had ever before been confronted with the situation that confronted him at Cousins' switch on the day of the accident, or that he had ever been informed, or had ever learned, that a regular schedule train, arriving at a place where it had been directed by special order to meet an inferior train before the arrival of the latter, was bound to await such arrival, unless the special order was withdrawn or modified. Upon being made a conductor he was given a printed schedule or time-table of the various regular trains, on the back of which were printed what was styled "Time-Table Rules." A new time-table, to take effect October 5, 1903, at 12:01 a. m., was issued before the accident, and a copy placed in his hands. On this appears the schedule for his train "No. 5 Freight." At the bottom of the page, in large type, appeared the following: "North-bound trains are superior to and have the right of track over south-bound trains of same or inferior class." At the time of the accident his train was north-bound, while extra 4 was south-bound, and inferior to his train, under the express provisions of a rule printed on the back of the time-table. Among the other rules so printed on the back of such time-table was rule 8, providing that "inferior trains must keep out of the way of all superior trains," and rule 16, providing, "when the expected train is not found at the schedule meeting or passing point, the superior train will proceed on schedule; the inferior train will take siding and wait for the superior train." When Clark arrived at Cousins' switch, he had his special order in mind, as is fully shown by

his compliance with that portion thereof requiring him to take on the "E. R. V. Lbr. Co.'s train," so that his action in proceeding with his train cannot be accounted for on the theory that he had forgotten the existence of any special order. In addition to this, Joseph Still, the fireman on train 5, testified that, before directing the engineer to move out from Cousins' switch, Clark told him (the engineer), "our instructions were to meet No. 4, but we are the superior train, and we will run on schedule, run on rule 16, and extra 4 will have to take siding and keep out of the way." It appears that this statement of Still was denied by Clark when he was recalled as a witness by defendant, and that Still was a brother of deceased, and also had a damage suit pending against defendant, arising out of the same accident, but we must assume that the jury believed the testimony of Still in this regard, and they were the sole judges as to his credibility. It also appeared that Still had given the same testimony in the presence of Clark on two previous trials of another action growing out of this accident, and that no denial thereof had then been made. Clark himself was not called by either party to testify at this trial as to the circumstances of the accident, or to explain why he had disregarded the "meet order." Of course, it is possible that Clark did know the full meaning and effect of such orders as applied to regular schedule trains, and that his proceeding on the day of the accident in violation of the order he had received was due simply to forgetfulness, and constituted merely an act of negligence on his part. But we have no doubt whatever that the evidence above set forth was sufficient to warrant a jury in concluding that he did not possess the knowledge that such an order superseded all schedules and printed rules in so far as such schedules and printed rules conflicted therewith, and that he believed that it was his duty to proceed from Cousins' switch with his regular schedule train under such printed rules, without waiting for the inferior train he had been directed to meet at that point. If they so concluded, they were necessarily compelled to find him to be incompetent to discharge the duties of the place to which he had been assigned.

This brings us to the question whether defendant used ordinary care in the selection of Clark as conductor of the freight train, or rather whether the evidence was such as to sustain the finding of the jury that it did not use ordinary care. Under all the authorities the term "ordinary care" as used in this connection means that degree of care that a man of ordinary prudence would use in view of the nature of the employment, and the consequences of the employment, of an incompetent person—a degree of care commensurate with the nature and danger of the business and the grade of service for which the servant is intended, and the hazards to which other servants are to be ex-

posed from the employment of a careless or incompetent person. Wood's Law of Master and Servant, §§ 417, 418. In accord with this rule it is generally declared that, where the service in which the servant is employed is such as to endanger the lives and persons of co-employés if the servant is not competent, an employer is bound, in the exercise of ordinary care, upon the plainest principles of justice and good faith, to make a reasonable investigation into his character, skill, qualifications, and habits of life. See 1 Labatt's Master and Servant, § 194; Bailey's Personal Injuries, § 1407; *Western Stone Co. v. Whalen*, 151 Ill. 472, 38 N. E. 241, 42 Am. St. Rep. 244; *Mann v. D. & H. C. Co.*, 91 N. Y. 495. The question whether he has made such investigation as is reasonable under all the circumstances is peculiarly one for the jury. As has been said before, even where there is no conflict in the evidence on the question of negligence, if the conceded facts are such that reasonable minds might differ as to the conclusion to be drawn, the question is one of fact for the jury. See *Market St. Ry. Co.*, 139 Cal. 271, 72 Pac. 1006. The presumption is that the employer has done his duty in this regard (*Beaseley v. S. J. Fruit, etc., Co.*, 92 Cal. 388, 28 Pac. 485); and, as a general rule, the employer's knowledge of incompetency, or the fact that he would have obtained such knowledge had he made reasonable inquiry, must be shown by evidence independent of that showing the incompetency, and cannot be inferred therefrom. Mr. Labatt in his Master and Servant says that the latter rule is subject to certain qualifications, one of which is that the testimony by which the incompetency is established may be such as to warrant a conclusion that the employer either had notice of the incompetency, or omitted to make such inquiries as common prudence would have dictated (section 196), and that it seems impossible to deny that the delinquency which caused the injury may be of such a flagrant character that a jury might fairly infer that the master could not have failed to discover the servant's unfitness if proper inquiries had been instituted when he was hired. Section 199. See, also, Bailey on Personal Injuries, § 1419. In *Murphy v. St. Louis, etc., R. Co.*, 71 Mo. 202, this is declared to be the law, and the statement is made that the inference is one of fact for the jury. In *Lee v. Michigan C. R. Co.*, 87 Mich. 574, 49 N. W. 909, the evidence showing incompetency was of such a nature that the court said that proof that he was so incompetent when employed need not be supplemented by proof of the employer's knowledge thereof; the presumption that the employer had done his duty being overcome by the proof of incompetency. It further said that, where one, competent at the time of employment, becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of the incompetency must

be brought home, but that, where the incompetency existed at the time of the employment, proof of notice is not necessary. This was said in reference to one who had been employed only a few weeks. In *Pleasants v. Raleigh, etc., R. Co.*, 121 N. C. 492, 28 S. E. 267, 61 Am. St. Rep. 674, the court said that there was no evidence that the defendant knew of the incompetency of Dunn when he was employed, except his action on the occasion of this fearful wreck, and the fact that he had been employed in this capacity only a few weeks, but that these facts raised such a presumption against the defendant as to make this an issue fit to be submitted to the jury under proper instructions. These are examples of decisions that support the statement of Mr. Labatt. If it be conceded that any of them states the rule in broader terms than is warranted, we think nevertheless that there can be no doubt under the authorities that the incompetency of an employé at the time of his employment may be of such a character that the evidence showing it will be legally sufficient to rebut the presumption that the employer used the requisite care in his selection, and make the question one for the jury. This is on the theory that the incompetency was of such a nature that a reasonable investigation would have disclosed it, and that, therefore, the employer either knew of it, or omitted to make such investigation, the same theory upon which evidence of general reputation of the employé for incompetency is admissible to show want of care on the part of the employer. See *Gier v. Los Angeles, etc., Co.*, 108 Cal. 129, 41 Pac. 22; *Gilman v. Eastern R. R. Co.*, 13 Allen (Mass.) 433, 441, 90 Am. Dec. 210. When we speak of the time of his employment, we mean the time when he was assigned to the particular employment. An employer is bound to institute affirmative inquiries in order to ascertain the qualifications of an employé whom he transfers to a more responsible position, for which special qualifications are demanded, unless the employé has given proof of his capacity in some similar position. Labatt, § 194. See, also, *Mann v. Delaware, etc., Co.*, 91 N. Y. 495.

The rule we have just discussed appears to us to be peculiarly applicable to incompetency of the character found by the jury, on sufficient evidence, to exist in the present case, viz., want of knowledge by a conductor of a schedule train as to the meaning and effect of telegraphic orders referring to the movement of his train in relation to other trains on the road. The safety of all those associated with him is dependent on his having such knowledge, and the most ordinary care requires reasonable affirmative investigation, on the part of the employer, to ascertain that the employé has it, before assigning him to the employment. Where such incompetency is shown, it is a fair inference that a reasonable investigation would have

disclosed it, when it could have been remedied by proper instruction. The uncontested showing by an employer, in response to the prima facie case thus made, may doubtless be such, in some cases, as to require the conclusion, as a matter of law, that the requisite investigation was made, and that the result thereof fully warranted the employer in selecting the culpable employé. But the record here presents no such case. There was evidence showing some inquiry by the trainmaster, and some discussion by him with Clark himself relative to the duties to be performed about the time he was first assigned as a conductor, but the evidence in this behalf relied on by defendant was such that, assuming it to be without conflict, reasonable men might well differ as to whether it showed such investigation as was requisite under the circumstances. The proposed conductor was being taken from the position of brakeman, on a road where, by reason of the fact that there was only one engine and one train crew, it was not essential for even a conductor to know anything about the rules and orders for the meeting and passing of trains. His service in that capacity on that road had continued for nearly two years next preceding his employment on the road where the accident occurred. His former employment on the road where the accident occurred had been several years before, and in capacities wherein he was not required to charge his mind with rules and orders relative to the meeting and passing of trains. His reputation as a careful and competent man, and the recommendation of Mr. Rose, the former trainmaster, amounted to no more than a showing that he was a competent railroad man within the lines of his knowledge and experience, and that he was the kind of man who might safely be made conductor of an extra train on defendant's road. Mr. Rose's statement to the trainmaster was substantially that he was a valuable man, and that he had promised him a conductorship of a gravel train on this road when the same was put on. There was nothing in all this to warrant the conclusion on the part of the trainmaster that, either by experience or actual instruction, Clark had acquired the adequate knowledge as to rules and orders relative to the meeting and passing of trains. The testimony as to the conversations between Clark and the trainmaster at and about the time of his employment is not of such a nature as to require a conclusion that the trainmaster was warranted in assuming that he had such knowledge, and the same must be said of the experience of Clark as conductor of the extra gravel train immediately prior to his employment as conductor of a regular freight train. A very clear knowledge, on the part of the conductor, of a regular schedule train as to the unprinted rule making a special "meet order" superior to all the printed "time-table rules" was especially essential, in view of the printed

rules, which expressly declared extra trains "inferior to all regular trains," required "inferior trains" to keep out of the way of all "superior trains," and provided that, when the expected train is not found at the schedule meeting or passing point, the superior train will proceed on schedule time, and the inferior train will take siding and wait for the superior train.

The case of *Gier v. Los Angeles, etc.*, 108 Cal. 129, 41 Pac. 22, is much relied on by learned counsel for defendant, but we see nothing therein that is in conflict with what we have said. As the court there said, the act producing injury in that case "was not one evincing 'incompetency,' employing the word strictly to denote a lack of skill or ability to use appliances or perform a duty in a workmanlike way, but was a single and signal exhibition of carelessness or recklessness," being the voluntary starting and sending ahead his electric car by a motorman under such circumstances that the car must strike the conductor who was standing at a switch. The motorman had been originally employed by the defendant as a driver of a horse car, and was subsequently trained as a motorman. At the time of his original employment, inquiry was made by the defendant of his former employers for whom he had acted in the capacity of driver of a horse car, and they had declared him "to be the best and most careful of men." It was in regard to such a case that the court said that defendant was not at fault in originally employing as a motorman a horse car driver without questioning him personally, inasmuch as it took pains to avail itself of evidence upon the matter, "disinterested and superior"—that of his former employers. But we do not desire to be understood as intimating that a personal examination of one about to be employed, even in such a responsible position as that of conductor of a railroad train, is always essential to the exercise of reasonable care. Such investigation as will warrant the assumption, under all the existing circumstances that the employé has adequate knowledge and qualifications is essential. Such an assumption may be warranted by the knowledge of the employer of the experience and reputation of the employé as to work calling for the knowledge and qualifications adequate to the discharge of the duties of the place, or by the recommendation of other persons on whom he is justified in relying. Each case must be determined on its own facts, and generally, as here, the question whether due care was exercised by the employer in this regard is one exclusively for the jury and trial judge. The verdict was not in conflict with any of the instructions.

The only other points made for reversal are as to the refusal of the trial court to give certain requested instructions to the jury. The first of these was one to the effect that, in determining the question of in-

competency, the jury might take into consideration, "with other evidence" given on the trial, certain specified evidence. As to this instruction it is sufficient to say that no reason appears why the court should have singled out a portion of the evidence given on the issue of incompetency, and specially directed that it might be considered. Under their general instructions the jury must have known that this evidence, with all other evidence on the subject, was to be considered by them in determining the question. Instructions which are drawn solely for the purpose of, and which simply have the effect of, emphasizing some particular portion of the evidence, are not to be commended. The second, defendant's proposed instruction 9, was properly refused. While taken from the opinion in *Gier v. Los Angeles, etc.*, supra, it was misleading as applied to the facts in this case, and assumed facts as to which there was a conflict in the evidence, if, indeed, one of such assumed facts was not wholly at variance therewith. If the third, defendant's proposed instruction 12, had been limited to the proposition suggested by learned counsel that, if defendant had made reasonable inquiry as to the fitness and competency of Clark at the time of his employment, with the result that Clark appeared to be competent, it had fulfilled its duty in the matter of selection, notwithstanding it was afterwards disclosed that Clark was in fact incompetent, it would doubtless have stated the law correctly. Such was the effect of other instructions given, as we read them. But by this proposed instruction it was attempted to have the court state what specific acts, inquiries, and information would constitute a reasonable investigation warranting the assumption of competency and requiring a conclusion that defendant had used proper care. We think this proposed statement would have been very misleading as applied to the evidence given on the trial, and that the court properly refused to give it.

The instructions given by the learned judge of the trial court were very complete and fair, and clearly and correctly stated the law applicable to the case.

The judgment is affirmed.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

(154 Cal. 573)

LOWE et al. v. SAN FRANCISCO & N. W. RY. CO. (S. F. 4,548.)

(Supreme Court of California. Dec. 4, 1908. Rehearing Denied Jan. 2, 1909.)

1. APPEAL AND ERROR (§ 997*)—REVIEW—DENIAL OF NONSUIT.

If all the evidence given by both parties, considered together, supports the verdict, an order denying a nonsuit will not be disturbed,

however weak the case when plaintiff closed his evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024; Dec. Dig. § 997.*]

2. TRIAL (§ 419*) — DENIAL OF NONSUIT — WAIVER OF ERROR.

Error in denying a nonsuit for want of testimony upon a material issue is waived by defendant proceeding and supplying the defect by evidence introduced by him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.*]

3. MASTER AND SERVANT (§ 279*)—INJURY TO SERVANT—INCOMPETENCY OF FELLOW SERVANT—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railway company for death of a brakeman in a collision, held to sustain a finding that his conductor was incompetent, and that the company knew of such incompetency, or would have known of it if using ordinary care in employing him.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.*]

4. MASTER AND SERVANT (§ 279*)—INJURY TO SERVANT—CAUSE OF INJURY—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for death of a brakeman in a collision, evidence held to sustain a finding that the accident was caused by the conductor's incompetency.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 279.*]

5. APPEAL AND ERROR (§ 1051*) — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action for death of a railway brakeman, based on the company's negligent promotion of one to be conductor, witnesses were asked whether the company examined persons promoted to be conductor, error in not striking witnesses' nonresponsive answers that "they" were not examined when they were promoted was harmless, where it was practically admitted that the first-mentioned conductor was not examined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4164; Dec. Dig. § 1051.*]

6. APPEAL AND ERROR (§ 1051*) — HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a railway company for negligent death, any error in receiving evidence that, when a new schedule with rules governing trainmen printed thereon was issued, the rules were not explained to an engineer and a conductor was harmless, where it appeared the same rules had been in effect previously.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1051.*]

7. APPEAL AND ERROR (§ 1068*) — HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

In an action against a railway company for negligent death, caused by a conductor's incompetency, any error in refusing an instruction that it was unnecessary to instruct him as to rules governing trains, if he had proved by his conduct that he understood all the rules and was competent, was harmless, where the jury found that he was incompetent, and where it did not appear that he had ever been previously placed in a situation like that confronting him at the time of the accident.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. § 1068.*]

8. APPEAL AND ERROR (§ 1068*) — HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

In an action against a company for an employe's negligence, any error in refusing an instruction that the company was not negligent in failing to examine the employe as to his competency, if his former employer, the company's predecessor recommended him, was harmless,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

where the jury found that the predecessor did not recommend him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4230; Dec. Dig. § 1068.*]

In Bank. Appeal from Superior Court, Humboldt County; W. G. Hunter, Judge.

Action by Myrtle Lowe and others against the San Francisco & Northwestern Railway Company. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Gillett & Cutler, for appellant. Henry L. Ford, L. F. Burnell, and J. F. Quinn, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment for plaintiffs, and an order denying defendant's motion for a new trial, in an action brought by the surviving wife and minor children of Henry S. Lowe, deceased, against defendant, to recover the damages resulting to them from the death of said Lowe, such death being alleged to have been caused by the negligence of defendant.

Lowe was killed in the collision described in the opinion in *Still et al. v. San Francisco & Northwestern Railway Company* (S. F. 4,605, this day filed) 98 Pac. 672. He was at that time employed as a brakeman on regular freight train No. 5, under Conductor Clark. The claim of plaintiffs, as in the *Still Case*, was that Clark was incompetent to act as such conductor for the reason, shown in that case, that his incompetency was the cause of the accident, and that defendant had neglected to use ordinary care in his selection as such conductor. According to the record before us, learned counsel for defendant are in error in their statement that there was no allegation in the complaint of defendant's failure to exercise due care in the original selection of Clark as conductor, and that, according to the complaint, the claim was simply that defendant had retained an incompetent servant after knowledge of his incompetency, it being alleged in paragraph 9 of the first count of the complaint, that the defendant "did carelessly and negligently employ and retain said Peter Clark in its employ." The answers to the special issues submitted to the jury show that the jury adopted the theory that defendant was negligent in the selection of Clark to act as conductor of freight train 5. At the conclusion of plaintiff's case a motion for nonsuit was made, on the ground that plaintiffs had not made a sufficient case for the jury on the claim of incompetency on the part of Clark, and the failure of defendant to use ordinary care in his selection, and the ruling of the trial court denying this motion is assigned as error. It is not necessary to determine whether the trial court erred in this ruling. The motion for nonsuit having been denied, defendant proceeded with

its defense, and introduced much evidence. If all the evidence given on the trial by both plaintiffs and defendant, considered together, sufficiently supports the verdict, "the order denying the motion for a nonsuit will not be disturbed, however weak the case may have been at the time plaintiff closed his evidence." *Scrivani v. Dondero*, 128 Cal. 31, 60 Pac. 463; *Williams v. Long*, 139 Cal. 186, 189, 72 Pac. 911. The rule is well settled that, if a motion for nonsuit for want of testimony upon any material fact has been erroneously overruled, and the defendant proceeds and supplies the defect by evidence which he himself introduces, the error committed in overruling the motion is waived. *Elmore v. Elmore*, 114 Cal. 516, 519, 46 Pac. 458; *Higgins v. Ragsdale*, 83 Cal. 219, 23 Pac. 316; *Vica Valley, etc., R. R. v. Mansfield*, 84 Cal. 560, 565, 24 Pac. 145; *Schlesinger v. Mallard*, 70 Cal. 326, 334, 11 Pac. 728; *Abbey, etc., Association v. Willard*, 48 Cal. 614, 617.

Under these circumstances, the principal question on this appeal is the same as that presented in the *Still Case*, viz., Was the evidence given on the trial sufficient to support the conclusion of the jury that Clark was incompetent to act as conductor of the train, that the accident was caused by his incompetency, and that the defendant either knew of such incompetency, or would have known of it if it had used ordinary care in the matter of his selection for that employment? The rules of law applicable in the consideration of these questions have been sufficiently stated in the opinion in the other case, and need not be again stated here. The evidence given on the trial as to the circumstances and cause of the accident, the prior experience and reputation of Clark as an employé of a railroad company, the time and circumstances of his employment by defendant on the road where the accident occurred, his promotion to the position of conductor of the gravel train, and his subsequent assignment as conductor of freight train 5, and his experience thereon prior to the accident, and the inquiries made and information received by defendant in relation to him prior to his selection as conductor, was substantially the same as that given in the *Still Case*. In one or two particulars defendant's case was somewhat weaker than in the *Still Case*. For instance, Clark, who was at the time of the trial in the employ of defendant, was not called as a witness at all, and the evidence of Joseph Still as to the statement made by Clark at Cousins' switch, when he ordered his engineer to proceed north with his train, being the same statement testified to in the *Still Case*, was not contradicted by any witness. Taking all the evidence together, we are satisfied, for the reasons stated in the opinion in the *Still Case*, that it cannot be held that there was not sufficient

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence to sustain the conclusions of the jury and the trial judge.

Certain rulings in the matter of evidence are assigned as error. Witness Rolley, who had been promoted from brakeman to conductor, was asked if he knew whether or not the defendant "examined their conductors in promoting them from brakeman to the position of conductor." This was objected to by defendant, and the objection overruled, whereupon the witness answered, "Well, I don't know about any one else, but they never examined me." A motion to strike out the answer as not responsive, incompetent, and irrelevant, was denied. Witness Joseph Still, who said he had acted as conductor on some special occasions, was asked a similar question, and, over objection, answered, "Well, I never was examined upon the rules," and a motion to strike out the answer as not responsive, incompetent, irrelevant, and immaterial was denied. It may be conceded that the motions to strike out these answers should have been granted. But we do not see how they could have prejudiced defendant. Their utmost effect was to tend to show that defendant had not examined Clark prior to selecting him as a conductor. Defendant did not claim that it had examined him. It introduced evidence showing all that it had done in the way of acquiring information as to his qualifications, relying on that as sufficient to have warranted it in assuming that he was competent, and there was no intimation that it had attempted to examine Clark himself. It was thus practically an admitted fact that he had not been so examined, and the refusal to strike out the answers of Rolley and Still to the effect that they had not been examined was a mere technical error not warranting reversal. Nor, assuming the objections to have been good, can we see any prejudicial effect to defendant in the evidence of Mr. Porter, defendant's vice president and general manager, to the effect that, at the time the new schedule of October 5th with the rules printed thereon was given to Clark and his engineer, Mr. Thayer, the rules were not explained, and that he did not instruct the trainmaster to construe those rules to Messrs. Clark and Thayer. It clearly appeared that the same rules had been in existence and printed on the prior schedule in the hands of the employes for some three months preceding, and it is unreasonable to assume that any inference of negligence may have been drawn by the jury from the mere fact that, when reprinted on a new time-table, the employes were not further instructed regarding the same.

There was no prejudicial error in the refusal to give certain instructions.

The requested instruction 5 was one relative to the matter of instructing Clark in the rules, and telling the jury that, if they found certain facts to exist, there was no necessity for any such instruction, and the defendant

was not negligent in failing to give it, or in examining him as to said rules. Among the facts so set forth was the following: That Clark had, during the time he was employed as conductor prior to the accident, "proved by his conduct and management of said trains that he thoroughly understood all of defendant's rules, * * * and that he was perfectly competent to manage the trains as a conductor thereof." The finding of the jury on the issue of incompetency disposed of the necessity for this instruction, assuming it to be a correct statement of the law. Under the facts of this case that finding necessarily implied that Clark had not "proved" by his conduct and management of trains that "he thoroughly understood all of its rules," and "that he was perfectly competent to manage the trains as a conductor thereof." If the evidence as to Clark's service during the few weeks prior to the accident was such as to prove that he in fact thoroughly understood all the rules, and was perfectly competent to manage the trains, the finding of incompetency could not be held to be sustained. As we said in the Still Case, the evidence as to his experience as a conductor was not such as to require the conclusion that he had ever been confronted with such a situation as confronted him on the day of the accident, or that he ever understood the effect of a "meet order" as against the printed rules relating to regular schedule trains. The most that can be said for defendant on that proposition is that there was a conflict in the evidence, which has been determined by the jury in favor of plaintiffs.

The requested instruction 6 was one to the effect that, if Clark was in the employ of the predecessor of defendant, and said former employer "recommended him to the defendant as a safe, careful, competent employe to take charge of trains, then it was not negligence, on the part of defendant, if it failed to examine said Clark as to his said competency at the time he entered its employ." Regardless of other points made against this instruction, the refusal to give it was not prejudicial. In response to a special question submitted to it, the jury found that the former employer of Clark did not recommend him as a competent person to act as conductor on one of its trains. This finding is specially attacked by learned counsel for defendant as not having support in the evidence, but we cannot so hold. The recommendation implied by the proposed instruction, and the question submitted to the jury, was one to the effect that Clark not only was competent and reliable within the lines of his knowledge and experience, but that he had an adequate knowledge as to the rules and orders under which trains were operated on that road—a sufficient knowledge to enable him to understand and apply the printed rules and orders that might be given to him in the course of his employment. The effect of the evidence as to the nature of the recommendation of Mr. Rose,

the trainmaster of the former employer, was discussed in the opinion in the Still Case.

The requested instruction 3 was substantially that, if Clark was competent to act as conductor when employed in that capacity, defendant could not be found guilty of negligence in having failed to examine him as to his competency as to rules and time-tables, or in failing to instruct him therein. The alleged error in refusing to give this instruction is disposed of by the finding of incompetency.

What has been said in reference to the requested instruction 6 is applicable to the refusal to give requested instruction 18, which was an instruction to the effect that defendant was not negligent in employing Clark as conductor, if, among other things, his former employers recommended him "as a competent man to act as conductor."

The judgment and order denying a new trial are affirmed.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

9 Cal. App. 238

PEOPLE v. GRINNELL. (Cr. 102.)

(Court of Appeal, Second District, California. Oct. 27, 1908. Rehearing Denied by Supreme Court Dec. 21, 1908.)

1. INDICTMENT AND INFORMATION (§ 154*)—OBJECTIONS—WAIVER—INFIRMITIES ON FACE OF INDICTMENT—SUBJECTS OF DEMURRER.

Failure to demur or move in arrest of judgment waives those infirmities on the face of an indictment which are subject to special demurrer.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 501; Dec. Dig. § 154.*]

2. INDICTMENT AND INFORMATION (§ 154*)—WAIVER OF OBJECTIONS—FAILURE TO STATE OFFENSE.

Failure to demur or move in arrest of judgment does not waive an objection that an indictment states no offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 501; Dec. Dig. § 154.*]

3. LEWDNESS (§ 5*)—INDICTMENT.

Pen. Code, § 228, makes it a felony to commit any lewd or lascivious act, other than the acts constituting other crimes, provided for in part 2 of the Code, upon or with the body, or any part or member thereof, of a child under 14 years of age. An indictment alleged that defendant did "lewdly commit a lewd and lascivious act with the body of a child," etc. It did not specify the act, nor state that the act was one not constituting a crime provided for in part 2 of the Code. *Held*, that the indictment was fatally defective.

[Ed. Note.—For other cases, see Lewdness, Dec. Dig. § 5.*]

Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

H. S. Grinnell was convicted of a violation of Pen. Code, § 288, and he appeals from the judgment, and from an order denying a motion for a new trial. *Reversed*.

L. E. Dadman, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty Gen., for the People.

SHAW, J. Defendant was convicted under an indictment charging him with the offense defined in section 288 of the Penal Code. He appeals from the judgment and an order denying his motion for a new trial.

At the trial the defendant interposed an objection to the introduction of evidence, upon the ground that the facts stated in the indictment did not constitute a public offense, which objection was overruled. Said section 288 is as follows: "Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this Code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison not less than one year." The allegation in the indictment is that the defendant "did willfully and lewdly commit a lewd and lascivious act upon and with the body of a child under the age of 14 years, * * * with the intent," etc. Respondent contends that defendant's failure to demur to the indictment, or move in arrest of judgment, constitutes a waiver of all infirmities appearing upon the face of the indictment. We may concede this to be true as to those defects which are the subject of a special demurrer, but neither neglect to demur, nor the absence of a motion in arrest of judgment, can be deemed a waiver of an objection based upon the ground that the indictment does not state a public offense. Section 1012, Pen. Code. As said in *People v. Smith*, 103 Cal. 563, 37 Pac. 516: "This was a defect which was not waived by a failure to demur, but one which went to the very essence of the cause of action, and which might be raised at any point in the progress of the case."

Section 15 of the Penal Code defines a public offense as "an act committed or omitted in violation of a law forbidding or commanding it. * * *" The indictment purports to charge defendant with the crime designated in said section 288, but does not attempt to specify the particular acts which defendant must have committed in order to warrant his conviction. Nor does it describe the offense substantially in the language of the statute, in that it fails to state the act committed was not one constituting some other crime, provided in part 1 of the Penal Code (erroneously designated part 2). *People v. Bradford*, 1 Cal. App. 41, 81 Pac. 712. It is only lewd and lascivious acts other than the acts embraced in those other crimes

which constitute a public offense under said section. The acts referred to in the exception "other than the acts," etc., are descriptive of and define the offense. Hence the indictment, in order to state the offense, must, unless it appear from particular acts described therein, negative any conclusion that the acts which defendant is charged with committing are those embraced in the exception. "The question is whether the exception is so incorporated with and becomes a part of the enactment as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception, and not its location, which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except,' as they may be used in the statute. In either case the only inquiry arises whether the matter excepted, or that which is contained in the proviso, is so incorporated with as to become, in the manner above stated, a part of the enacting clause." *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *Ex parte Hornef* (Cal.) 97 Pac. 891.

Defendant is entitled to the benefit of any inference, reasonably deducible from the facts charged, consistent with his innocence. The indictment, neither by a particular description of the act, nor by describing the offense substantially in the language of the statute, charges defendant with committing the lewd and lascivious acts described in the statute as constituting the crime, and for this reason fails to state a public offense.

The judgment and order appealed from are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 233

PEOPLE v. JOHNSON. (Cr. 123.)

(Court of Appeal, First District, California.
Oct. 27, 1908.)

1. WITNESSES (§ 61*)—COMPETENCY—HUSBAND AND WIFE.

Under Pen. Code, § 1322, providing that neither husband nor wife shall be a competent witness for or against the other, except with the consent of both, or in case of criminal violence upon one by the other, if witness was the wife of defendant at the time of an assault, she is competent to testify; but, if she was not then his wife, but became such thereafter, she is incompetent without his consent.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 61.*]

2. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where it does not appear whether defendant's wife was such at the time of an assault with intent to murder, and therefore whether she was competent or not as a witness, and she gave no testimony on the trial for the as-

sault against him, defendant was not injured because she was sworn and asked whether she was his wife at the time of the assault, to which she replied that she could not remember.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

3. CRIMINAL LAW (§ 1110*)—APPEAL—REVIEW.

An amendment of the bill of exceptions cannot be allowed under rule 14 of rules of the Supreme Court (78 Pac. x), providing that, if there is an error or defect in the transcript, the proper clerk may be required to certify to the Supreme Court the whole or part of the record, and the appeal be determined upon the amended record, where to do so would not be to review the trial court's action, but to pass upon a different case.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1110.*]

4. CRIMINAL LAW (§ 1208*)—PUNISHMENT—DISCRETION OF COURT.

The severity of the sentence and the placing of defendant on probation rest in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1208.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

William Johnson was convicted of an assault with intent to murder, and from the judgment, an order denying a new trial, an order denying probation, and the sentence, he appeals. Affirmed.

Daniel O'Connell and Milton T. U'Ren, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. The defendant was convicted of the crime of assault to commit murder, and was sentenced to the penitentiary for the term of 10 years. This appeal is from the judgment, the order denying defendant's motion for a new trial, the order denying probation, and from the sentence.

It is claimed that the trial court committed error in permitting a certain witness to be sworn and to be asked whether she was the wife of appellant (defendant). After having been sworn, no testimony on the subject having yet been introduced, the district attorney, over the objection and exception of the appellant, asked the witness whether or not she was the wife of the appellant at the time of the alleged assault, to which question she responded that she could not remember, whereupon the district attorney announced that he did not wish to further question the witness, and she gave no other testimony. Section 1322 of the Penal Code declares: "Neither husband or wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal violence upon one by the other. * * *" Under this section, as construed in *People v. Curiale*, 137 Cal. 534, 70 Pac. 468, 39 L. R. A. 588, if the witness was the wife of appellant at the

time of the assault, she was competent to testify; whereas, if she was not his wife at the time, but (as is claimed in appellant's brief) became such afterward, she could not have testified for or against appellant without his consent. But the record in this case—and even the suggested diminution of the record—fail to show whether the witness was the wife of appellant at the time of the assault, and therefore whether she was competent or not as a witness, and, as she gave no testimony against him, we are unable to see wherein he was at all injured.

A diminution of the record has been suggested, and it is asked that the court permit the bill of exceptions to be amended by inserting therein certain testimony under rule 14 of this court (144 Cal. xlv, 78 Pac. x), providing that, where there is an error or defect in the transcript, the proper clerk may be required to certify to the appellate court the whole or part of the record, but the court has no power to vary or amend the transcript itself. *Campbell v. Coburn*, 77 Cal. 36, 18 Pac. 860; *Thompson v. Patterson*, 54 Cal. 546; *Hanna v. De Garmo*, 140 Cal. 174, 73 Pac. 830; *Hayne on New Trial & Appeal*, vol. 2, § 283. If we should allow the proposed amendment, and then determine this appeal upon the amended record, we would not be reviewing the action of the trial court, but would be passing upon a different case. *Satterlee v. Bliss*, 36 Cal. 521; *Rogers v. Tennant*, 45 Cal. 186. It may not be improper to say that we have examined the testimony which it is alleged was inadvertently omitted from the bill of exceptions, and we are of the opinion that if the testimony had been incorporated therein our conclusion would be the same, namely, that the court committed no error in regard to the examination of the wife of the appellant.

Appellant further claims that, upon the showing made, the sentence was too severe, and that he should have been placed on probation. Without discussing these matters at any greater length than counsel has, we will say that in our opinion these contentions are without merit. They concern matters which rested in the sound discretion of the trial court, which discretion does not appear to have been abused.

The judgment and orders appealed from are affirmed.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 267

PEOPLE v. HIGGINS. (Cr. 78.)

(Court of Appeal, Third District, California.
Oct. 31, 1908.)

1. CRIMINAL LAW (§ 1171*)—APPEAL AND ERROR—HARMLESS ERROR—ARGUMENT OF COUNSEL.

It was not ground for reversal of the conviction that the district attorney in his argu-

ment referred to the failure of accused to testify, where the evidence was convincing, and the court promptly and clearly instructed the jury that they could draw no inference from the silence of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3127; Dec. Dig. § 1171.*]

2. BURGLARY (§ 46*)—INSTRUCTIONS.

On a prosecution for burglary an instruction that if defendant made the entry charged "in the nighttime, between sunset and sunrise," he should be convicted, was not erroneous on the ground that it took from the jury the question whether the burglary was effected in the nighttime, but the instruction was proper as declaring as a matter of law the meaning of "nighttime" as defined by Pen. Code, § 463.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 114; Dec. Dig. § 46.*]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Charles Higgins was convicted of burglary, and he appeals from the judgment and from an order denying a motion for a new trial. Affirmed.

H. W. A. Weske, for appellant. U. S. Webb, Atty. Gen., for the People.

HART, J. The defendant was convicted of the crime of burglary of the first degree, and prosecutes this appeal from the judgment and the order denying his motion for a new trial.

The claim for a reversal of the judgment is based, principally, upon alleged misconduct of the district attorney in his address to the jury. Objection is also urged against one of the instructions given by the court.

The evidence presented by the record is conclusive of the guilt of the appellant. The place alleged and proven to have been burglariously entered by the accused was a saloon, located in a small town called Bloomfield, in Sonoma county. In addition to a number of strong circumstances pointing to the defendant's guilt, two witnesses positively testified that they saw him in the saloon after the proprietor had closed the establishment for the night. The defendant did not take the witness stand, nor did he offer any testimony contradictory to that introduced by the people.

During the course of his argument to the jury, the district attorney, among other things, said: "Then, in addition to that, was the other bottle which he has not yet found, and two beer bottles which were found, which correspond with the bottles which he had in stock. Now, then, it cannot be presumed for one moment—the defendant himself and no one in his behalf have seen fit to testify, or to contradict—" At this juncture the attorney for the defendant interposed an exception to the remarks of the district attorney, whereupon the court thus admonished the jury: "Yes, that should not be referred to at all. He is not called upon to take the stand. Gentlemen of the jury,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes Cal. Rep. 98-101 P.—11

you will entirely disregard that. You have no right to infer anything by reason of the matter commented upon. Do not touch that, Mr. Hoyle."

In view of the convincing character of the testimony presented by the people against the defendant, we do not think we would be justified in holding that the remarks of the district attorney involved misconduct on his part prejudicial to the accused. The district attorney had no right to refer either directly or indirectly to the defendant's silence. Under the law it was defendant's right either to become a witness or to refuse to take the stand, and his omission to testify could not, legally, be the basis of an unfavorable inference against him. And, in a case where the evidence is so slight that a verdict either of conviction or acquittal might be warranted, unfavorable criticism by the prosecuting officer in his address to the jury of the defendant's omission to testify in his own behalf ought to be, and we think would undoubtedly be, held sufficient to justify a reversal of the judgment. In the case at bar, however, under the evidence as disclosed by the record, the jury could have consistently returned no other verdict against the accused than the one found. Besides, the court promptly and with clearness instructed the jury that the reference by the district attorney to the failure of the defendant to testify for himself was without legal justification, and that no inference militating against the appellant could lawfully be drawn by the jury from that circumstance.

In the case of the *People v. Amer*, 96 Pac. 401—a case decided by this court—a similar point was made by the appellant, and the language of the district attorney was much stronger against the accused than the language of which complaint is made here. In the opinion of the court, speaking through Justice Burnett, it is said: "But admitting that it is error for the district attorney to comment upon the circumstance, notwithstanding it is within the knowledge of the jury, and it is referred to by defendant's counsel and the judge of the court, it is clear in the case at bar that error was without prejudice. This follows from the nature of the evidence against the defendant. We shall not review it, but deem it sufficient to say that it is inconceivable that any honest jury could have found any other verdict, in the absence of any dereliction on the part of the district attorney. His objectionable remarks, in other words, could not have been considered nor used by the jury to the prejudice of the defendant." The foregoing observations are peculiarly applicable to the case at bar. For further authorities as to the rule under consideration, see 2 Ency.

Pleading and Practice, p. 725; *People v. McRoberts*, 1 Cal. App. 28, 81 Pac. 735; *People v. Salas*, 2 Cal. App. 540, 84 Pac. 295; *State v. Ahern*, 54 Minn. 196, 55 N. W. 959; *People v. Bradbury*, 151 Cal. 675, 91 Pac. 497.

The following is the instruction to which appellant objects upon the alleged ground that it involves a trespass upon the province of the jury in that it deals, so it is charged, with the facts: "If you are satisfied from the evidence herein beyond a reasonable doubt that the defendant committed the crime charged in the information herein, in the manner and form therein charged, and that he entered the said house and building with the felonious intent as charged, in the nighttime, during the period between sunset and sunrise, then your verdict should be burglary of the first degree."

The criticism specifically directed against the foregoing instruction is that its language is such that the question of fact of whether the burglarious entry of the building was effected in the day or the night time was taken from the jury and determined by the court. We do not so read the instruction. The Legislature has defined the meaning of the term "nighttime" as used in connection with the commission of the crime of burglary (section 463, Pen. Code), and a trial court remains strictly within its power and authority in the matter of instructing a jury in such a case as this when it declares that, as a matter of law, the "nighttime," as it is employed in that section, means the period between sunset and sunrise. This is all that the court did in the criticised instruction, and, in doing so, did not invade the province of the jury or the constitutional right of the accused to have the jury alone pass upon all the questions of fact in the case.

Some contention is also made that the only direct testimony offered against the accused was that of an accomplice, and that the circumstances and other testimony do not corroborate said accomplice as required by section 1111 of the Penal Code. As suggested in the beginning of this opinion, the testimony conclusively establishes the defendant's guilt. No doubt one of the witnesses was an accomplice, but there were, as before observed, strong circumstances proved against the accused, and, moreover, a witness, not an accomplice, Mrs. Lefevre by name, positively declared that she saw the defendant in the saloon after the proprietor had closed the place and saw him light several matches while in the building.

We see nothing in the record calling for a reversal of the case.

The judgment and order are affirmed.

We concur: CHIPMAN, J.; BURNETT, J.

9 Cal. App. 260

HANNON v. HARPER et al.

SAME v. LELANDE et al. (Civ. 408, 409.)

(Court of Appeal, Second District, California.
Oct. 30, 1908.)**1. ABATEMENT AND REVIVAL (§ 58*)—ACTION TO COMPEL ISSUE OF LICENSE.**

Proceedings to review the action of city officials in revoking plaintiff's license to conduct an employment agency, and to compel city officials to issue such a license, which is a mere personal right not assignable, and not assets of plaintiff's estate, abate upon his death without right of revivor in his personal representatives.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 58.*]

2. APPEAL AND ERROR (§ 333*)—PARTIES—DEATH—ABATEMENT.

Where appellant dies after taking appeals in actions which abated upon his death, the appeals will be dismissed; the records presenting mere abstract questions, the determination of which could be of no practical benefit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1846-1850; Dec. Dig. § 333.*]

Appeals from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Petitions by E. H. Crowley for a writ of review against A. C. Harper and others, as the Board of Police Commissioners of the City of Los Angeles, and for a writ of mandate against H. J. Lelande, as Clerk of the City of Los Angeles, and others. From judgments denying the petitions, plaintiff appeals. Upon plaintiff's death subsequent to the appeals, his administrator, J. Vincent Hannon, was substituted. Appeals dismissed.

Isidore B. Dockweiler, for appellant. Leslie R. Hewitt, City Atty., and John W. Shenk, Deputy City Atty., for respondents.

SHAW, J. The first of the above-entitled causes, No. 408, is an appeal from a judgment denying plaintiff's petition for a writ of review directed to said defendants in their capacity of, and as constituting, the board of police commissioners of the city of Los Angeles; said petition being based upon the alleged fact that said board had unlawfully made an order whereby it revoked the employment agency license which had theretofore been issued to and under which said Crowley was conducting an employment agency. The second entitled action, No. 409, is an appeal from a judgment denying plaintiff's petition for a writ of mandate requiring defendants, as officials of the city of Los Angeles, to issue to him a license and permit to conduct an employment agency in said city. In each case the respondents have filed a motion to dismiss the appeal upon the ground, supported by certificate of such fact, that since the taking of said appeal said Crowley has died, and said right of action is not one which survives to the personal representative of said deceased. The administrator of said deceased has been duly substituted as appel-

lant in said proceedings, and the notice of said motions duly served upon him, but he has interposed no objection to the granting of said motions.

Neither case presents a cause of action which survives to or can benefit the estate of deceased. Conceding that deceased was entitled to have the proceedings of the board of police commissioners, whereby they revoked his license, set aside and annulled, and likewise conceding that he was entitled to have issued to him the license as prayed for in his petition for writ of mandate, they were nevertheless personal rights and privileges not assignable and not assets of his estate. *Buck's Estate*, 185 Pa. 57, 39 Atl. 821, 64 Am. St. Rep. 816. The proceedings belong to that class of actions which, upon the death of plaintiff, abate without right of revivor in the personal representative of the deceased. *Booze v. Humbird*, 27 Md. 1. For the reasons given, the records present mere abstract questions, the determination of which could be of no practical benefit to any one. *Bradley v. Voorsanger*, 143 Cal. 214, 76 Pac. 1031.

Appeals dismissed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 236

McDOUGALD v. SOUTHERN PAC. R. CO.
(Civ. 476.)(Court of Appeal, Third District, California.
Oct. 27, 1908.)**EVIDENCE (§ 67*)—PRESUMPTIONS.**

In an action for damages to land from the construction of a railroad embankment thereon, Code Civ. Proc. § 1963, subd. 32, providing that a thing once shown to exist is presumed to continue as long as is usual with things of that nature, does not render evidence of the value of the land at the time of trial sufficient to support a finding as to the value of the land at time the damage accrued.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 88; Dec. Dig. § 67.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by Carrie B. McDougald against the Southern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. F. Buck and Buck, Miller & Clark, for appellant. Budd & Thompson, for respondent.

BURNETT, J. The action was brought to recover damages caused by the construction of a certain railroad drawbridge and embankment in front of, and partly upon, the premises of plaintiff.

The vital finding upon which the judgment rests is: "That said real property in finding 2 described was prior to and at the time of the acts of the defendant hereinafter mentioned of the value of \$2,624, and that by

reason of the works and acts of the defendant hereinafter mentioned the said real property has been depreciated in value, and plaintiff has thereby been and is damaged in the sum of \$1,200." This finding is assailed by appellant as unsupported by the evidence. It is declared that "the only testimony in the record in regard to the value of plaintiff's property at that time is the testimony of witness Boggs, and he placed the value of said property at said time at \$500." The only answer to this contention made by respondent is that "the evidence fully justifies the findings." We are not pointed to any part of the transcript wherein may be found any testimony inconsistent with that given by witness Boggs. Our own examination of the record has served to confirm the contention of appellant. Indeed, Boggs seems to have been the only witness who testified to the value of the property at the time mentioned in said finding. It is true certain witnesses gave their opinion as to what the property would be worth at the time of the trial without the obstructions caused by defendant. For instance, C. M. Weber was asked this question: "What in your opinion is the market value of this tract of land of the plaintiff, eliminating from consideration the railroad bridge and embankment as shown on this plat?" But the answer is not evidence of the value of the property at the time mentioned in said finding, for the reason that the trial took place more than three years afterwards. Evidence of the value of property to-day cannot be sufficient of itself to show the value nearly four years ago. There is no room for the presumption of subdivision 32, § 1963, of the Code of Civil Procedure, "that a thing once proved to exist continues as long as is usual with things of that nature," as that is prospective and not retrospective. In view of the rapid and radical fluctuations in values characterizing our growing communities, which is a matter of common knowledge, it cannot be said that this evidence is sufficient to support said finding. The court proceeded upon the theory that damages could be shown as of the date of the trial. Conceding this view to be correct, nevertheless, there is no finding as to what the property would be worth without the obstruction at the time of the trial. In the one respect therefore there is a finding without evidence, and, in the other, evidence without any corresponding finding or allegation in the complaint. Hence the judgment lacks adequate support.

If the other questions discussed arise upon a new trial, we assume that they will be correctly decided, and we deem it unnecessary therefore to consider them.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 262

PEOPLE v. COOMBS. (Cr. 71.)

(Court of Appeal, Third District, California.
Oct. 31, 1908.)

1. CRIMINAL LAW (§ 1114*)—APPEAL—RECORD—SCOPE OF REVIEW.

In a prosecution of an elector for perjury in misstating the place of his birth in an affidavit for registration, an objection that the complaining witness is but a year older than accused, and that therefore his statement in the complaint that accused was born at a designated place could not have been based on personal knowledge, and must have been made on information and belief, cannot be considered on appeal, where the record fails to show the age of the complaining witness.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1114.*]

2. CRIMINAL LAW (§ 238*)—PRELIMINARY EXAMINATION—EVIDENCE TO SUPPORT COMMITMENT—"SUFFICIENT CAUSE"—"PROBABLE CAUSE."

Under Pen. Code, § 872, providing that if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe defendant guilty, the magistrate must issue the commitment, evidence that accused on June 16, 1906, stated, in the affidavit to secure registration as a voter, that he was born in England, and on January 31, 1908, stated, in a similar affidavit, that he was born in San Francisco, was sufficient to justify an order of commitment; the term "sufficient cause," as used in the statute, being equivalent to the term "probable cause," as used in the habeas corpus act. Pen. Code, § 1487.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 238.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5618-5627; vol. 8, p. 7765; vol. 7, pp. 6760, 6761.]

Appeal from Superior Court, Plumas County; J. D. Goodwin, Judge.

William Gulliver Coombs was charged with perjury, and from an order setting aside the information, the People appeal. Reversed and remanded.

M. C. Kerr, Dist. Atty., U. S. Webb, Atty. Gen., and J. Chas. Jones, Asst. Atty. Gen., for the People. W. W. Kellogg and J. D. McLaughlin, for respondent.

CHIPMAN, P. J. Defendant was informed against for the crime of perjury alleged to have been committed in registering as a voter. When called upon to plead in the superior court, he demurred to the information, and also filed a motion to set it aside upon the following grounds: That prior to the filing of the information against him he had not been legally committed by a magistrate because of the insufficiency of the complaint filed in the magistrate's court. This alleged insufficiency consisted in the claim that the said complaint was not based upon the personal knowledge of the complaining witness; that no depositions of persons knowing the facts of the case of their own personal knowledge were attached to said complaint or made part thereof, and hence the issuance of the warrant of arrest was illegal and void; that the commitment and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the succeeding proceedings were illegal and void; "that the testimony of the two witnesses, H. P. McBeth and W. M. Cleveland, consisted entirely of questions and answers touching their qualifications to administer oaths and regarding statements made by defendant at two different times and in a manner contradictory to each other, but no attempt was made or was any evidence offered to prove which of the two statements was true or which was false." The information charged that defendant, in making oath at the time his name was placed upon the great register, in 1908, declared that he was born in San Francisco, Cal.; whereas, in truth he was born in England. No objection was made as to the sufficiency in point of form either of the information, the warrant of arrest, or commitment; but it was further objected "that, though the complaint (filed in the magistrate's court) appears on its face as sworn to that M. C. Kerr, the complainant (district attorney), makes complaint upon his own personal knowledge, and not upon information and belief, his affidavit of registration on file in the office of the county clerk of Plumas county shows that at the time of the birth of the defendant the complaining witness was an infant of the age of about one year," and hence he could not have made the complaint otherwise than upon information and belief, which it is claimed is wholly insufficient. The trial court made an order setting aside the information, and the people appeal. The testimony of County Clerk McBeth and his deputy, Cleveland, was that the defendant registered in 1906, making oath that he was born in England, and that upon registering in 1908 he made oath that he was born in San Francisco, Cal. The respondent has filed no brief.

As to the objection to the complaint that it was made upon information and belief, the record fails to support the claim that the complainant was at the birth of defendant too young to personally know where defendant was born, and hence must have deposed upon information and belief only. If such was the fact, it should have been made to appear, for error will not be presumed. For all that appears, the complaining witness was a much older man when he swore to the complaint than as stated in the objection made. We must assume it to be true that the complaining witness deposed from personal knowledge, as the complaint on its face so shows. The question therefore whether a complaint charging perjury upon information and belief, otherwise unsupported, is insufficient in law, is not before us for review.

But it was urged in support of the motion that the evidence taken before the magistrate was wholly insufficient to justify the making of the order of commitment. It was

proved that on January 31, 1908, defendant signed and verified an affidavit stating that he was born in San Francisco, Cal. It was also proven that on June 16, 1906, he had signed and verified an affidavit stating that he was born in England and had been naturalized in San Francisco. We think there was enough in the two contradicting affidavits of defendant to establish probable cause for holding him to answer the charge made. Section 872, Pen. Code, provides that if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must issue the commitment. The terms "sufficient cause" here mentioned mean, we think, about the same as the terms "probable cause" in the habeas corpus act. Pen. Code, § 1487. We held in the Matter of Jesse Heacock (Cal. App.) 97 Pac. 77, that, though the evidence was insufficient to warrant conviction, it was sufficient to establish probable cause. So here the evidence shows that there was sufficient cause appearing to the magistrate that a public offense had been committed, and that the defendant was guilty thereof.

The Attorney General makes the point that insufficiency of the evidence is not mentioned among the statutory grounds (Pen. Code § 995) upon which an information may be set aside, and hence the court was without the power to consider the objection. We do not find it necessary to decide the question.

The order setting aside the information is reversed, and the cause remanded for further proceedings.

We concur: HART, J; BURNETT, J.

9 Cal. App. 223
DENIKE v. SANTA CLARA VALLEY AGR.
SOCIETY et al. (Civ. 590.)

(Court of Appeal, First District, California.
Oct. 23, 1908.)

1. LIMITATION OF ACTIONS (§ 179*)—PLEADING—FRAUD.

In an action to set aside deeds for fraud, an allegation that plaintiff did not know or have notice of, or have the means of knowing or discovering, said acts of fraud until within three years next before the commencement of this action, is too general to take the action out of the statute barring actions for fraud after three years, and especially where the deeds attacked have been recorded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 668; Dec. Dig. § 179.*]

2. LIMITATION OF ACTIONS (§ 179*)—FRAUD—DISCOVERY—PLEADING.

To take a case based on fraud out of the statute of limitations by reason of nondiscovery of the fraud, plaintiff must allege that the fraud was done under such circumstances that he would not be presumed to have any knowledge of them—as that it was done in secret or was kept concealed—and he must allege, also, when and how the facts constituting the fraud were brought to his knowledge, so that the court

may determine whether the discovery of these facts was within the time alleged.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 668; Dec. Dig. § 179.*]

3. CANCELLATION OF INSTRUMENTS (§ 37*)—GROUNDS—FRAUD—PLEADING—BONA FIDE PURCHASERS.

Where, in an action to set aside deeds as fraudulent, plaintiff alleges facts showing the transfer of title down to the only defendant having possession of the property, and shows that defendants acquired title by purchase from the grantees in deeds claimed to be fraudulent, but does not allege that the defendants were not bona fide purchasers for value, he fails to state a cause of action.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 37.*]

4. EJECTMENT (§ 23*)—TITLE—SOURCES—DEFENSES.

Where defendant, in a suit to set aside deeds and to recover possession of land, obtained title both through a deed from an agricultural society and through a sale on execution on judgments against the society, the fact that the acts of the society as to the deed were *ultra vires* is immaterial.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 23.*]

5. EXECUTION (§ 50*)—ORGANIZATION OF SOCIETIES—POWER TO DISPOSE OF LANDS.

Under the express provisions of St. 1859, p. 104, c. 110, agricultural societies organized under the act have authority to sell, lease, and dispose of its lands at pleasure, and hence its lands could be sold under execution.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 50.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by A. R. Denike against the Santa Clara Valley Agricultural Society and others to set aside a judgment and deeds, and to recover the possession of land. From a judgment on sustaining demurrers to the complaint, plaintiff appeals. Affirmed.

Wm. P. Veuve, for appellant. Olney & Olney and E. M. Rea, for respondents.

HALL, J. This is an appeal by plaintiff from final judgment against him upon defendants' demurrers to his amended complaint, and the only question presented by the record concerns the correctness of the ruling of the court in sustaining said demurrers.

The action was brought for the benefit of the defendant Santa Clara Valley Agricultural Society, a corporation organized and still existing under and by virtue of the act entitled "An act concerning agricultural societies," approved March 12, 1859, plaintiff suing as a life member of said corporation, and making the members of the board of directors and several life members thereof, as well as said corporation, formal defendants. The other defendants are San Jose Land & Exhibit Association, a corporation, Peninsula Land & Improvement Company, a corporation, San Jose & Santa Clara Railroad Company, a corporation, E. M. Rea, and L. E. Hanchett.

The action was brought to obtain a decree:

- (1) Vacating and annulling a certain judgment made and entered on the 18th day of May, 1899, in favor of W. C. Andrews, and against the Santa Clara Valley Agricultural Society, and all proceedings founded thereon, including the sheriff's deed of the land described in the complaint executed in pursuance of a sale to satisfy said judgment;
- (2) vacating a deed to the said premises executed by the said Santa Clara Valley Agricultural Society on the 7th day of June, 1900;
- (3) that said Santa Clara Valley Agricultural Society have and recover possession of the premises described in the complaint;
- (4) and that said society recover of the Peninsula Land & Improvement Company the sum of \$1,000 as the value of the rents and profits of said premises.

The defendant, the Peninsula Land & Improvement Company, appeared separately, and demurred to the amended complaint upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and upon the ground that the supposed cause of action is barred by subdivision 4 of section 338 of the Code of Civil Procedure. The other defendants also demurred to the amended complaint upon the same grounds. The court sustained the demurrers upon both grounds, and rendered judgment against plaintiff.

If the action be treated as an action for relief on the ground of fraud, it was clearly barred by the provisions of subdivision 4 of section 338, Code of Civil Procedure, requiring such an action to be brought within three years from the discovery of the facts constituting the fraud. The complaint charges that the judgment and deeds sought to be vacated were procured and executed through alleged fraud on the part of the officers of the agricultural society and others of the defendants. But these alleged frauds occurred prior to and during the year 1900. The precise date when this action was commenced does not appear from the record brought here by appellant, but the amended complaint appears to have been filed on the 12th day of June, 1907. Respondent in its brief states that the original complaint was filed on the 19th day of February, 1907, and appellant has not challenged this statement. We therefore assume it to be true. At any rate the action was commenced after the 3d day of November, 1906, for the complaint alleges that a transfer of a right of way to one of the defendants occurred on that day.

The only allegation as to when the plaintiff learned of the frauds complained of is that "the plaintiff did not know, nor have notice of or have the means of knowing or discovering, said acts of fraud hereinbefore specifically alleged until within three years next before the commencement of this ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion." Such general allegation is insufficient to take an action for relief on the ground of fraud, occurring more than three years before the commencement of the action, out of the bar of the statute. *People v. San Joaquin Valley Agr. Ass'n*, 151 Cal. 797, 91 Pac. 740; *Truett v. Onderdonk*, 120 Cal. 589, 53 Pac. 26; *Lady Washington Co. v. Wood*, 113 Cal. 486, 45 Pac. 809; *Lant v. Manley (C. C.)* 71 Fed. 7. "He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret, or were kept concealed; and he must also show the times and circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged." *Lady Washington Co. v. Wood*, supra; *People v. San Joaquin Valley Agr. Ass'n*, supra. Especially is this rule applicable where it appears, as it does in the complaint here, that the deeds attacked were recorded in the recorder's office. *Lant v. Manley*, supra. The complaint in this case in no respect complies with the rule laid down in the above-cited cases.

The appellant, however, takes the position that this is an action to recover the possession of land, and that the statute barring actions for fraud after three years does not apply; citing *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820. The only defendant who is charged to be in possession of the premises is the Peninsula Land & Improvement Company. It is not claimed that any of the other defendants are now in possession of the land, or have ever been in possession of any part of it, save that the railroad corporation defendant has, since the entry of the Peninsula Land & Improvement Company, received from it a grant of a right of way across the premises. As to the Peninsula Land & Improvement Company, it appears from the complaint that it derails title to the premises in question from the defendant Santa Clara Valley Agricultural Society through the judgment and the two deeds sought to be declared fraudulent and void. The two deeds in question were executed to defendant San Jose Land & Exhibit Association, and it in turn conveyed to defendant E. M. Rea. Thereafter E. M. Rea and his wife in November, 1905, conveyed to defendant L. E. Hanchett, and on the 31st day of March, 1906, said Hanchett conveyed the premises to defendant the Peninsula Land & Improvement Company. These facts are alleged in the complaint, but it is not alleged that either Hanchett or defendant Peninsula Land & Improvement Company were not purchasers for value, or that they or either of them had any notice of the alleged frauds now complained of, or were in any way parties thereto. It appears from the complaint

that defendant Peninsula Land & Improvement Company entered into possession of the premises under its deed from Hanchett. It must be assumed that plaintiff has stated his cause of action as strongly as the facts will warrant, and we must therefore assume that the Peninsula Land & Improvement Company is a bona fide purchaser for value. This being so, its title is good against plaintiff and the defendant for which he sues. *Morrow v. Graves*, 77 Cal. 218, 19 Pac. 489; 2 Pom. Eq. § 754. See, also, *Pratt v. Curtis*, Fed. Cas. No. 11,375, where it was held that, where a subsequent purchaser of land alleged to have been fraudulently conveyed is made defendant in a bill to set aside the conveyance, he must be charged with participation in or knowledge of the fraud.

The general allegations in the complaint that certain of the acts of the officers of the Santa Clara Valley Agricultural Society were ultra vires do not strengthen the case of plaintiff against defendant Peninsula Land & Improvement Company, for said company holds title both under the deed of the society and the sheriff's deed upon execution under the judgment against the society. The act under which the society was organized expressly authorizes it "to sell, lease and dispose of" its lands "at pleasure" (St. 1859, p. 104, c. 110), and not being a public corporation, such as are societies organized under the act of 1880 (*People v. San Joaquin Valley Agr. Ass'n*), its lands could be sold upon execution. The whole case of plaintiff resolves itself into an attempt to recover from the possession of a subsequent bona fide purchaser for value, land, the title to which may have been obtained from the defendant society (for the benefit of which plaintiff sues), by frauds of some of the grantors of the present possessor and owner of such title. Such an action cannot be maintained. *Morrow v. Graves*, supra; *Pratt v. Curtis*, supra; 2 Pom. Eq. § 754.

For the reasons above stated, the court did not err in sustaining the demurrers, and the judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

by the obstruction, which, under Civ. Code, § 3490, cannot by lapse of time be legalized, and the public officers charged with the duty of removing obstructions from streets may remove the same on the refusal of the owner so to do.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1498; Dec. Dig. § 696.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Valentine Nerio and others against Frank A. Maestretti and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Chas. S. Peery and Jas. G. Conlan, for appellants. Percy V. Long, City Atty., and John T. Nourse, Asst. City Atty., for respondents.

HENSHAW, J. This action was brought by plaintiffs, seeking to enjoin the defendants, constituting the board of public works of the city and county of San Francisco, from an alleged unlawful interference with their property. The facts found by the court are that plaintiffs had erected houses upon a part of a public street of the city and county of San Francisco; that the board of public works had given notice to the plaintiffs to remove these structures and abate the nuisance created by them; that, upon plaintiffs' failure and refusal so to do, the board of public works entered and proceeded to remove the obstructions, using no more force than was necessary so to do; that the board of public works in so demolishing plaintiffs' buildings was authorized and empowered so to do by the laws of the state of California, wherein and whereby the said board of public works was charged with the duty of removing obstructions from the public streets of the city and county.

The appeal here is from the judgment and upon the judgment roll alone, and the appeal is entirely without merit. The findings abundantly support the judgment. The continued occupation by plaintiffs of a portion of the public street was but the continuance of a nuisance. No lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right. Civ. Code, § 3490.

The judgment appealed from is affirmed.

We concur: **LORIGAN, J.; MELVIN, J.**

(154 Cal. 580)

NERIO et al. v. MAESTRETTI et al.
(S. F. 4,787.)

(Supreme Court of California. Dec. 8, 1908.
Rehearing Denied Jan. 4, 1909.)

MUNICIPAL CORPORATIONS (§ 696*)—STREETS—OBSTRUCTIONS—NUISANCE.

The continued occupation by one of a portion of a public street by maintaining a house thereon is a continuance of a nuisance created

PEOPLE v. MESKEL. (Cr. 1480.)

(Supreme Court of California. Dec. 8, 1908.)

CRIMINAL LAW (§ 1090*)—APPEAL—AFFIRMANCE.

Where accused appealed from a conviction of murder, but no briefs were filed nor appearance made for him in the Supreme Court, and the transcript contained only the information, judgment, and instructions, in which there was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

no substantial error, the judgment must be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2807; Dec. Dig. § 1090.*]

In Bank. Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Daniel F. Meskel was convicted of murder, and he appeals. Affirmed.

S. M. Smyser, for appellant. U. S. Webb, Atty. Gen., for the People.

SHAW, J. The defendant was convicted of murder of the first degree and sentenced to death. His motion for a new trial in the court below was denied. He appeals from the final judgment and from the order denying his motion.

No briefs have been filed in his behalf and upon the hearing of the cause in this court there was no appearance for him. The cause was submitted by the Attorney General without briefs and without argument. No bill of exceptions was filed in the court below, and the evidence is not before us. The transcript contains only the information, the judgment, and the instructions given by the court. After a careful examination of the record, we find no substantial error.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

9 Cal. App. 244

PEOPLE v. BOTKIN. (Cr. 68.)

(Court of Appeal, First District, California. Oct. 29, 1908. Rehearing Denied by Supreme Court Dec. 21, 1908.)

1. CRIMINAL LAW (§ 1186*)—APPEAL—DESTRUCTION OF PART OF RECORD—BURDEN OF SHOWING ERROR.

Photographic copies of writings introduced on a trial for murder, some as made by defendant and tending to connect her with the homicide, and others as exemplars of her handwriting used by expert witnesses in making comparisons with disputed writings, were made by the bill of exceptions a part thereof, but after settlement of the bill were destroyed by fire, and could not be restored. *Held*, that a reversal of a conviction was not required on the ground that the entire record could not be presented to the Supreme Court, as it was incumbent on defendant to show error, and the court could not presume that he did not have a fair trial because a portion of the record had been destroyed without fault of either party.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

2. CRIMINAL LAW (§ 1186*)—APPEAL—RECORD—REVERSAL.

A reversal was not required, where the only apparent purpose of including in the record photographic copies of writings, made by defendant and destroyed after the record was made up, was to enable the Supreme Court to judge of the weight of the evidence to the effect that defendant was the author of the incriminating writings, and to make comparisons, and where, under the condition of the evidence tending to

connect defendant with the homicide, any views which the Supreme Court might have as to the credit that should be given to the handwriting experts and the witnesses who testified that, in their opinion, the incriminating writings were written by defendant would not justify the Supreme Court in reversing the conviction by the jury who heard and saw all the witnesses.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

3. CRIMINAL LAW (§ 112*)—VENUE—CRIME COMMITTED IN PART IN STATE.

Where poisoned candy is prepared in and sent from the state to a person in another state in which it is eaten, and such person dies, the homicide is committed in part in the state, within Pen. Code, § 27, making a person amenable to the penal laws of the state who in whole or in part commits a crime therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 230; Dec. Dig. § 112.*]

4. CRIMINAL LAW (§ 1180*)—DECISION ON FORMER APPEAL.

A decision on a former appeal is conclusive on a subsequent appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3002-3004; Dec. Dig. § 1180.*]

5. JURY (§ 33*)—RIGHT TO TRIAL BY.

Where poisoned candy was prepared in and sent from the state to a person in another state in which it was eaten, and such person died, the homicide was committed in part in the state, within Pen. Code, § 27, making a person amenable to the penal laws of the state, who in whole or in part commits a crime therein, and a trial in the state did not deprive defendant of the right of trial by jury secured by Const. art. 1, §§ 7, 13, on the ground that no crime was committed in the state, but in such other state, and that the jury must be selected from the county where the crime is committed.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 33.*]

6. INDICTMENT AND INFORMATION (§ 2*)—CONSTITUTIONAL PROVISIONS.

Const. U. S. 5th Amend., providing that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment, has reference only to the United States, and not to the states.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 5; Dec. Dig. § 2.*]

7. CRIMINAL LAW (§ 162*)—FORMER JEOPARDY—CONSTITUTIONAL PROVISIONS.

Const. U. S. 5th Amend., providing that no person shall be subject for the same offense to be twice put in jeopardy, has reference only to the United States, and not to the states.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 285; Dec. Dig. § 162.*]

8. WITNESSES (§ 293*)—PRIVILEGE—CONSTITUTIONAL PROVISIONS.

Const. U. S. 5th Amend., providing that no person shall be compelled in a criminal case to be a witness against himself, has reference only to the United States, and not to the states.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1013; Dec. Dig. § 293.*]

9. CONSTITUTIONAL LAW (§ 251*)—DUE PROCESS OF LAW.

Const. U. S. 5th Amend., providing that no person shall be deprived of life, liberty, or property without due process of law, has reference only to the United States, and not to the states.

[Ed. Note.—For other cases, see Constitutions¹ Law, Cent. Dig. § 727; Dec. Dig. § 251.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

10. JURY (§ 11*)—RIGHT TO TRIAL BY.

Const. U. S. 6th Amend., providing that in all criminal prosecutions accused shall enjoy the right of trial by a jury of the state and district wherein the crime shall have been committed, has reference only to the United States, and not to the states.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 23; Dec. Dig. § 11.*]

11. CONSTITUTIONAL LAW (§ 67*)—APPLICABILITY OF FEDERAL CONSTITUTION—STATES.

Const. U. S. art. 3, relative to the judicial department of the federal government, has reference only to the United States, and not to the states.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 67.*]

12. CONSTITUTIONAL LAW (§ 207*)—PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE SEVERAL STATES.

Pen. Code, § 27, making a person amenable to the penal laws of the state, who in whole or in part commits a crime therein, is not in violation of Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 207.*]

13. CONSTITUTIONAL LAW (§ 259*)—DUE PROCESS OF LAW—VENUE.

Pen. Code, § 27, making a person amenable to the penal laws of the state, who in whole or in part commits a crime therein, is not in violation of Const. U. S. 14th Amend. § 1, providing that no person shall be deprived of life, liberty, or property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 750; Dec. Dig. § 259.*]

14. HOMICIDE (§ 166*)—EVIDENCE—ADMISSIBILITY—MOTIVE.

On a trial for murder, evidence that close, intimate, and meretricious relations had existed between defendant and decedent's husband was properly admitted upon the question of motive.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 327; Dec. Dig. § 166.*]

15. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

On a trial for murder by sending poisoned candy, evidence that decedent on opening the box, had said that she wondered whom it was from, if not strictly admissible because being hearsay, was too trivial in character to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3137; Dec. Dig. § 1169.*]

16. HOMICIDE (§ 175*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder by sending poisoned candy, evidence by witnesses who had partaken thereof that shortly thereafter they had symptoms of arsenical poisoning was admissible.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 175.*]

17. CRIMINAL LAW (§ 448*)—EVIDENCE—BELIEF OF WITNESS.

On a trial for murder by sending poisoned candy, an objection that a witness who, according to the state's theory, as an employé of certain candy manufacturers, sold the candy was permitted to testify that defendant reminded her of the person to whom she had sold the candy went to the weight of her testimony, rather than its admissibility; witness' whole testimony being to the effect that she believed defendant the purchaser, but could not be sure.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 448.*]

18. HOMICIDE (§ 173*)—EVIDENCE—ADMISSIBILITY.

On a trial for murder by sending poisoned candy, evidence by candy makers that no arsenic or other poison was used in making candy at the factory at which they were employed was properly admitted; there being evidence to show that the candy came from such factory, and was strongly charged with arsenic when received by decedent.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 173.*]

19. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error, if any, in permitting the state to prove that on the first trial defendant's attorney, in her presence, admitted writings introduced on the second trial as exemplars of defendant's handwriting to be in her handwriting was cured, where defendant thereafter testified that the exemplars were in her handwriting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3138; Dec. Dig. § 1169.*]

20. CRIMINAL LAW (§ 730*)—TRIAL—MISCONDUCT OF COUNSEL.

The characterization by the district attorney of a question, asked by defendant's attorney, as a cowardly statement will not justify a reversal, where the court at once instructed the jury that such remark was not evidence, and was not to be considered and should be disregarded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

21. CRIMINAL LAW (§ 730*)—TRIAL—MISCONDUCT OF COUNSEL.

The use of a microscope by the district attorney, during his argument on a trial for murder by sending poisoned candy, will not justify a reversal, where defendant's objection thereto was sustained, and the jury admonished not to allow the district attorney's action to influence them, and to render their verdict upon the evidence and the law, and upon nothing else.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

22. CRIMINAL LAW (§ 730*)—TRIAL—MISCONDUCT OF COUNSEL.

Reference by the district attorney to another case will not justify a reversal, where the court sustained defendant's objection thereto, and admonished the jury that, when other cases were mentioned and such remarks made, they were not to be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

23. CRIMINAL LAW (§ 768*)—TRIAL—INSTRUCTIONS—DUTY OF JURORS.

An instruction that, "If you do so, no harm can come from my errors, if I commit any, for a Supreme Court sits to correct them, and the jury should not assume to exercise the functions of that tribunal," given at the close of an instruction that the jury must determine all questions of fact, but must receive the law from the court, but emphasized what had been said as to the duty of the jury to be governed by the court's instructions, and contained no erroneous statement of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1798-1802; Dec. Dig. § 768.*]

24. CRIMINAL LAW (§ 783*)—TRIAL—INSTRUCTIONS—LIMITING EFFECT OF EVIDENCE.

An instruction, on a trial for murder by sending poisoned candy, concerning evidence that close, intimate, and meretricious relations had existed between defendant and decedent's husband was proper, and designed to limit the effect of such evidence to the proof of motive, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

protect defendant from the possibility that the jury might allow it to otherwise prejudice her.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 783.*]

25. CRIMINAL LAW (§ 778*)—TRIAL—INSTRUCTIONS—PRESUMPTIONS AS TO INTENT.

An instruction on a trial for murder in the express language of Code Civ. Proc. § 1962, subd. 1, that a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1850; Dec. Dig. § 778.*]

26. CRIMINAL LAW (§ 782*)—TRIAL—INSTRUCTIONS—WEIGHT AND EFFECT OF EVIDENCE.

An instruction that the jury were not bound to decide in conformity with the declarations of any number of witnesses which did not produce conviction in their minds against a less number, or against a presumption of law, or other evidence satisfying them; in other words, that it was not the greater number of witnesses that should control where their testimony was not satisfactory to the jury against a less number whose testimony did satisfy them, and that it was upon the quality, rather than the quantity or number, of witnesses that the jury should act—was, as to the first part, in the express language of Code Civ. Proc. § 2061, subd. 2, and what the court added was but an amplification thereof, and was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

27. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—"REASONABLE DOUBT."

An instruction that the term "reasonable doubt" does not mean a "mere possible doubt, a conjectural doubt," nor "a doubt which is merely capricious," when read in connection with a preceding instruction that a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that defendant committed the offense, was entirely correct.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 822.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

28. CRIMINAL LAW (§ 811*)—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that, in considering the weight and effect to be given to the testimony of witnesses, the jurors have the right to consider the consequences resulting to a witness from the result of the trial is not open to the criticism that it singles out defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 811.*]

29. CRIMINAL LAW (§ 1137*)—APPEAL—INSTRUCTIONS—MOTIVE—ESTOPPEL TO ALLEGE ERROR.

Defendant, having asked and obtained an instruction that absence of motive is a circumstance in favor of innocence, cannot complain that the court gave a correlative instruction as to the presence of motive.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1137.*]

30. CRIMINAL LAW (§ 768*)—TRIAL—INSTRUCTIONS—DUTY OF JURY.

General observations by the court, intended to guard the jury against being moved by pity for defendant, or prejudice or passion that might be caused by the heinous nature of the

crime, and to impress upon them the serious nature of their duties, were not open to criticism.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1798; Dec. Dig. § 768.*]

Appeal from Superior Court, City and County of San Francisco; Carroll Cook, Judge.

Cordelia Botkin was convicted of murder in the first degree, and from the judgment and an order denying a new trial, and also an order denying a motion in arrest of judgment, she appeals. Affirmed.

Geo. A. Knight, Frank McGowan, and Knight & Heggerty, for appellant. U. S. Webb, Atty. Gen., for the People.

HALL, J. Defendant was convicted of murder in the first degree, and thereupon made a motion for a new trial, and also a motion in arrest of judgment. Both motions were by the court denied, and final judgment was pronounced that she suffer imprisonment for life in accordance with the verdict of the jury. This is an appeal from the judgment and from the orders denying said motions.

Defendant was convicted for the killing of one Mary Elizabeth Dunning, otherwise known as Mrs. John P. Dunning. The manner in which the death of Mrs. Dunning was accomplished is fully set forth in the indictment, from which it appears that, on or about the 4th day of August, 1898, defendant, at the city and county of San Francisco, state of California, prepared and sent through the United States mail certain poisoned candy to Mrs. Dunning, at Dover, in the county of Kent, in the state of Delaware, where it was by Mrs. Dunning received and eaten, and from the effects of which she, on the 12th day of August, 1898, at Dover, in said county of Kent, state of Delaware, died. Defendant was once before convicted under this indictment, but upon appeal the judgment was reversed because of an erroneous instruction. *People v. Botkin*, 132 Cal. 231, 64 Pac. 286, 84 Am. St. Rep. 39.

A. The first point urged for a reversal of the judgment is that, without the fault of defendant, a part of the record on appeal was destroyed in the conflagration of April 18, 1906. Upon the trial certain writings were introduced in evidence. Some of these were writings claimed to have been made by defendant, and tending to connect her with the killing of Mrs. Dunning, and others were exemplars of her handwriting used by expert witnesses in making comparisons with the incriminating and disputed writings. From the bill of exceptions in this case it appears that photographic copies of these exhibits were made upon the former trial, and were filed with the clerk of the Supreme Court. These photographic copies of exhibits are by the present bill made a part

thereof, but since the settlement of the bill were destroyed by the conflagration of April 18, 1906, and cannot now be restored. It is now urged that because the entire record cannot now be presented to this court, we should reverse the judgment and remand the case for a new trial. No authority is cited in support of this position, and we know of none that could be. It is incumbent on the appellant to show error, and we know of no rule that permits us to presume that defendant did not have a fair trial because a portion of the record upon her appeal has been destroyed without fault of either party. Furthermore, an examination of the bill of exceptions shows that, so far as the writings appear to have been read to the jury, their contents are set forth in the bill of exceptions. The only apparent purpose of making the photographic copies of the writings a part of the record on appeal was to enable this court to judge of the weight and effect of the evidence to the effect that defendant was the author of the incriminating writings, and to enable this court to make comparisons between the exemplars of defendant's writing and the incriminating writings. Under the condition of the evidence in this case, tending to connect appellant with the killing of Mrs. Dunning, any views that we might have as to the credit that should be given to the evidence of the handwriting experts, and of the witnesses that testified that, in their opinion, the incriminating writings were written by defendant, could not justify us in reversing the judgment founded on the verdict of the jury that heard and saw all the witnesses as they gave their testimony. We see no reason for reversing the judgment because the photographic copies of the said exhibits have been destroyed under the circumstances appearing in this case.

B. The second point urged for reversal is that the California court had no jurisdiction of the crime charged, for the reason that the poisoned candy was received and eaten by Mrs. Dunning in the state of Delaware, where she died, though prepared in and sent from the city and county of San Francisco, with intent that Mrs. Dunning should eat thereof and be killed thereby in the state of Delaware. Which state had jurisdiction of the offense is stated by appellant in her brief to be the principal controversy in this case. But this question has been on the former appeal determined adversely to the present contention of appellant. *People v. Botkin*, 132 Cal. 231, 64 Pac. 286, 84 Am. St. Rep. 39. That decision is conclusive on this court.

C. Appellant, under the deed of "Objections to the Jurisdiction of the Court Involving Federal Questions," contends that by the trial in the superior court of the city and county of San Francisco various provisions of the Constitution of this state and of the United States were violated.

1. It is insisted that defendant was de-

prived of her right of trial by jury, secured to her by sections 7 and 13, art. 1, of the Constitution. This contention is based on the proposition that no crime of murder was committed in the state of California, but in the state of Delaware, if committed at all, and that the jury must be selected from the vicinage or county where the crime is alleged to have been committed. This contention is answered by the decision upon the first appeal. It was there said: "The defendant, having committed a murder in part in the state of California, is punishable under the laws of the state exactly in the same way, in the same courts, and under the same procedure as if the crime was committed entirely within the state." *People v. Botkin*, supra; Pen. Code, § 27.

2. Predicating her contention upon the same proposition that the only crime charged was committed in the state of Delaware, appellant claims that by the trial in this state she was deprived of rights under article 5 and article 6 of the amendments to the Constitution of the United States, and article 3 of the same Constitution. But it is well settled that the provisions of these articles have reference to powers exercised by the government of the United States, and not to those of the states. *Ellenbecker v. Plymouth County*, 134 U. S. 35, 10 Sup. Ct. 424, 33 L. Ed. 801; *Brown v. New Jersey*, 175 U. S. 174, 20 Sup. Ct. 77, 44 L. Ed. 119.

3. It is also urged that appellant was deprived of rights given her by section 2, art. 4, and section 1, art. 14, of amendments to the Constitution of the United States. This contention seems to be predicated upon the assumption that the provisions of section 27 of the Penal Code, making any one amenable to our penal laws who, in whole or in part, commits a crime within the state, is in violation of said sections of said articles. Section 2, art. 4, simply provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." How it can be conceived that the provisions of section 27 of the Penal Code contravenes this provision is not discernible. The provision of the fourteenth amendment claimed to be violated is: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." We see nothing in section 27 of the Penal Code that violates this provision. "The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated by only an imaginary line. On one side of the line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its

own modes of judicial proceeding." *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989. "Any legal proceeding sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232. So, also, it was said in *Leeper v. Texas*, 139 U. S. 462, 468, 11 Sup. Ct. 577, 579, 35 L. Ed. 225, "that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied." We find nothing in any of the constitutional provisions relied on by appellant that prevents a state from punishing, as an offense against the penal laws of such state, a crime when only a portion of the acts constituting the crime are committed within the state.

D. The court allowed the prosecution to show, by both John P. Dunning and by other witnesses, that close, intimate, and meretricious relations had existed between defendant and John P. Dunning for several years, and up to the time of his departure from this state, which occurred shortly before the killing by poison of Mrs. John P. Dunning. Appellant urges this action of the court as error. The court, however, carefully and fully instructed the jury that this evidence could only be considered by them upon the question of motive, and for this purpose it was clearly admissible. To make this clear it is only necessary to state some of the salient facts shown by the evidence. John P. Dunning and Mrs. John P. Dunning were married in 1891, and continued to be husband and wife until her death. The defendant was also a married woman but not living with her husband during the period covered by the evidence. Several years before the killing of Mrs. Dunning she and her husband came to San Francisco, where they both resided for a while, but Mrs. Dunning and her young child returned to Dover, Del., several years before her death, and there remained as a member of the household of her father until her death. John P. Dunning remained in San Francisco, except for a short time, when he worked in Salt Lake City. He became acquainted with defendant before his wife left San Francisco, and after her departure his relations with defendant became closer. He took up his residence in the same house with her and cohabited with her. Shortly before the death of Mrs. Dunning John P. Dunning was offered work as a war correspondent for a New York paper, from the scene of activity about Cuba in the Spanish American War. He accepted the position, and upon telling defendant of his purpose to leave San Francisco, and that he expected never to return to San Francisco, but at the close of the war to go to New York, and establish a home for himself, wife, and child, and to there again

live with his wife, she sought to dissuade him from so doing, and urged him to remain in San Francisco. After his departure from San Francisco defendant corresponded with him, and after the death of Mrs. Dunning, and after she knew that suspicion had been directed to her as the person who had sent from San Francisco the poisoned candy to Mrs. Dunning, she used expressions, to one witness at least, that she even then cherished the thought or hope that she and Dunning might yet come together and be married. Defendant and Mrs. Dunning were not acquainted. The evidence connecting the defendant with the killing of Mrs. Dunning was circumstantial only. It was therefore most important that the prosecution should show that defendant had a motive for desiring the death of Mrs. Dunning; and we think that it cannot admit of a doubt but that the evidence now under discussion tended to prove the existence of such motive, and was therefore admissible. The action of the court upon this matter is amply sustained by the authorities. *People v. Brown*, 130 Cal. 591, 62 Pac. 1072; *People v. Stout*, 4 Parker Cr. R. (N. Y.) 128; *People v. Bowers*, 1 Cal. App. 503, 82 Pac. 553; *People v. Cook*, 148 Cal. 334, 83 Pac. 43; *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Soeder*, 150 Cal. 15, 87 Pac. 1016; *Plerson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *State v. Larkin*, 11 Nev. 329; *People v. Lane*, 101 Cal. 517, 36 Pac. 16; *People v. Ebanks*, 117 Cal. 664, 49 Pac. 1049, 40 L. R. A. 269; *People v. Craig*, 111 Cal. 460, 44 Pac. 186.

E. Under the head of "Errors of Law on the Admission and Rejection of Evidence" appellant calls our attention to several rulings of the court which she claims were erroneous.

1. The box of poisoned candy was received at the post office at Dover, Del., at 5:58 o'clock p. m., August 9, 1898. It was shortly after obtained by a witness, Harry C. Pennington, a nephew of Mrs. Dunning, and by him taken to the house of her father, and handed to her in the presence of several members of the family, when she opened the box, and took therefrom a note in pencil, "With love to yourself and baby," and signed "Mrs. C." After testifying to the above facts the witness was asked, "Did she say anything?" and, over the general objection made by defendant that it was "incompetent, irrelevant, and immaterial," answered that "after she read the note she wondered as to who the candy could be from." Appellant now urges the court thus allowed hearsay evidence of the declarations of Mrs. Dunning. But whether the answer of the witness "that she wondered as to who the candy could be from" should be regarded as hearsay, or as proper evidence because a part of the res gestæ attending the receipt of the candy, as contended by respondent, we do not think it of sufficient importance to justify a reversal. The question that was objected to was "Did

she say anything?" and called for the answer "Yes" or "No." The question was but preliminary, and the objection was not specifically directed to the point that the answer might be hearsay. When the answer was given going beyond the question, and perhaps containing hearsay matter not called for by the question, no motion was made to strike it out. The statement made by Mrs. Dunning was at most but negative in its character. It simply indicated that she had no thought as to who sent the candy. Whether the evidence was strictly admissible or not, it was too trivial in character to require a reversal of the judgment or a new trial.

2. Several witnesses, who partook of the candy received by Mrs. Dunning, were allowed, over the objections of defendant, to testify as to the symptoms experienced by them shortly after eating of the candy. All these symptoms were shown to be characteristic of arsenical poisoning, and the evidence thereof tended to prove that the candy contained arsenic, and was clearly admissible.

3. Appellant claims that the court permitted the physician who attended Mrs. Dunning to testify as to what she told him as to what she had eaten on the previous day. (He was called the next morning after she had eaten the candy.) An examination of the folios referred to in appellant's brief does not sustain this contention, but on the contrary, we find that the court, as well as the district attorney, confined the witness to stating what Mrs. Dunning said to him as to her then existing symptoms, and admonished the witness not to state what Mrs. Dunning said as to what she had eaten, and promptly struck out the testimony that the physician seems to have interjected as to what she said to him about eating the candy. In other words, the point made by appellant has no existence in the record.

4. Objection is made to the action of the court in permitting Mrs. McGinnis, who, according to the theory of the prosecution, as an employé of Haas & Son, sold the candy that was sent to Mrs. Dunning, to testify that the defendant reminded her of a person to whom she sold candy on Sunday afternoon, July 31, 1898. Her whole testimony on the subject of the identity of defendant with the purchaser of the candy was to the effect that she believed them to be the same person, but could not be sure. The criticism of her testimony simply goes to its weight, and not to its admissibility.

5. There was no error in allowing testimony from the various candy makers in the employ of Haas & Son that no arsenic or other poison was used in making candy at the factory of Haas & Son. The evidence in the case tended strongly to show that the candy sent to Mrs. Dunning came from the candy store of Haas & Son, and that this particular candy was strongly charged with arsenic when received by her. The evidence in ques-

tion, while probably not at all necessary, tended to show that the poison was placed in the candy after it was sold.

6. Certain writings were introduced in evidence as exemplars of defendant's handwriting. The district attorney, over the objection of defendant, proved that at the first trial of this case defendant's attorney, in her presence, admitted these writings to be in her handwriting. Undoubtedly such admission at the first trial could not be used as a conclusive admission of the fact at the second trial. But we see no good reason why it was not proper proof of a statement, made in the presence of the defendant, which might be considered as evidentiary matter tending to prove that the writings were in her handwriting. It is quite improbable that a defendant would permit her counsel to make such admission in her presence without objection if it were not a fact. If such admission had been made by her attorney in her presence to the district attorney in his office, proof thereof would have been admissible as evidentiary matter. We do not see why the fact that the admission was made on the trial and in open court robs it of its evidentiary character. But however that may be, the defendant herself afterwards, while on the witness stand, without objection, testified that these same exemplars were in her handwriting. This clearly cured any error that may have been committed in the manner of their proof in the first instance. Some other alleged errors of law in the admission of testimony are referred to by appellant, and we have carefully examined each of them, but find no error in any of them, and we do not consider them of sufficient importance to require special discussion.

F. Appellant also makes the point that the evidence was insufficient to justify the verdict. We have carefully read all the evidence in the record. While it is a case of circumstantial evidence, we are justified in saying that it is a very convincing one of the guilt of the defendant. No good purpose will be served by detailing the evidence, which shows a remarkably cruel act, resulting as it did in the death of two persons and illness of several who partook of the poisoned candy. The evidence in the record is quite sufficient to justify the verdict.

G. Complaint is made that the district attorney was guilty of misconduct during the taking of evidence in the case and in his argument to the jury. We have examined the record carefully as to the various assignments of misconduct, and find nothing that will justify a reversal. We find that whenever the alleged misconduct of the district attorney was at all serious the court, by proper and timely admonitions to the jury, guarded against any injurious effect therefrom. Thus, where the district attorney characterized a question asked by the attorney for defendant as a cowardly statement, the court at once instructed the jury

that such remark of the district attorney was not evidence, and was not to be considered by them, and should be disregarded by the jury. Also, when defendant objected to the use of a microscope by the district attorney during his argument, the court sustained the defendant's objection, and admonished the jury not to allow the action of the district attorney in this matter to influence them in regard to their verdict, but that they must render their verdict upon the evidence and the law, and upon nothing else. So, too, when the district attorney referred to the Bowers Case, the court sustained the position taken by the defendant, and concluded his remarks by this statement to the jury: "When other cases are mentioned of that sort, and such remarks made as have just been referred to, they are not to be considered in this case, not to be considered by you as evidence in any manner or form." But without discussing each assignment of misconduct, it is sufficient to repeat that we find nothing under this head to justify a reversal of the judgment or order.

H. "Errors in the Charge of the Court."

Under this head our attention is very briefly called to several alleged errors in the charge to the jury, which we shall now notice.

1. At the close of an instruction to the effect that the jury must determine all questions of fact, but must receive the law from the court, the court used this language: "If you do so, no harm can come from my errors, if I commit any, for a Supreme Court sits to correct them, and the jury should not assume to exercise the functions of that tribunal." This but emphasizes what had been before said as to the duty of the jury to be governed by the instructions of the court as to the law of the case, and certainly cannot be said to contain any erroneous statement of law.

2. The instruction concerning the evidence as to the relations existing between defendant and John P. Dunning was entirely proper, and clearly designed to limit the effect of such evidence to the proof of motive. As we have heretofore shown, such evidence was admissible upon the question of motive, and the instruction of the court was designed to protect the defendant from the possibility that the jury might allow it to otherwise prejudice defendant.

3. The court did not err in instructing the jury "that a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another." Subdivision 1, § 1962, Code Civ. Proc.; *People v. McGlade*, 139 Cal. 66, 72 Pac. 600.

4. The court charged the jury as follows: "You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your mind, against a less number, or against a presumption of law or other evidence satis-

fying your mind; in other words, it is not the greater number of witnesses that should control you where their testimony is not satisfactory to your minds, against a less number whose testimony does satisfy your minds, and produces moral conviction that they are telling the truth. It is upon the quality of the testimony, rather than the quantity or the number of witnesses, that you should act, providing it produces in your minds this moral conviction, and satisfies you of its truthfulness." The first part of the instruction is taken from the statute (Code Civ. Proc. § 2061, subd. 2), and that which the court added is but an amplification of what is taken from the statute.

5. After giving the well-known charge upon reasonable doubt from the Webster Case (*Commonwealth v. Webster*, 59 Mass. [5 Cush.] 295, 52 Am. Dec. 711), the court further charged the jury to the effect that the term "reasonable doubt" does not mean a "mere possible doubt, a conjectural doubt," nor "a doubt which is merely capricious," and more to the same effect. The instruction is substantially the same as the instruction approved in *People v. Yun Kee* (Cal. App.) 96 Pac. 96, except that it omits the only portion of the instruction in the Yun Kee Case that was even criticised, and when read in connection with the preceding charge was entirely correct.

6. The instruction as to the effect of the presumption of innocence, so far as it was not taken from a requested instruction of defendant, is substantially the same as was approved in *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390, and clearly was in no sense erroneous.

7. The charge of the court to the effect that in considering the weight and effect to be given to the testimony of witnesses the jurors have the right, among other things, to "consider the consequences resulting to a witness, if any, from the result of the trial," is not open to the criticism "that it singles out the defendant." The language of the court is general, and simply lays down a principle without making any special application to any particular witness. As was said in *People v. Amaya*, 134 Cal. 539, 66 Pac. 797: "The proposition is general and abstract, not indicating any particular witness as being, in the opinion of the court, subject to its application." The application of the principle was left to the jury. The instruction is fully supported by *People v. Amaya*, supra; *People v. Benc*, 130 Cal. 159, 62 Pac. 404.

8. The appellant criticises the charge of the court on the question of "motive." A substantial part of this instruction was taken from an instruction requested by defendant. The criticism made is that the charge is an instruction upon a matter of fact. The portion given at the request of the defendant is in these words: "When the evidence fails to show any motive to commit the crime charged on the part of the accused, this is

a circumstance in favor of innocence. And in this case, if the jury find, upon careful examination of all the evidence, that it fails to show any motive upon the part of the accused to commit the crime charged against her, then this is a circumstance which the jury ought to consider in connection with all the other evidence in the case in making up their verdict." In addition to this, the court charged that the presence or absence of any motive to commit the homicide charged against defendant was a circumstance to be considered by the jury in connection with all the evidence in the case, and if no motive was apparent, that this was a circumstance in favor of innocence and should be so considered. The court also stated that the presence or absence of motive increases or diminishes the presumption of innocence, and can have no other function. Having asked and obtained the instruction which was given as to the effect of absence of motive, it does not lie in the mouth of defendant to complain that the court gave the correlative instruction as to the presence of motive. Upon the subject of motive, see *People v. Durrant*, 116 Cal. 208, 48 Pac. 82.

9. The court explained to the jury what is meant by "circumstantial evidence," and gave instructions in regard thereto, several being given at the request of defendant. Appellant now says, "The charge of the court as to the value and effect of circumstantial evidence is an argument in favor of that class of evidence," but fails to point to any statement in the instructions in support of this contention. After a careful examination of the instructions on circumstantial evidence, we have failed to find anything that can fairly be said to be argumentative.

10, 11, and 12. Appellant finally criticises some general observations made by the court, intended to guard the jury against being moved by pity for defendant, or prejudice or passion that might be caused by the heinous nature of the crime, and to impress upon them the serious nature of the duties they were called upon to perform. We find nothing of merit in this criticism.

In conclusion, we will say that, after a careful examination of the whole record, we are unable to find any just cause for reversing the judgment of conviction in this case, but are of opinion that the judgment and orders should be affirmed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

PEOPLE v. LA PIQUE. (Cr. 110.)

(Court of Appeal, Second District, California.
Oct. 28, 1908.)

COURTS (§ 212*)—JURISDICTION.

Under Pen. Code, § 1174, an application to prove exceptions which the trial judge refuses

to allow should be made to the Supreme Court; there being no provision for such proceeding in the Court of Appeal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 212.*]

Application by John La Pique to prove exceptions taken on trial in a superior court which the trial judge refused to allow. Application dismissed.

See, also, 98 Pac. 256, 257.

PER CURIAM. An application to prove exceptions taken upon a trial in the superior court, and which the trial judge refused to allow, was made to this court. Since the matter was presented the petitioner has filed in the Supreme Court an application to that court for the same purpose.

It appearing from an examination of section 1174 of the Penal Code that the statute provides that such application be made to the Supreme Court, and that no provision is made for such proceeding in this court, the application to this court is hereby dismissed.

9 Cal. App. 241

CURTIN v. INGLE. (Civ. 545.)†

(Court of Appeal, First District, California.

Oct. 28, 1908.)

1. APPEAL AND ERROR (§ 622*) — FILING TRANSCRIPT—TIME—PROVISO TO RULE.

Appellant is not within a proviso to Court of Appeal rule 2 (144 Cal. xi, 78 Pac. vii), providing that the time for filing the transcript on appeal (ordinarily 40 days from perfection of appeal) shall not, when a proceeding for settlement or statement on appeal is pending, commence to run till the settled statement is filed, where no proceeding for settlement of a statement was pending within said 40 days, but respondent was served with a statement long thereafter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2735; Dec. Dig. § 622.*]

2. APPEAL AND ERROR (§ 624*)—FILING TRANSCRIPT—TIME—PROVISO TO RULE.

Appellant is not within a proviso to Court of Appeal rule 2 (144 Cal. xi, 78 Pac. vii), as to time for filing the transcript on appeal, extending the time when appellant has given notice of motion for a new trial before perfecting the appeal; he having perfected his appeal the day before giving notice of motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 624.*]

3. APPEAL AND ERROR (§ 620*)—FILING TRANSCRIPT—TIME—PROVISO TO RULE.

Even if it be immaterial that appellant perfected his appeal the day before he gave notice of motion for a new trial, the proviso to Court of Appeal rule 2 (144 Cal. xi, 78 Pac. vii), extending till the decision of the motion, the time from which the 40 days for filing the transcript on appeal shall commence to run, will not avail him; the transcript not having been filed within 40 days after denial of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 620.*]

4. APPEAL AND ERROR (§ 627*)—SETTLEMENT OF STATEMENT — LACHES — QUESTION FOR TRIAL COURT.

Whether there has been such laches and delay in settlement of the statement on appeal as

*For other cases on same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

†For Supreme Court opinion, see 99 Pac. 480.

to warrant the trial court in dismissing the proceeding therefor is a question primarily for such court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 627.*]

5. APPEAL AND ERROR (§ 628*)—DISMISSAL—PRESUMPTION—NEGLECT IN SETTLING STATEMENT.

No motion having been made in the trial court to dismiss the proceeding to settle the statement on appeal, but it still being pending there unabandoned, it must be assumed, on motion to dismiss the appeal for failure to file the transcript in the prescribed time, that appellant in that proceeding has been guilty of no inexcusable neglect.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 628.*]

6. APPEAL AND ERROR (§ 628*)—DISMISSAL—DELAY IN FILING TRANSCRIPT—NEGLECT.

As the transcript on appeal cannot be filed till the statement is settled, appellant is not guilty of inexcusable neglect in failing to file the transcript in the prescribed time, where the statement has not been settled, and he has not been guilty of neglect therein.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 628.*]

7. APPEAL AND ERROR (§ 627*)—DISMISSAL—DELAY IN FILING TRANSCRIPT.

The facts disclosed by the record, on motion to dismiss the appeal for failure to file the transcript in the prescribed time, being such that an extension of time would have been granted by the Court of Appeal, had application therefor been made to it, the appeal will not be dismissed, especially where the rule of court invoked for the dismissal does not seem to be primarily designed to deal with a case of the character in hand.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 627.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by D. A. Curtin against J. W. Ingle. From a judgment for defendant, plaintiff appealed. Defendant moves to dismiss the appeal. Motion denied.

William M. Cannon, for appellant. Wal J. Tuska, for respondent.

KERRIGAN, J. This is a motion to dismiss an appeal from a judgment. The ground of the motion is that the transcript was not filed within 40 days after the appeal from the judgment was perfected.

The judgment in this case was entered May 22, 1907, and, for the purpose of keeping alive an attachment, plaintiff took and perfected an appeal therefrom within five days, to wit, on May 27, 1907. On May 28, 1907, plaintiff served and filed his notice of motion for a new trial, to be heard on the minutes of the court. This motion was heard October 4, 1907, and was denied and entered October 14, 1907. Thereafter, and in due time, on December 17, 1907, the plaintiff served on defendant his original statement on motion for a new trial, and the defendant served his amendments thereto December 27, 1907. On the 6th day of January,

1908, the statement and amendments were delivered to the clerk of the court for the judge for settlement, and the settlement thereof is now pending and set for hearing. The affidavits on file do not show that any stipulation had been entered into or order made extending the time to serve and file the transcript on appeal. The respondent contends that the transcript on appeal from the judgment should, under rule 2 of this court, have been filed 40 days after the appeal was perfected. This, of course, is true unless the facts bring the case within either of the two provisos of the rule extending the time, or unless good cause is shown for the delay.

Rule 2 (144 Cal. xl, 78 Pac. vii) reads as follows: "The appellant in a civil action shall within forty days after the appeal is perfected serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken; provided, that when there is a proceeding pending for the settlement of a bill of exceptions or a statement which may be used in support of such appeal, the time for filing and serving the transcript shall not begin to run until the settled and authenticated statement or bill of exceptions has been filed; and provided, further, that when a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time for filing and serving the printed transcript shall not begin to run until the motion for a new trial has been decided or the proceeding dismissed for want of prosecution; and the appeal from the judgment and from any order denying a new trial of the issue may in all cases be presented upon the same transcript." The appeal from the judgment, as we have just seen, was perfected May 27th, and not within 40 days thereafter, nor, indeed, until nearly 7 months later (December 17th), when appellant served respondent with a statement on appeal, can it be said that there was pending a proceeding for the settlement of a statement which might be used to support such appeal. Hence, as there was no settlement of a bill of exceptions or statement pending within 40 days after the perfecting of the appeal, the first proviso of rule 2 does not apply. Nor does appellant come within the second proviso, for instead of giving the notice of motion first and perfecting his appeal afterward, he did the reverse. He perfected the appeal May 27th, and the next day gave his notice of motion for a new trial. But assuming, without deciding, that the order in which these two steps were taken is, as claimed by appellant, unimportant, still this proviso is inapplicable because more than 40 days have long ago elapsed since the motion was denied (October 14th), and no transcript has yet been filed.

The rule covers the majority of cases, but it does not seem to contemplate a state of facts such as is here presented. However this may be, we are of the opinion that the circumstances of the present case show a sufficient excuse why the transcript has not yet been served and filed. Inasmuch as the question of laches or delay in the settlement of a statement is primarily one to be determined by the trial court (*Dernham v. Bagley*, 151 Cal. 219, 90 Pac. 543), and as no motion has been made there to dismiss the proceeding, and as it is still pending there and not abandoned, we are bound to assume that the appellant in that proceeding has been guilty of no inexcusable neglect. If he has not been guilty of neglect there, and as the transcript cannot be served and filed until the statement is settled, we certainly cannot hold that he has been guilty of inexcusable neglect here. The facts disclosed by the record in this case are such that, had the appellant made application to this court for an extension of time in which to serve and file the transcript, such extension would have been granted; and we see no reason why the same considerations should not have weight in the determination of this motion (*Chapman v. Bank of California*, 88 Cal. 420, 26 Pac. 608), particularly as the rule of court here invoked for the dismissal of the appeal does not seem to be primarily designed to deal with a case of this character.

The motion to dismiss the appeal is denied.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 265

PEOPLE v. PEREZ. (Cr. 76.)

(Court of Appeal, Third District, California.
Oct. 31, 1908. Rehearing Denied by
Supreme Court Dec. 28, 1908.)

1. CRIMINAL LAW (§ 998*)—JUDGMENT ON PLEA OF GUILTY — APPLICATION TO SET ASIDE—REMEDY.

A motion to set aside a judgment of conviction on a plea of guilty, and to permit accused to withdraw his plea, on the ground that it was extorted from him by fear of violence, is the proper procedure for the avoidance of a judgment on a plea of guilty extorted by fear of violence; the statute not providing how the action of the court shall be invoked for the avoidance of such judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2549; Dec. Dig. § 998.*]

2. CRIMINAL LAW (§ 538*)—CONFESSION OF GUILT THROUGH DURESS—EFFECT.

A confession of guilt obtained by duress is void and cannot form the basis for a valid judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1227; Dec. Dig. § 538.*]

3. CRIMINAL LAW (§ 1023*)—PLEA—ORDERS APPEALABLE—ORDER AFTER JUDGMENT.

An order denying a motion to set aside a judgment of conviction entered on a plea of guilty, and to permit accused to withdraw his

plea, on the ground that it was extorted from him by fear of violence, is appealable within Pen. Code, § 1237, authorizing appeals from orders after judgment affecting the substantial rights of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2588; Dec. Dig. § 1023.*]

4. CRIMINAL LAW (§ 998*)—JUDGMENT—MOTION TO SET ASIDE—ASCERTAINMENT OF FACTS.

The court, on a motion to set aside a judgment of conviction entered on a plea of guilty extorted by fear of violence, is not bound to accept as true the statements of accused in his petition in support of the motion, but must ascertain the facts and act accordingly.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2549; Dec. Dig. § 998.*]

5. CRIMINAL LAW (§ 998*)—JUDGMENT—SETTING ASIDE—EVIDENCE.

A motion to set aside a judgment of conviction, entered on a plea of guilty, on the ground that the plea was extorted by fear of violence, held properly denied on the showing made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2549; Dec. Dig. § 998.*]

Appeal from Superior Court, Merced County; E. M. Rector, Judge.

Juan Perez was convicted of robbery, and from an order denying a motion to set aside the conviction, and to permit accused to withdraw his plea of guilty, he appeals. Affirmed.

Ben. Berry, for appellant. U. S. Webb, Atty. Gen., for the People.

BURNETT, J. Appellant pleaded guilty to the crime of robbery, and on March 23, 1907, he was sentenced to the penitentiary for life. On the 2d day of March, 1908, he filed a petition in the lower court alleging: That his plea of guilty was made while under duress, "in that subsequent to his arrest, and prior to the preliminary examination, and while incarcerated in the county jail, the sheriff represented to him that he was in immediate danger of mob violence, and the only way to escape the same was to plead guilty and be immediately taken to the penitentiary. That believing and acting solely upon said representations, he did then and there consent to plead guilty to said charge of robbery." On March 31, 1908, after notice given to the district attorney, counsel for petitioner moved the court to grant a writ of error coram nobis in accordance with the allegations and prayer of the petition. Affidavits in opposition to the motion were offered by the district attorney, which were received in evidence by the court over the objection and exception of petitioner, and from the order denying said motion the appeal has been taken.

It is claimed by respondent that no such proceeding is known to our practice as an application for the writ of "error coram nobis"; but we need not discuss this technical phase of the question, as we consider the proceeding here equivalent to a motion that the court set aside the judgment and permit the defendant to withdraw his plea of guilty upon the ground that it was extorted from him

by fear of violence. That such a motion is proper we entertain no doubt. A confession of guilt obtained by duress is void and cannot be the basis for a valid judgment. The statute does not expressly provide how the action of the trial court shall be invoked for the avoidance of such a judgment, but under the authorities it is clear that the proper procedure is by motion supported by documentary or oral evidence, or both.

Again, it is contended by the Attorney General that no appeal lies from the order denying the motion; but in this we think respondent is in error, as this is an "order made after judgment affecting the substantial rights of the defendant." Section 1237, Pen. Code.

The order should be affirmed, however, for the all-sufficient reason that the trial court was justified in believing that defendant's plea was entirely voluntary. The court was not bound to accept as true the statements of appellant in his petition, but it was its duty to ascertain the facts and act accordingly. The affidavits of the sheriff and other witnesses are clear and complete to the effect that nothing whatever was said to appellant about mob violence, and that there was no support for his claim of coercion. No doubt, if appellant had desired to make a further showing, upon application, the court would have granted him permission; but from the record before us we must conclude that appellant committed a most atrocious crime, and that the judgment of the court is valid and must be upheld.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. xlii

PEOPLE v. MONTANO. (Cr. 77.)

(Court of Appeal, Third District, California.
Oct. 31, 1908.)

Appeal from Superior Court, Merced County;
E. M. Rector, Judge.

Antone Montano was convicted of crime, and from an order denying a motion to set aside the judgment, and to permit accused to withdraw his plea of guilty, he appeals. Affirmed.

Ben. Berry, for appellant. U. S. Webb, Atty. Gen., for the People.

PER CURIAM. This case is in all essential respects similar to *People v. Perez* (No. 76, this day decided by this court) 98 Pac. 870, and for the reasons therein stated the order is affirmed.

(154 Cal. 581)

**J. F. PARKINSON CO. v. BUILDING
TRADES COUNCIL OF SANTA
CLARA COUNTY et al.**
(S. F. 4,469.)

(Supreme Court of California. Dec. 8, 1908.)

1. APPEAL AND ERROR (§ 867*)—SCOPE OF REVIEW—NECESSITY OF MOTION TO REVIEW FACTS.

The right of appellant to a review of the evidence on his appeal from an order overruling a new trial is not prejudiced by his failure to move for such review under Code Civ. Proc. §§ 663, 663½.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3480; Dec. Dig. § 867.*]

2. TRADE UNIONS (§ 4*)—ELIGIBILITY TO MEMBERSHIP—"EMPLOYER OF LABOR."

A stockholder in a corporation which employs tinnerns is not an "employer of labor" within the meaning of a by-law of a labor union which admits to its membership master tinnerns, but by such by-law describes them as employers of labor.

[Ed. Note.—For other cases, see Trade Unions, Dec. Dig. § 4.*]

3. TRADE UNIONS (§ 3*)—CONSTRUCTION OF RULES—DEFINITION OF WORD "UNFAIR."

The word "unfair," as used in a rule of a labor union to indicate the attitude of employers towards members of the union, does not mean that the employer is guilty of fraud, breach of faith, or dishonest conduct, but only that the employer has refused to comply with the conditions upon which union men will consent to remain in his employ or handle materials produced by him.

[Ed. Note.—For other cases, see Trade Unions, Dec. Dig. § 3.*]

4. INJUNCTION (§ 104*)—CONSPIRACY—WHAT CONSTITUTES.

A conspiracy which will afford ground for injunctive relief is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by a criminal or unlawful means.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 177; Dec. Dig. § 104.*]

5. TORTS (§ 3*)—GROUNDS OF ACTION—MOTIVE OR INTENT.

An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

6. INJUNCTION (§ 101*)—BOYCOTTS AND OTHER COMBINATIONS.

Defendant, a labor union, in accordance with one of its rules prohibiting its members from working for or handling the material of an employer who employed nonunion men, called out its members from plaintiff's establish-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment, sent notices to persons employing union men and dealing with plaintiff, informing them that plaintiff had been declared unfair by defendant, and that union men could not handle material supplied by plaintiff, and presented to plaintiff a written agreement for its signature embodying the terms on which the union men would re-enter its service. Aside from these acts there was no force, violence, threat, or intimidation used towards the nonunion men employed by plaintiff, and no attempt to obstruct plaintiff in its efforts to secure nonunion men. The most serious act proved against defendant was that one of its business agents informed plaintiff's manager that the union would drive plaintiff out of business, if plaintiff refused to observe its rules, but this appeared to be no more than a mere expression of the agent's opinion. *Held*, that defendant was not guilty of unlawful acts, and that its conduct did not amount to "coercion" or "intimidation," and plaintiff was not entitled to injunctive relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

7. INJUNCTION (§ 12*)—COMPLETED ACTS.

The act of defendant, a labor union, in sending notices to plaintiff's customers, notifying them that plaintiff had been declared unfair by defendant, is not ground for injunctive relief where the act complained of had been completed at the time the action for injunction was commenced, and there is no evidence that defendant threatens to send further notices; plaintiff's remedy being an action for damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.*]

8. INJUNCTION (§ 22*)—GROUNDS—DEFENSES—INJUNCTION INEFFECTUAL.

Injunctive relief cannot be granted to prevent a labor union from holding out to plaintiff a standing warning that union men will not work for him or handle his material while he remains on the "unfair" list, since such injunction could not be enforced.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 20; Dec. Dig. § 22.*]

9. TRADE UNIONS (§ 9*)—RESTRAINING ACTS OF LABOR UNION—ACTS OF INDIVIDUAL MEMBERS.

In an action to restrain a labor union from interfering with plaintiff's business, an injunction will not be granted on a mere showing of improper acts by individual members of the union.

[Ed. Note.—For other cases, see Trade Unions, Dec. Dig. § 9.*]

10. TORTS (§ 10*)—INJURY TO BUSINESS.

Any injury to a lawful business, whether the result of a conspiracy or not, is prima facie actionable, but may be defended on the ground that it was merely the result of a lawful effort by defendants to promote their own welfare, and that the act was not inspired by express malice to injure plaintiff without benefiting themselves.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. § 10.*]

Shaw, J., dissenting. Sloss, J., dissenting in part.

In Bank. Appeal from Superior Court, Santa Clara County; Hiram D. Tuttle, Judge.

Action by the J. F. Parkinson Company against the Building Trades Council of Santa Clara County and others. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendants appeal. Reversed.

Cleveland L. Dam, Charles S. Burnell, and Austin Lewis (R. M. Royce, of counsel), for appellants. Will M. Beggs, for respondent.

BEATTY, C. J. This is a suit to enjoin an alleged boycott. The plaintiff is the owner and proprietor of a lumber yard at Palo Alto, in Santa Clara county, and also of a plumbing and tinning shop, mill, etc. It buys and sells lumber, building materials, and hardware, and employs laborers, teamsters, and mechanics. The principal defendant, the Building Trades Council, is a voluntary association composed of delegates from various labor unions of Santa Clara county. The other defendants are labor unions composed of artisans engaged in the various crafts concerned in building operations, the officers of the council, and of the several unions and a large number of members of said unions.

The allegations of the complaint are, in brief: That the defendants, for the purpose of coercing the plaintiff into the subjection of its business to their control, entered into a conspiracy to compel compliance with their demands by force and intimidation, and, in pursuance of said conspiracy, gave notice that, unless plaintiff should agree to comply with the rules of the Building Trades Council, they would declare a boycott, etc. That in consequence of plaintiff's refusal to sign a written agreement presented by the council, agents, and emissaries of the defendants unlawfully and against the will of the plaintiff entered upon its premises and notified its employés that they must quit work for plaintiff on pain of being themselves boycotted and turpented and beaten, etc., thereby causing many of its employés to quit its service. That by threatening injury to them in their business if they continued to do business with plaintiff the defendant caused persons with whom plaintiff had been dealing to refuse to sell to it, and its customers to cease buying from it. That by these and other acts of the defendant in which they are still engaged, and which they threaten to continue, plaintiff has been damaged in a large amount and will be irreparably damaged; the defendants and each of them being pecuniarily irresponsible and unable to respond in damages. A general and special demurrer to the complaint was overruled, and all the defendants united in an answer denying all the material allegations of the complaint except those descriptive of the several parties and their relations to the controversy as above stated. A preliminary injunction was issued and the cause subsequently tried by the court. It was found that the defendants had not caused persons with whom the plaintiff had been dealing to refuse to sell to it, but upon the remaining issues generally the findings were in favor of the plaintiff, and by the judgment and decree of the court the defendants, all and each of

them, were enjoined "from boycotting plaintiff—that is to say, from coercing others against their will to withdraw from plaintiff their beneficial business intercourse, through or by threats that, unless those others do so, the defendants will cause directly and indirectly, loss to them—and to desist and refrain from forcibly or by threats of violence or intimidation, or coercion of any kind, interfering with plaintiff in the conduct of its business, or at all, and from forcibly or by threats of force or intimidation, or coercion of any kind, interfering with any person or persons doing or desiring to do business with plaintiff, and from obstructing or interfering forcibly or by threats of force or intimidation, or coercion of any kind with the business of plaintiff and its dealings with its customers or its employés, and from forcibly or by threats of force or intimidation or coercion of any kind, or in any manner molesting, harassing, annoying, or interfering with the employés of the plaintiff at any time." There was also a judgment for \$1 damages and costs taxed at \$304.25.

The defendants in due time moved for a new trial upon a bill of exceptions, specifying numerous alleged errors in the rulings of the court at the trial, and numerous particulars in which it was claimed the evidence was insufficient to justify the findings. The motion for a new trial was overruled, and the appeal is from that order and from the judgment. In support of their appeal the defendants contend that the evidence is insufficient to sustain the findings of the court in material particulars, and that those findings which are sustained by the evidence will not support the judgment. They contend, also, that the findings are vitiated by the rulings admitting and rejecting evidence at the trial against their objections. Counsel for respondent objects to any consideration of the questions raised as to the sufficiency of the evidence to justify the findings on the grounds, first, that the appeal was not taken from the judgment within 60 days after its entry; and, second, that the defendants have failed to move under sections 663, 663½, Code Civ. Proc. This objection is wholly untenable. The defendants do not ask us to review the evidence on their appeal from the judgment, and their right to have it reviewed on their appeal from the order is not prejudiced by their failure to move under the sections cited upon the ground that the facts found do not support the judgment.

The first and most important finding of the superior court attacked upon the ground of insufficiency of the evidence to sustain it is the following: "That in order to coerce, and for the purpose of coercing plaintiff into the subjection of its business to the control of said defendants, a combination and conspiracy was entered into by and between the said defendants as individuals and as members of the said defendant associations, and

other persons, associations, and organizations of persons unknown to plaintiff, and that said persons, defendants, associations, and organizations confederated and conspired together to injure, coerce, and intimidate plaintiff into compliance with the rules and regulations of said associations, organizations, and union, and to the subjection of its business to the control of said defendants and said associations and unions, thus depriving plaintiff of the control and management of its said business."

The evidence does not sustain this finding, except in a qualified sense, and, when properly understood, it presents a question of law materially different from that arising upon its literal terms. The defendants, as above stated, are the Building Trades Council of Santa Clara county, its officers and agents, several labor unions affiliated with the council, and the members of said unions. The council is composed of delegates from the affiliated unions, and exercises a general control in matters of common interest to the whole body of its constituents. The unions are voluntary associations organized for the purpose of enforcing regulations which they consider necessary for their welfare. These rules cover a variety of details, including terms of admission into the unions, rates of wages, hours of labor, etc., not of especial importance in this connection, all of which the members are pledged to observe under penalty of fine or expulsion. What we are more immediately concerned with is the rule that union men are not allowed to work on the same job or in the same shop with non-union men, or to handle or use in their several employments material which has been supplied by a dealer who has been declared "unfair" by the council because of the employment by him of nonunion workmen. The evidence in this case shows without conflict that the Building Trades Council of Santa Clara county and its constituent or affiliated unions were organized, and that they adopted these and other rules before there was any controversy with plaintiff, and without any special reference to it, and that they merely put its rules in force when, as they contend, the corporation had become "unfair" and had been so declared, by reason of its retention in its employment of a tinner who had refused to join the Tinnerns' Union. Their combination and conspiracy, if it can be called a conspiracy, was not inspired by any malicious purpose or feeling against the plaintiff. It embraced the world at large, and consisted wholly in an agreement to which all the members were pledged that they would refuse to work for any person or firm who employed nonunion men, and that they would refuse to work upon or handle any material supplied by an employer of nonunion men. They were, in other words, organized for the purpose of enforcing in Santa Clara county what is known as the "closed shop," and the means by which they proposed to accomplish

their object was to bind themselves by a mutual pledge to quit working for any one who should be declared "unfair" either because he employed nonunion men, or because he required them to handle material supplied by an employer of such men. This being the situation on the 1st of February, 1904, the plaintiff corporation, which seems to have been conducting its business under some understanding with the council, to the effect that it would employ only union men, set some nonunion men to work erecting sheds in its lumber yard at Palo Alto.

The employment of these men was made the subject of complaint by the business agent representing the council, and while that matter was still pending another and more serious controversy arose. There was a tinner by the name of Waterman working in plaintiff's shop who was not a member of the Tinnners' Union. He was advised by Steuder—a plumber—to join the union of his, Waterman's, craft, and to take out a working card. Being informed that the initiation fee was \$25, he agreed to become a member, and gave Steuder \$5 as a first payment upon his application. A few days afterwards he was informed that the initiation fee was \$50. This and other circumstances induced him and Mr. Parkinson, the plaintiff's manager, to believe that the initiation fee had been raised from \$25 to \$50 for the express purpose of "freezing him out," and, acting upon Parkinson's advice, he determined to withdraw his application for a journeyman's card, and instead thereof to apply for a master tinner's card, which would enable him to continue to do the work he was doing without any violation of the rules of the union, and would cost only \$5. It was necessary, however, to entitle him to a master's card that he should be a boss—an employer of labor, not a journeyman working for wages. In order to comply with this condition, he purchased five (out of twelve thousand five hundred) shares of the plaintiff corporation's stock (par value ten dollars per share) and upon this basis claimed to be an employer within the rules of the union. His claim was disputed and was clearly untenable. A stockholder of a corporation—even a large and preponderant stockholder—is not in legal contemplation the employer of those who are working for the corporation, which is a person distinct from its members, and as such the only employer in the case. Aside from this technical view, it is equally clear that the holder of a minute fraction of the stock of a corporation from which he is receiving wages is not his own employer in any substantial sense. As to this branch of the dispute, therefore, the position of the union and of the council in denying Waterman's claim to be a master tinner within the meaning of the union rules was clearly correct. As to the contention that the initiation fee of the union was doubled in violation of its own constitution

for the express purpose of keeping Waterman out, the evidence wholly fails to sustain it. Steuder, it is true, told him that it was \$25, but Steuder was a member of the Plumbers' Union, and based his statement upon the rule of his own union and on the former rule of the Tinnners' Union. It appears, however, very clearly from the uncontradicted evidence that the preliminary steps for raising the initiation fee of the Tinnners' Union of Santa Clara county had been taken in December, 1903, nearly two months before Waterman was employed by plaintiff, and that it had been ratified by all the superior bodies whose approval was required as early as February 2, 1904, the day upon which Waterman made his preliminary payment to Steuder, who received it, not as the agent of the union, but as the agent of Waterman. These matters have been stated thus fully and in detail—not because they are regarded as very material in point of law—but because they have been largely discussed in the briefs under the claim upon the part of the respondent that the raising of the initiation fee by the Tinnners' Union after Waterman's application for membership, and while he was in the employment of plaintiff, and the subsequent refusal of a master's card, is proof of a malicious determination on the part of the council and union to force a quarrel upon the plaintiff, and to make use of the dispute as a mere pretext for interfering with its legitimate control of its own business. The evidence in our opinion does not sustain this contention. The action of the union in this matter was in strict accordance with the rules then in force, and the approval of the council was also in accordance with its established rules. There was no doubt some heat exhibited in the course of the controversy between the parties over this Waterman affair, and as a consequence considerable bitterness of feeling engendered on both sides, but what followed was the inevitable outcome of the rules of the council as applied to a situation brought about by causes implying no actual desire on the part of the defendants to injure the plaintiff specially, or to injure it at all except in so far as the enforcement of the rules of the council and its affiliated unions must affect injuriously all who might undertake to carry on business in defiance of those rules. What happened was this: On the 9th of February the business agent of the council reported the final refusal of Waterman to take out a journeyman tinner's card, and plaintiff's refusal to discharge him from its employment. Plaintiff was then declared "unfair," and on the following day the business agent went upon plaintiff's premises and notified his union employes of that fact, reminding some of them of their pledge to quit work for any employer declared "unfair." He also mailed or delivered notices to all the contractors of Palo Alto employing union men as follows: "San Jose, February

10th, 1904. To all whom it may concern: You are hereby notified that J. F. Parkinson Company has been placed on the unfair list of the Building Trades Council of Santa Clara County. And Union men cannot work for, or handle any material furnished by said Parkinson until further notice. Building Trades Council, per Chas. H. Harrison, Secretary." The effect of these notices was that all the union employes of plaintiff quit work and its mill was closed at noon on the 10th of February, remaining closed until it secured a crew of nonunion men. And most of the contractors who had formerly purchased building material from plaintiff ceased to deal with it upon receipt of the written notice addressed to them. On the day following the strike, the council, by its agent, presented to plaintiff the draft of a contract with a demand that he execute it as follows:

"Articles of Agreement.

"Article of Agreement between J. F. Parkinson Co. of Palo Alto, Santa Clara County, Cal., and the Building Trades Council of Santa Clara County, Cal.

"Article 1. It is hereby agreed by the J. F. Parkinson Co. of said County and City that work on all buildings or construction work, old or new, erected for their use or by them, shall be done by men carrying the working card of said Building Trades Council of the current quarter.

"Art. 2. It is further agreed by the said J. F. Parkinson Co. that they will pay and enforce in full to and with all of their employes working in any craft coming under the jurisdiction of the said Building Trades Council and under the control of the said J. F. Parkinson Co. the schedule of wages and demands that are adopted and demanded by the said Building Trades Council.

"Art. 3. It is further agreed by the said J. F. Parkinson Co. that they will employ on all tinning and sheet metal work directly or indirectly done for or by the said J. F. Parkinson Co. a member or members of the Amalgamated Sheet Metal Workers' International Alliance in good standing and carrying a regular working card of said Building Trades Council.

"Art. 4. In consideration of the foregoing the said Building Trades Council agrees to consider the said J. F. Parkinson Company as a fair firm and to deal with them and their products accordingly.

"Art. 5. This agreement shall remain in full force and effect for one year from date hereof."

The plaintiff refused to execute this proposed agreement, and at once set about obtaining the services of a sufficient number of nonunion laborers, teamsters, mechanics, etc., to reopen its mill and shops. The mill was shut down for only one week. It does not appear how long the shops were idle. It does appear that Waterman and the fore-

man of the plumbers worked continuously. There was but a very brief interruption to plaintiff's business before a full resumption in the mill and shops with nonunion men, but there was a substantial loss of profits for a time by reason of the withdrawal of patronage by the contractors who had no alternative except to stop buying material of the plaintiff or losing the services of their union employes. Some of the contractors dealing with the plaintiff disregarded the "unfair" notice, and, when their union employes quit work, replaced them with nonunion men. All of the men who quit the employment of plaintiff and of those contractors who disregarded the unfair notice did so peaceably and quietly. There was no force, no threat, no violence, or intimidation used against them aside from the reminder addressed to one or two individuals of their obligation to their respective unions. There was no force, violence, threat, or intimidation used towards the nonunion men employed in place of the strikers, and no attempt to obstruct the plaintiff in its efforts to secure nonunion men. There was not at any time any picketing of the plaintiff's premises or interference with its customers. The most serious act proved against the council was that its business agent in the course of the dispute over the Waterman affair told Mr. Parkinson that they—the council—would drive him out of business if he refused to observe their rules. This, however, was merely an expression of the business agent's opinion of the effect of declaring the plaintiff unfair. It was a warning, or caution, intended no doubt to force compliance with the council's demands, but evidently it did not have that effect, for Mr. Parkinson, being of a different opinion, stood his ground, and accepted the consequences. There was also some evidence that in three instances individual members of some of the unions had warned some of the strikers that they would incur some danger of personal violence if they returned to work while the plaintiff remained unfair, but these threats were not authorized or countenanced by the council or any of the unions, and not a single act of violence was proved against any one who did return to work. It was found by the court upon evidence which fully sustains the finding that the plaintiff had been injured by the acts of the defendants in an amount not susceptible of computation, and it was found that a continuance of such acts would cause a damage irreparable, for the reason, I suppose, that its amount could not be computed, and for the same reason that the plaintiff had no plain, speedy, and adequate remedy at law. It was not found that the defendants were insolvent or unable to respond in damages.

In reference to the word "unfair," it clearly appears that, as employed by the defendants and labor organizations generally, it has a technical meaning well understood by

the plaintiff and by all the persons to whom the council sent notices that plaintiff had been declared unfair. Such declaration means, and in this instance was understood by all parties concerned to mean, not that the plaintiff had been guilty of any fraud, breach of faith, or dishonorable conduct, but only that it had refused to comply with the conditions upon which union men would consent to remain in its employ or handle material supplied by it. The sole effect of the notice to the contractors was that a majority of them ceased to deal with the plaintiff, at least for a time, and some of them countermanded orders for lumber and other material previously sent in.

The foregoing statement embraces the substance of all the material findings of the superior court, and indicates the qualified sense in which the principal finding above quoted is to be taken in applying the law to the facts.

Can it be said, in view of this more specific and detailed statement of the probative facts involved in the general finding of the trial judge, that the defendants entered into a conspiracy for the purpose of compelling the plaintiff, by coercion and intimidation, to subject its business to their control? Can it be said that they entered into a conspiracy at all? A combination there certainly was, but it had no reference to the plaintiff except as the business of the plaintiff put it into the general class (employers of labor) who would necessarily be affected by the enforcement of the regulations of the unions. Their object was to secure higher wages, shorter hours, and more favorable conditions generally than employers of labor might be willing to concede, and just so far as they might be successful in accomplishing this object it may be assumed that employers, as a class, the plaintiff included, would incur a corresponding loss. But assuming all this, would that constitute the combination a conspiracy? A conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose, or a lawful purpose by criminal or unlawful means, and, to support the conclusion that these defendants were guilty of a conspiracy, it must be held that their purpose was at least unlawful if not criminal, or their purpose being lawful that they proposed to attain it by the employment of some unlawful means.

Limiting our consideration for the present to this question of conspiracy, it is clear that the avowed object of these organizations—the several unions of working men and the council in which they were combined—was in no sense unlawful, and the discussion may be confined to the question whether the means proposed for its attainment were unlawful, a question as to which there is a wide divergence of view disclosed by the decisions of the courts of different jurisdictions, and often by the differing opinions

of judges of the same court. There is, however, at the present day a tolerably uniform consensus of judicial opinion as to some fundamental principles which form the basis of discussion in all that class of cases, which, for convenience, may be designated as boycotting cases. In one of the more recent of these (*National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648) the seven justices of the Court of Appeals were divided, four to three, as to the lawfulness of the avowed object of the defendants, and as to the means employed by them against the plaintiff. Chief Justice Parker—three of his associates concurring—held both object and means to have been lawful, while Justice Vann, with the concurrence of the other two justices, condemned the means employed by the defendants to accomplish their purpose, not because the acts of defendants were otherwise unlawful, but because they were rendered unlawful by the selfish and censurable motive which inspired them. "The object of the defendants," he concluded, "was not to get higher wages, shorter hours, or better terms for themselves, but to prevent others from following their lawful calling." This conclusion was based upon evidence which showed clearly enough what appears as clearly in this case—that the immediate object of the defendants was to exclude the competition of men outside of their unions. This purpose Judge Vann considered so selfish, and its accomplishment so opposed to public policy and common right as to infect acts otherwise entirely lawful with the taint of illegality. The opposing opinion of the Chief Justice—the majority opinion—seems to be rested partly upon the ground that, in order to secure employment on more favorable terms for themselves, individuals have an absolute right to combine for the purpose of preventing the employment and competition of others, and partly upon the further and independent ground that, whether such right is absolute or not, every man is clearly privileged to stop work with or without reason whenever he can do so without violating his contract, and that no one can question his motive, since a bad motive does not convert an act otherwise lawful into a ground of action. This last proposition embodies the rule of decision which was approved by this court in the case of *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233, and which has recently been reaffirmed in the much discussed case of *the People v. Schmitz*, 94 Pac. 419, 15 L. R. A. (N. S.) 717. In the first named case it was concluded upon an extensive review of the authorities, American and English, that "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." This was more than five years before the same question was considered and decided in England by the House of Lords in the great

case of *Allen v. Flood*, Appeal Cases H. of L. 1898, p. 1. The report of that case covers 180 pages of the volume cited, and shows that in the House of Lords all the English and several of the American cases were reviewed. Elaborate opinions were delivered by the chancellor, Lord Halsbury, and by eight others of the law lords present and deliberating upon the case. Altogether it is safe to say that few cases have ever been more thoroughly considered, and the conclusion reached by six out of the nine judges is stated in the headnote of the report in substantially the same terms in which this court announced its conclusion in *Boyson v. Thorn*: "An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action." We are aware that several of the adverse criticisms of our recent decision in the *Schmitz Case*, where this doctrine was applied in construing the indictment, have claimed that it was repudiated by the House of Lords in deciding the later case of *Quinn v. Leatham* (Appeal Cases H. of L. 1901, p. 495). If this were so, it would afford no conclusive reason for changing the rule of decision here. But nothing could be farther from the truth, and, since counsel for respondent in this case places great reliance upon *Quinn v. Leatham* as an authority supporting his position, it will not be unprofitable to point out the distinction between that case and *Allen v. Flood*, and to emphasize the fact that so far from overruling *Allen v. Flood* upon the particular point in question here *Quinn v. Leatham* lends it additional support and confirmation.

The question for the House of Lords to decide in *Allen v. Flood* was whether there was any evidence to support the verdict for the plaintiffs. There was evidence that the defendant had procured the discharge of the plaintiffs by their employers and had prevented their re-employment, and this not only for the purpose of securing their places for members of his own union, but also for the purpose of punishing them for past acts. It was held, however, that because the defendant had violated no legal right of the plaintiffs, had done no unlawful act, and had employed no unlawful means in procuring their dismissal, his conduct was not actionable no matter how malicious or bad his motive may have been. Appeal Cases H. of L. 1898, p. 1. In the case of *Quinn v. Leatham* the principal question again presented for decision was whether the evidence for plaintiff should have been submitted to the jury; whether, in other words, it was sufficient to support the verdict in his favor. Upon this question it was held, without dissent by the six judges participating in the decision, that the evidence did support the verdict, and accordingly the judgment of the trial court was affirmed. Five of the six judges delivered opinions expressing more or less fully their views of the evidence and its effect. The chancellor,

Lord Halsbury, who had dissented in *Allen v. Flood*, delivered a rather short opinion in which he adopted the more elaborately stated views of Lords Lindley and Brampton. Lord Robertson concurred upon the grounds stated by Lord Justice Holmes in the Irish Court of Appeal (an opinion which I have not been able to consult). Lords Shand and Macnaghten, who were of the majority in *Allen v. Flood*, while expressly adhering to their decision in that case, concurred in the judgment upon the ground that the two cases presented a radically different state of facts. Lord Halsbury in his short opinion, while adhering to his views expressed in *Allen v. Flood*, concedes that *Quinn v. Leatham* "is distinguished in its facts from those which were essentially important facts in *Allen v. Flood*," and in the end bases his decision upon the ground that: "Rightly or wrongly, the theory upon which judgment was pronounced in that case (*Allen v. Flood*) is one whereby the present is shown to be one which the majority of your Lordships would have held to be a case of actionable injury inflicted without any excuse whatever." Page 507. Coming next to the more elaborate opinions of Lords Brampton and Lindley (approved in his opinion by Lord Halsbury), we find a fuller and clearer statement of the difference between *Quinn v. Leatham* and *Allen v. Flood*. Lord Brampton (page 523) shows that in the earlier case "all questions of conspiracy, intimidation, and coercion or breach of contract were withdrawn from the jury; the only matters of fact found by them being that *Allen* maliciously induced the Glengal Company to discharge *Flood* and *Taylor* from their employment, and not to engage them again, and that each plaintiff has suffered £20 damages." He proceeds to show that it was assumed as the grounds of decision that "*Allen* in making the communication which induced the Glengal Company to dismiss the plaintiff was doing only that which he had a legal right to do, and they [the Lords Justices] held, therefore, that the plaintiffs had no legal cause of action against either the Glengal Company or the defendant, and that the mere fact as found by the jury that the defendant was actuated by a malicious motive could not convert a rightful into a wrongful act." He then proceeds (page 524) to stamp this doctrine with his express approval in these words: "This latter proposition, that the exercise of an absolute legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise, was established as clear law by this House in *Bradford Corporation v. Pickles* (1895) App. Cas. 587, and it is now too late to dispute it even if one were disposed to do so, which I am not." Could anything be more emphatic than this in support of the doctrine of *Allen v. Flood*, of *Boyson v. Thorn*, of *People v. Schmitz*, and of the large number of cases in England and in the United States, which like *Boyson*

v. Thorn have accepted as "a maxim of the law" the words of Baron Parke in delivering the judgment of the Common Pleas in *Stevenson v. Newnham* in 1853: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." 13 C. B. 297. Immediately following the passage above quoted from Lord Brampton's opinion, he proceeds to demonstrate the scope of the rule by mentioning the limited class of cases which constitute the exception to its operation; such actions, for instance, as libel, false imprisonment, and malicious prosecution, which would always be wrongful and actionable unless privileged, and where proof of a malicious intent defeats the plea of privilege or probable cause. In Lord Lindley's opinion (also approved by Lord Halsbury), where he states the propositions decided in *Allen v. Flood*, he uses this language (page 533): "The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in *Allen v. Flood*. It had been gaining ground for some time, but it was never before so fully or authoritatively expounded as in that case." I have thus shown that five out of the six judges who sat in *Quinn v. Leatham* delivered opinions in the case; that Lords Shand and Macnaghten adhered to their views expressed in *Allen v. Flood*; that Lord Halsbury, who had dissented in that case, concurred with Shand and Macnaghten in holding that *Quinn v. Leatham* might be decided as it was decided without infringing the doctrine of *Allen v. Flood*; and that Brampton and Lindley, whose opinions were specially commended by Lord Halsbury, each expressly approved the doctrine of *Allen v. Flood*. The importance of that doctrine in its application to controversies such as the present seems to justify this extended review of a case which has been supposed to have brought it in question, but which, when carefully considered, will be found to have placed it upon a firmer basis of authority than it occupied before. The rule of law, therefore, as firmly established in England, in this state, and in most of the United States, supports the conclusion of Chief Justice Parker and the majority of the Court of Appeals of New York in the case first above cited (*National Protective Association v. Cumming*), so far as it rests upon the doctrine "that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action." We may, therefore, in the further consideration of this case, confine our attention to what the defendants did and threatened to do, and to the simple question whether those things were or were not in themselves lawful. The general objects of the union and the council

being lawful, if they used no unlawful means for their attainment, the motives which inspired their action in this case are irrelevant to the question of conspiracy and immaterial as affecting the cause of action.

As to what are lawful acts in furtherance of such objects as were proposed by the defendants in this case, the consensus of recent judicial opinion above referred to cannot be better illustrated than by quoting the propositions upon which the majority and the minority of the New York Court of Appeals, despite their opposite conclusions in *National Protective Association v. Cumming*, were entirely agreed. Chief Justice Parker at the outset of his opinion (170 N. Y. 320, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648) says: "I shall assume that certain principles of law laid down by Judge Vann are correct, namely: 'It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work or refuse to work at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from any one. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike; that is, to cease working in a body by prearrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and ordinary strike, not to harm others, but to improve their own condition, is not in violation of law.'" This is a most conservative statement of the law. It embraces nothing that is not conceded at this day by even the most determined opponents of the principle of the strike, and contains in the concluding sentence a qualification which the rule of *Boyson v. Thorn* would compel us to disregard. In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, this court would not inquire into the motives of the strikers. Their acts being entirely lawful, their motives would be held immaterial. But, taking the doctrine as stated by Justice Vann with all its qualifications, it suffices for the decision of everything of real importance in the present controversy, so far as the council and its constituent unions are concerned. The rule that their members could not work with nonunion men, or handle material supplied by an employer of nonunion men, was adopt-

ed before any difference had arisen between them and the plaintiff or its manager. It was a rule which they supposed would benefit them, and that was its sole purpose. Whatever others may think of the policy or justice of such a rule that is a matter outside the province of the courts, and as with regard to other questions of economic or political aspect, the remedy, if a remedy is needed, must be found by the Legislature. In the meantime, and for present purposes, we must recognize the fact that this rule, as established by the council and the affiliated unions, was devised for the promotion of an object certainly not unlawful, that the occasion that called for its application was the voluntary act of plaintiff's agent, and that with two or three possible exceptions to be hereafter noticed the defendants did nothing unlawful in their attempt to make it effective.

Certainly it was not unlawful to call out the union men, and it was not unlawful for the men to cease work which they were bound by no contract to continue. It was no doubt a technical trespass for the business agent of the council to enter the premises of plaintiff for the purpose of calling the men out for which the plaintiff might have recovered nominal damages in an action at law, but, it was no ground for an injunction in the absence of any evidence of a threatened repetition of the act. Was it unlawful to send the written notices to the contractors employing union labor that the plaintiff had been declared unfair, and that union men could not work for it or handle material supplied by it till further notice? There are authorities on both sides of this question, but I think those which would answer it in the negative have the better reason. The contractors were working in harmony with the unions (as indeed the plaintiff had previously done), and fair dealing required that the council, representing and acting for the unions, should protect such contractors from any loss they might incur if left in ignorance of the action it had taken. If they had not sent the notices some of those contractors who felt constrained to stop dealing with plaintiff when informed that it had been declared unfair might have purchased material which they could not have used, and it is only upon the assumption that such purchases would have been made that the plaintiff can base a claim that it was damaged by the notices. But can plaintiff make such a claim as a ground for equitable relief? It seems very clear that it cannot; for, with full knowledge that it had been declared unfair and of all the consequences flowing from that declaration, it would not have been justified in selling material to a contractor employing union men without disclosing a fact so material to his freedom of contract. And, if good faith and fair dealing imposed an equal obligation upon the plaintiff and the coun-

cil to inform the contractors of what the plaintiff knew, it is difficult to see what right of plaintiff was infringed by the sending of the notices. Their only effect was to enable the contractors and plaintiff to conduct their future dealings on equal terms. Nor was there anything unlawful in the presentation to the plaintiff of an agreement embodying the conditions upon which union men would consent to re-enter its service and handle the output of its mill and shops. Conceding that the conditions of the proposed contract were intolerable, the right to propose them stood upon the same plane as the right to reject them, and no right of the plaintiff was infringed unless it can be held that men who are free to work or not to work, with or without reason, are breaking the law in proposing unreasonable terms as a condition of entering the employment of another. If this were so, why would it not equally follow that an employer would be breaking the law by proposing to men seeking employment conditions of service which they might consider intolerable, or a court deem unreasonable? Neither proposition can be admitted. The fact that the business agent of the council in the course of the dispute over the Waterman affair told Mr. Parkinson that they would drive him out of business if he refused to observe their rules is material only in so far as it is an item of evidence tending to show that the course pursued by the council was dictated by a malicious purpose to injure the plaintiff, and not by a desire to benefit its members. I think myself, as I have in substance said, that it has very slight probative force for that purpose, and that it is completely refuted by all the facts of the case. But, conceding that it might have warranted the superior court in concluding that the motives of defendants were tainted with malice, it cannot be denied that all the acts of the council and its affiliated unions were lawful, and that they were adapted to the promotion of the plans devised by them for bettering the condition of the members. Being so adapted, and being lawful in themselves, they could not be rendered actionable by the mere fact that some feeling of animosity had been engendered in the course of the controversy between the parties.

One other consequence of the strike and the notice to the contractors remains to be considered. Some of the contractors to whom the notices were sent countermanded orders for building material which they had already placed with the plaintiff. This it may be conceded was a breach of their contracts, and the law is pretty thoroughly settled both in England and in this country that causing another to violate his contract with a third party, without a legal justification, is an actionable injury, from which it follows that if the defendants by sending the notices to the contractors caused some of them to break their contracts, and did so

maliciously and without justification, they made themselves liable at least to an action for damages. But I do not think it can be said that the sending of the notices was without justification. The plaintiff had been declared unfair, and it was certain that, until that action of the council should be reversed, no member of any of the unions—so long as he remained a member—would handle material supplied by the plaintiff. The contractors to whom the notices were sent were all employing union men, and it was no less the duty of the plaintiff than of the council to inform them, with a view to future transactions, that they could not use material supplied by the Parkinson Company without engaging nonunion men in place of the men they had. If this is so—if the notice to the contractors was proper and essential to fair dealing, as between them and the plaintiff—the fact that some of them violated their existing contracts cannot be deemed a wrong caused by the defendants. It was a wrong for which the contractors alone were responsible. But, even if it could be held that the action of the council in sending the notices was without justification and malicious, something would still be wanting to sustain the injunction. The notices had all been sent before this action was commenced, and there was no evidence of any threat to send notice to any other person. An injunction lies only to prevent threatened injury, and has no application to wrongs which have been completed, and for which the injured party may obtain redress by an action at law. This proposition involves a consideration of the sufficiency of the evidence to support the fifth finding of the trial court: "That said defendants threatened to continue to coerce and intimidate plaintiff and its patrons and customers to the irreparable damage and injury of plaintiff." Being challenged to point out the evidence to support this finding, counsel for respondent cites us to the testimony of only one witness (Harrison, an officer of the council), the entire substance of which is a mere restatement of the rule forbidding union men to work for a person declared unfair, or to handle his material. The finding, therefore, so far as it is sustained by the evidence, means no more than this: There is a standing warning that union men will not work for plaintiff while it remains on the unfair list, or handle its material. This is the whole extent of the coercion and intimidation threatened, and against such a threat an injunction would be utterly impotent. To enjoin men from not working would be wholly ineffective unless there resides in the courts a power to compel them to go to work. But there is no such power. A court of equity cannot even enforce specifically a contract for personal services, and much less can it enforce the performance of such services in the absence of any contract.

I have not overlooked the fact that there

was evidence that two or three individual members of the unions used threatening language in one or two instances towards other members who spoke of returning to work, and there may have been reason to conclude that they would continue to employ threats of the same character to deter others from seeking employment with the plaintiff. If so, the court would have been justified in enjoining those individuals, but there was nothing to justify an injunction against the council or the unions, or their officers, or the large number of individual members who made no threats.

I have not attempted to review in detail the numerous cases cited by counsel in support of the judgment. The task indeed would be endless. Speaking generally, it may be said that many of them relate to propositions which are not here questioned, while many of the others, like *Quinn v. Leatham*, supra, were actions for damages for unlawful interference with a legitimate business, in which, as in that case, the verdicts were sustained, and on substantially the same grounds. We do not question the doctrine of *Quinn v. Leatham*, as we gather it from the opinions of the judges—particularly those of Lords Brampton and Lindley, with which the Lord Chancellor agreed. Any injury to a lawful business, whether the result of a conspiracy or not, is *prima facie* actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare. To defeat this plea of justification the plaintiff may offer evidence that the acts of the defendants were inspired by express malice, and were done for the purpose of injuring plaintiff, and not to benefit themselves. The principle is the same which permits proof of express malice to defeat the plea of privilege in libel, or the defense of probable cause in actions for malicious prosecution or false imprisonment. In such cases as *Quinn v. Leatham* a verdict for the plaintiff imports a finding by the jury that the injurious acts of the defendants, which standing by themselves are actionable, have not been justified, or, in other words, that they were done to injure the plaintiff and not to benefit the defendants, or that the means employed were unlawful. In *Quinn v. Leatham* the verdict was supported on both grounds. There was proof of express malice, and of unlawful means employed to injure plaintiff's business. In this case there was overwhelming proof that the council, when the occasion arose, simply put in force a rule long before adopted for their own benefit, and not directed against the plaintiff or any particular person. Nor did the council, the unions, or their members generally use any unlawful means to injure the plaintiff, unless it was unlawful to send the notices. I have expressed the opinion that so far from being unlawful the sending of the notices was only the fulfillment of

a duty under the circumstances, but whether so or not, since the contractors doing business in Palo Alto and employing union men had all received the notices before the action was commenced, and there was no threat to send notices to any other persons, there was nothing to enjoin. As to the sending of notices that a firm or corporation has been declared "unfair," the authorities are by no means uniform that such notices are unlawful. In the case of *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 483 (a Minnesota case cited by respondent), the Supreme Court modified an injunction by striking out that part which restrained the giving of unfair notices, and this for reasons equally applicable to the present case.

There is nothing in our decision in *Goldberg v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, at all inconsistent with the views herein expressed. By their demurrer to the complaint the defendants in that case admitted the truth of all that was charged, and the injunction as modified restrained only acts of violence and intimidation.

For the reasons above stated, the judgment of the superior court is reversed.

I concur: LORIGAN, J.

SLOSS, J. I concur in the judgment, but am not prepared to assent to everything that is said in the main opinion.

What is particularly to be borne in mind is that we are not here concerned with a strike or boycott presenting any of the features of violence, either expressly or impliedly threatened, to be found in so many of the decided cases. There was here no effort or threat to interfere by physical force with the plaintiff or its employes, nor any intimidation of employes or customers, using the term "intimidation" as meaning an act tending to inspire fear of violence to person or property. One may, to be sure, be put in fear of violence without the use of any word indicating an intent to resort to force. "Picketing," as practiced in labor disputes, may, and perhaps usually does, constitute an intimidation of the employes and patrons of the person whose establishment is picketed. *Goldberg v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145. The carrying, near a place of business, of banners calling upon laborers to remain away from such place, has been treated as a form of menace directed against those who might seek employment. *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689. So, too, words which, of themselves, purport to express merely a request, may be uttered in such manner and under such circumstances as to convey to the hearer a plain threat that refusal to comply with the request (or demand) will result in physical harm to him. None of these

considerations are, however, presented in this case. In so far as the injunction restrains the defendants from the use of force or threats of violence, it is clearly not supported by any evidence.

Nor need we here consider how far it is unlawful, whether by persuasion or other means, to induce one of the parties to a contract to break it to the damage of the other. As is pointed out in the opinion of the Chief Justice, any acts of this character that may have been committed by the defendants had occurred prior to the commencement of the action, and there was no evidence that any further interference in this direction was to be anticipated. There was, therefore, no basis for enjoining such acts.

The real question in the case turns upon the activities of the defendants exerted in two ways: First, in ceasing to work for the plaintiff (striking); second, in notifying (or threatening, if that term be preferred) the customers of plaintiff that workmen affiliated with the Building Trades Council would not work for contractors using materials purchased of plaintiff. That workmen employed by the Parkinson Company had a right to leave its employ whenever they desired, and for any reason that might seem to them sufficient, is universally conceded. Was it unlawful to notify contractors dealing with the Parkinson Company that union men would not continue to work for them if they purchased material of said Parkinson Company? In this inquiry I think it is unimportant that the defendants were merely acting in accordance with a rule adopted before any difference with the plaintiff had arisen. The opinion of the Chief Justice appears to proceed upon the theory that, since the defendants had bound themselves to act in a certain way in the event of a controversy of this kind, it was not only proper, but laudable, for them to notify contractors of their intended action and of the consequences which would follow to contractors who should continue to deal with the plaintiff. More than this, that it was in some way incumbent upon plaintiff to notify contractors dealing with him that a continuance of their patronage would be likely to result in loss to them. I cannot agree to the proposition that the rights of the parties are in any way affected by such considerations. If the defendants' course of conduct amounted to an unlawful interference with plaintiff's rights, it was not made lawful by the fact that the defendants had decided, in advance, to act in this way whenever an occasion should present itself.

But was their action unlawful? They had a right, as has been said, to cease working for Parkinson. They had an equal right to cease working for any other employer. Upon what ground, then, is it claimed that, while their refusal to work for plaintiff gave plaintiff no cause of complaint, the refusal to work for others did give plaintiff a ground of action?

Because, it is said, they are bringing to bear upon the Parkinson Company, with which they have a controversy, the pressure of loss inflicted by third persons, not connected with the main dispute, and are, by holding over these third persons the risk of financial loss, compelling them against their will to inflict upon Parkinson the damage resulting from a cessation of their patronage. This is the argument commonly advanced to establish the illegality of what has been called, in much of the recent discussion of the subject, a "secondary" rather than a "primary" boycott. I do not see that we are helped to a solution of the question of the illegality of the defendants' acts by looking into the "motive" or "intent" with which they acted. Even if we assume, contrary to the decisions of this court, that an improper motive may, as a general proposition, render actionable an act otherwise lawful, or, to use another form of statement, that damage intentionally inflicted will be actionable unless its infliction can be justified by showing that it was inspired by a proper motive, the motive with which these defendants acted was not, in my opinion, one which the law regards as improper. The defendants were seeking in all they are shown to have done to secure employment by the plaintiff for themselves, to the exclusion of those not associated with them, and to secure that employment upon terms deemed satisfactory or advantageous to them. That is the effort of every dealer in goods. It is the struggle of competition, and is no more to be frowned upon where the subject of trade is labor than where it is a specific commodity. The uniting or combining of a number of persons to accomplish a lawful object by lawful means will not per se render the conduct of the many any more unlawful than would be the same conduct on the part of any one of them. "It is plain," as is said by Mr. Justice Holmes in his dissenting opinion in *Vegelahn v. Guntner*, 167 Mass. 92, 108, 44 N. E. 1077, 1081, 35 L. R. A. 722, 57 Am. St. Rep. 443, "from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. * * * One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination upon the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."

The injunction then, must rest upon the principle that it is unlawful, in an effort to compel A. to yield a legitimate benefit to B., for B. to demand that C. withdraw his patronage from A. under the penalty of losing

B.'s services or patronage to which he has no contract right. That there are many cases sustaining the affirmative of this proposition is true. *Thomas v. Railway Co.* (C. C.) 62 Fed. 803; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 23 C. C. A. 99; *Vegelahn v. Guntner*, supra; *Beck v. Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Lucke v. Clothing C. & T. A.*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; *Jackson v. Standfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Crump v. Commonwealth*, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895. So are there many to the contrary. *Mogul Steamship Co. v. McGregor*, L. R. (1892) App. Cas. 25; *National Protective Association v. Cumming*, 170 N. Y. 315, 16 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367; *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686; *McCauley Bros. v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *Payne v. Railroad Co.*, 13 Lea (Tenn.) 507, 49 Am. Rep. 666; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882; *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760; *Lindsay & Co. v. Montana Fed. of Labor* (Mont.) 96 Pac. 127. This enumeration does not attempt to cite all of the great mass of authority that might be referred to as bearing upon the proposition here involved. Nor do I undertake to review or to reconcile the well-known English cases of *Allen v. Flood* and *Quinn v. Leatham*.

Upon a consideration of the authorities, I think the sounder rule is that one who is under no contract relation to another may freely and without question withdraw from business relations with that other. This includes the right to cease to deal, not only with one person but with others; not only with the individual who may be pursuing a course deemed detrimental to another who opposes it, but with all who by their patronage aid in the maintenance of the objectionable policies. In other words, if the defendants violated no right of the Parkinson Company by refusing to work for it, they violated none by refusing to work for contractors who used material bought of Parkinson. Such refusal, as is shown in the opinion of the Chief Justice, and as is stated in the testimony of plaintiff's manager and principal witness, was the "sum total of the interference" which was practiced or threatened. An agreement by shipowners, in order to secure a carrying trade exclusively for themselves, that agents of members should be prohibited upon pain

of dismissal from acting in the interest of competing shipowners (*Mogul S. S. Co. v. McGregor*, supra); a combination of retailers binding the members to refuse to purchase of wholesalers who should sell to nonmembers of the combination (*Bohn Mfg. Co. v. Hollis*, supra; *McCauley Bros. v. Tierney*, supra); an agreement of contractors to withdraw their patronage from wholesalers selling to a contractor who had conceded the demands of his employes for an eight-hour day (*Cote v. Murphy*, supra); a threat by a railroad company to discharge any employe who should deal with the plaintiff (*Payne v. R. R. Co.*, supra); a threat by an employer that he would discharge any laborer who rented plaintiff's house (*Heywood v. Tillson*, supra)—have been held to give no right of action to the individuals affected. The defendants in each case were held to be acting within their absolute legal right in entering or refusing to enter into business relations with persons to whom they were not bound by contract. I see no reason why workmen have not the same absolute right to dispose of their labor as they see fit. So long as they abstain from breach of contract, violence, duress, menace, fraud, misrepresentation, or other unlawful means, they may lawfully inflict such damage as results from the withholding of their labor or patronage. To quote again from Judge Holmes' opinion in *Vegeahn v. Guntner*: "If it be true that workmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control." The terms "intimidation" and "coercion," so frequently used in the discussion of this question, seem to me to have no application to such acts as were here committed. One cannot be said to be "intimidated" or "coerced" in the sense of unlawful compulsion by being induced to forego business relations with A., rather than lose the benefit of more profitable relations with B. It is equally beside the question to speak of "threats" where that which is threatened is only what the party has a legal right to do. It may be that the combination of great numbers of men, as of great amounts of capital, has placed in the hands of a few persons an immense power, and one which, in the interest of the general welfare, ought to be limited and controlled. But if there be, in such combinations, evils which should be redressed, the remedy is to be sought, as to some extent it has been sought, by legislation. If the conditions require new laws, those laws should be made by the lawmaking power, not by the courts.

Chief Justice in his opinion upon such matters as are material to a determination of this appeal. The only material question in the case as to which there can be any doubt under the law as it is now generally stated by the courts is whether the defendants have been and are guilty of any such coercion or intimidation towards patrons of the plaintiff, tending to injure its business, as would warrant the granting of relief by injunction. Their offending in this regard was simply the notification given by them to contractors who were patrons of plaintiff and employers of union men that plaintiff had been "placed on the unfair list of the Building Trades Council of Santa Clara county," and that "union men cannot work for or handle any material furnished by said Parkinson until further notice." This notice concededly meant only that plaintiff had refused to comply with the conditions upon which union men would consent to remain in its employ, or handle material supplied by it while in the employ of any one else. While it was in effect a statement to the effect that, if the persons notified desired to retain union men in their employ, they must refrain from using material supplied by plaintiff, and was thus effectual to deprive plaintiff to its injury of the patronage of those who preferred to retain such union employes, I do not think it constituted the coercion or intimidation as to which the courts can extend relief. In the absence of statutory prohibition of such combinations, the right of persons, no matter how numerous, to voluntarily agree among themselves to withhold their labor from any one for any reason they see fit, and voluntarily abide by such agreement, seems clear. The decisions now generally recognize that right so far as an employer, with whom some dispute has arisen and who refuses to grant demands which they deem essential to their interests, is concerned, even though the effect of their refusal to work for him would be most injurious to him. If he yields to their demands, he may be said to have been coerced into doing so by the fear that, if he does not, he will not be able to obtain such employes as will enable him to properly carry on his business, but this is not the kind of coercion of which the courts can take notice. Those who have labor to give have the same right to insist upon the terms upon which it shall be given by them as have employers to refuse to employ except upon such terms as they see fit to make, and the law will not interfere with either class in the lawful exercise of that right. Even where the courts hold that the motive with which an otherwise lawful act is done may render the act unlawful, it is held that there is no unlawful motive where there is a mere refusal of organized labor to work for one who refuses to concede such terms as to wages, hours, etc., as they in good faith demand for the purpose of compelling him to accede to more reasonable terms. But in this state and in

ANGELLOTTI, J. I concur in the judgment, and generally in what is said by the
Cal. Rep. 98-101 P.—13

most of the other states the motive with which a lawful act is done is absolutely immaterial. Where such is the rule, the right of persons associated in labor unions to voluntarily withhold their labor for any reason and with any motive would appear to be absolute, and, after careful consideration of the authorities, I can see no material distinction so far as the lawfulness of the act is concerned between the withholding it from A. with whom they have some dispute arising out of his treatment of union labor, and withholding it from B. against whom they have no other grievance than that he is assisting A. by trading with him. That their motive in withholding it from B. is to induce A. to accede to their terms through the apprehended loss of B.'s patronage is immaterial, even if it be conceded that there is anything wrong in such a motive, which I do not grant. On this point I am in entire accord with the views expressed by Justice SLOSS. But regardless of this, their simple withholding of labor being lawful, the courts will not inquire into their motives. We are, of course, speaking of cases where there is no contract between employer and employé under the terms of which the legal obligation rests upon the employés to continue work. There is no consideration of that kind in this case, and we need not consider how it would affect the question. If employés thus banded together have a lawful right to withhold their labor from one unless he refrains from patronizing another, there can be nothing unlawful in their simple announcement that they intend to do so. It may be claimed by some that such combinations of labor are inimical to the public welfare, but that, it appears to me, is purely a question for the legislative department of the government. The question, in this respect, is the same in character as would arise over any kind of combination for business purposes. If any of plaintiff's customers were guilty of a breach of contract with plaintiff because of the knowledge of the intention of the defendants communicated to them, that was a matter purely between such customers and the plaintiff, and one for which the defendants were in no way legally responsible.

We concur: HENSHAW, J.; MELVIN, J.

SHAW, J. I dissent. I think the judgment should be modified, but that it should not be reversed.

The plaintiff complains of both a strike and a boycott, and asks an injunction against both. So far as the matter of the alleged strike of plaintiff's men is concerned, I think the defendants did nothing which they did not have a lawful right to do, and that they used no unlawful means in doing what they did. The plaintiff was employing a number of men who belonged to the several unions represented by the Building Trades Council, and it was understood by all the

members of the unions that they would not work for an employer who persisted in employing nonunion men in the business. The plaintiff employed nonunion men, and thereupon the union men in its employ quit work. There was no violence used and no effort made to prevent plaintiff from securing other men to work, or to prevent other men from seeking its employment. The men had an absolute right to quit work at any time. None of the defendants used any improper means to induce the men to quit. They were simply informed that the plaintiff had refused to discharge the nonunion men, and thereupon, in accordance with the rules of the unions, which amounted to a previous agreement of all the members between themselves, they left the plaintiff's service. The judgment purports to enjoin the defendants from "molesting, harassing, annoying, or interfering with the employés of plaintiff at any time" by "threats of force, intimidation, or coercion." There is no evidence that the employés had been or would be threatened, or coerced, or that they had been harassed, annoyed, molested, or interfered with. This part of the judgment is therefore without support. An injunction should not be granted against the doing of acts which have not been done or threatened. I think the judgment is sustained by the evidence in so far as it enjoins the continuance of the alleged boycott. The defendants are forbidden to coerce plaintiff's customers to withdraw their custom from plaintiff by threats that, unless they do so, the defendants will cause loss to them in their business.

The respective unions represented by the Federated Trades Council were 22 in number. It does not appear how many members they had in the aggregate, but it is plain from all the circumstances that the membership included the majority of the workmen in that vicinity engaged in the respective trades, and that they were of such numbers that, if they all refused to work for any contractor engaged in building enterprises in that neighborhood, such contractor would be unable to carry on his business without substantial loss. The agreement of the union men that they would not work for any contractor who employed nonunion men, or who used material made by any manufacturer or sold by any dealer who employed nonunion men, was embodied in their rules adopted by them long before any difficulty had arisen with the plaintiff and without any reference whatever to the plaintiff. It was a general regulation and agreement, intended to apply to all persons and to be enforced whenever any occasion arose which made it applicable. The method of putting it in force was that the Building Trades Council, when it found any contractor, dealer, or manufacturer employing nonunion men, or using nonunion materials, sent out notices to all union workmen and to other dealers and contractors that the person in question was "unfair," and there-

upon it was understood that all men in the employ of such other persons would refuse to work for their respective employers unless such employer refused to use materials received or purchased from such boycotted person. When the Parkinson Company employed nonunion men, these notices were immediately sent to all its customers. As a result, its customers immediately countermanded such orders to plaintiff for goods as were then unfilled, and ceased thereafter to deal with plaintiff. The evidence showed that at least seven of the plaintiff's important customers quit dealing with the plaintiff; that substantial damage had already been caused to the plaintiff by this loss of custom during the time it had continued, and that its further continuance would cause plaintiff further substantial loss; that these customers were, by the aforesaid threats of defendants, coerced and compelled, against their wish and will, to cease dealing with plaintiff or using goods obtained from plaintiff; and that the defendants intended and threatened to continue this boycott indefinitely. The claim of the defendants appears to be that these notices were intended for the benefit of the several persons to whom they were sent to warn them of the consequences that might attend their patronizing the plaintiff, so that they could avoid doing so, and thereby escape the evil results that would otherwise come to them, and that the sending of notices for such a purpose is not only lawful and innocent, but praiseworthy as well; that these consequences would not come as the result of any act done with reference to the parties warned, but as the result of conditions that existed under the union rules established long before any difficulty with plaintiff arose. These rules seem to be regarded as of similar force to the law of the land and a notice not to disregard them as a friendly act similar to a notice to a friend not to violate the law. I concede, of course, that, where a strike has been determined upon, the mere sending of a notice of the fact is not unlawful, or blameworthy, and cannot be made the foundation of an action. Perhaps the sending of these notices under some circumstances might have been considered as an act of this character. But under the circumstances disclosed in this case, and in view of the findings of the court which show that the acts of the defendants were intended to coerce plaintiff's patrons to cease dealing with plaintiff in order to injure plaintiff in its property rights, the conduct of the defendants must be considered as malicious and unlawful. The defendants had the right, by lawful means, to persuade or induce others to cease dealing with plaintiff, although their purpose in so doing was to injure the plaintiff in its business and constrain plaintiff to yield to their demands in regard to the conduct of plaintiff's business. It is only when they seek to accomplish such injury by the use of means which the law deems unlawful that their ac-

tion to that end becomes unlawful and the resulting injury an actionable wrong. The entire case depends on the question whether or not the means by which the defendants induced the plaintiff's customers to cease dealing with it were unlawful.

It is settled in this state, and, for the most part, in other jurisdictions, also, that in cases where one person induces another to do an act injurious to a third person, the mere fact that the person instigating the doing of the act was actuated by a bad motive, or by malice toward the third person, will not make his instigation unlawful. *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233. The effect of the authorities, in cases like the present, is that, in order to make such instigation unlawful, the customer must be induced to cease dealing with the party intended to be injured by means of some force, intimidation or coercion which destroys his freedom of action and constrains him to cease such dealing when he does not wish to do so and would not do so except for the constraint put upon him. In *People v. Schmitz*, 94 Pac. 419, 15 L. R. A. (N. S.) 717, it is said that the means used to induce the injurious action toward the third party, and which, if used, will make the resulting injury actionable, includes duress, menace, fraud, and undue influence, as defined in Civ. Code, §§ 1569, 1570, 1572 and 1575. According to these sections, fraud involves deceit, duress, confinement of the person, or detention of property, and menace a threat of violence to person or property or of an attack on character. Neither of these things occurred here. The class to which the conduct of the defendant belongs, if it can be characterized as illegal, is that of undue influence. In the decisions on the subject, this method of influencing the action of others is usually included with various forms of menace, and is designated as intimidation or coercion. In other jurisdictions, there are no code provisions defining the general principles of law such as we have in the Civil Code. By the provisions of the Code above mentioned a contract which is procured by either duress, menace, fraud, or undue influence is said to be voidable. The use of such means is characterized as illegal. It is not necessary, in order to constitute such undue influence or coercion, that there should be any sort of physical violence done or threatened, or that there should be any act done or threatened, which in itself, and apart from its effect in controlling the action of the person coerced, would be unlawful. It is sufficient if the acts threatened, although lawful, were of such a character that, if done, they would cause loss or injury to the person threatened of so serious a nature that the mere threat prevents him from exercising his own will in the matter, and causes him, against his will, to act injuriously to the person intended to be injured.

These principles are established by a great

number of decisions of the courts of this country and England. One of the latest of these is *Quinn v. Leatham*, in the House of Lords (App. Cas. 1901, p. 495). Leatham, a butcher, was employing nonunion men. Quinn and others, members of a union, threatened Leatham that, if he did not discharge these men, they would stop his custom and call out his union men. He refused to discharge the objectionable men, and thereupon, by threats to a customer named Munce that they would also call out his men if he did not cease dealing with Leatham, they forced Munce to comply with their demand and cease buying of Leatham, to his injury. One Dickie, a workman, was by similar means compelled to quit Leatham's service. The question was whether or not there was sufficient evidence to sustain a verdict for the plaintiff for damages. Lord Brampton, referring to Dickie, who quit without notice, says: "There was an abundance of evidence that he was induced to do that wrongful act by the unjustifiable influence of the defendants." And respecting the rights of the defendants as a trades union, he says: "As members of a trades union society they have no more legal right to commit what would otherwise be unlawful wrongs than if the association to which they are attached had never come into existence. They have no more right to coerce others pursuing the same calling as themselves to join their society or adopt their views or rules than those who differ from them and belong to other trades associations would have a right to coerce them." And with reference to the method of such coercion his opinion proceeds: "It is at all times a painful thing for any individual to be the object of hatred, spite, and ill will of any one who seeks to do him harm. But that is nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately, as often as opportunity occurs, regardless of law and actuated by malevolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organized and ruinous oppression." On this subject Lord Lindley's opinion is the fullest. The following is extracted from it: "What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some nonunion men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers and persons lawfully working for them to all the inconvenience they could without violence. * * * The defendants were doing a great deal more than exercising their own rights. They were dictating to the plaintiff and his customers

and servants what they were to do." Page 536. "One man without others behind him who would obey his orders could not have done what these defendants did. One man, exercising the same control over others as these defendants had, could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen v. Flood* (1898) App. Cas. 128, 138, Lord Herschell expressed his opinion that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But, if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike or threatening to make them strike by calling them out, when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen v. Flood* there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats, open or covert, of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every one whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful. * * * A threat to call men out given by a trades union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. * * * It is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. That may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. * * * Coercion by threats, open or disguised, not only of bodily harm, but of serious annoyance and damage, is *prima facie*, at all events, a wrong inflicted on the person coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded."

In *Read v. Friendly Societies*, 1902, K. B. Div. 737, an apprentice sued the defendants

for damages arising from the coercion of his employer to discharge him by threats to call out the employer's men, all of whom belonged to the society. The court considered this to be the use of illegal means, and said regarding it: "Where illegal means have been used to bring about a breach of contract to the detriment of a party thereof, 'just cause' cannot come into the discussion at all." In *Glamorgan Co. v. South Wales M. Federation* (1903) 2 K. B. Div. 573, it was held that the act of the defendants in inducing a breach of their contract of service by the employer's men could not be justified by showing that the direction to strike was made for the benefit of the men and without malice towards the employers. In *Giblan v. Amalgamated L. U.*, 2 K. B. Div. (1903) 620, the court said: "In my opinion it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of. In my judgment, if a person who, by virtue of his position or influence, has power to carry out his design, sets himself to the task of preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to, or special influence upon, the man's employers, or would-be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered." And on page 623 the "special influence" there intended is thus described: "Going to his employer and threatening that they would resort to the powers which were, or were believed to be, vested in them as officers of a trades union, and which involved a resort to the power of numbers in a way which might and probably would cause detriment to the employer. * * * Such acts, so persisted in, seem to me to be in the nature of molestation or coercion; and, although they do not involve recourse to physical force, I am far from satisfied that they are not such as to be illegal, even if done by a single individual."

In *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252, the court says: "For a person to wrongfully—that is, by employment of improper means—induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable," although the third party has the lawful right to terminate the contract at any time. "Wherever a person, by means of fraud or intimidation, procures the breach of a contract * * * which, but for such wrongful interference, would have continued, he is liable." "The important question in an action of this kind is as to the nature of the defendant's acts and the means adopted by him to accomplish his purpose. Merely to

induce another to leave an employment or discharge an employé, by persuasion or argument, however whimsical, unreasonable, or absurd, is not in and of itself unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer by threats if the threats are of such a character as to produce this result and thereby cause him to discharge an employé whom he desired to retain and would have retained except for such unlawful threats is an actionable wrong." In *Vegelahn v. Guntner*, 167 Mass. 99, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, it is said: "A combination to do injurious acts expressly directed to another by way of intimidation or constraint either of himself or other persons employed or seeking to be employed by him is outside of allowable competition, and is actionable." In *Commonwealth v. Hunt*, 4 Metc. (Mass.) 129, 38 Am. Dec. 346, the court says: "When an association is formed for purposes actually innocent, and afterwards its powers are abused by those who have the control and management of it to purposes of opposition and injustice, it will be criminal in those who misuse it, or give consent thereto." In *Lucke v. Clothing C. A.*, 77 Md. 407, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421, a cutters' union threatened the employers of Lucke that if they did not discharge him, all labor organizations would be notified that the house was a nonunion house, and it appeared that this was intended to mean, and was so understood, that all the union men in their employ would walk out, and that this would cause the employers great loss in their business. This threat so made caused the discharge of Lucke, and it was held to constitute unlawful coercion and that it gave Lucke a cause of action against the union making the threats for the damages suffered therefrom. In *Cœur D'Alene Co. v. Miners' Union* (O. C.) 51 Fed. 267, 19 L. R. A. 382, the court said: "If the things done, or the words spoken, are such that they will excite fear, or a reasonable apprehension, of damages, and so influence those for whom designed as to prevent them from freely doing what they desire and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit and intent." In *U. S. v. Kane* (C. C.) 23 Fed. 748, the opinion by Brewer, J., shows that a threat may be sufficient if merely implied, although not expressed. In *Thomas v. Railway Co.*, (C. C.) 62 Fed. 818, Taft, J., said: "All the employés had the right to quit their employment but they had no right to combine to quit their employment, in order thereby to compel their employers to withdraw from the mutually profitable relations with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever upon the

character or reward of their services." See, also, *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; *U. S. v. Cassidy* (D. C.) 67 Fed. 763; *Oxleys Co. v. Coopers' Union* (C. C.) 72 Fed. 695; *Nashville v. McConnell* (C. C.) 82 Fed. 65; *Hopkins v. Oxley Stave Co.*, 83 Fed. 918, 28 C. C. A. 99; *Doremus v. Hennessy*, 176 Ill. 614, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; *Casey v. Typographical Union* (C. C.) 45 Fed. 135, 12 L. R. A. 193; *Boutwell v. Maar*, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 58; *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Willcutt Co. v. Bricklayers' Union* (Mass.) 85 N. E. 897. All these expressions are but different ways of saying that the use of undue influence to compel or bring about the action of one person to the injury of a third person is the use of illegal means to that end.

It is of no importance that the rules were adopted without special reference to the plaintiff. They were adopted for the express purpose of being put in force against any person when the occasion should arise which made it desirable that the conduct of such person should be influenced or controlled. The effect in contemplation of law is the same as if they had been made expressly for the occasion for which they were used. Nor is the case of plaintiff defeated by the fact that the only act done by the defendants at the time of the boycott was the sending of notices that the plaintiff had been declared unfair without threat of any sort accompanying it. It is in evidence that all the persons thus notified knew of the purport and effect of the union rules which would be applied in such a case. The defendants had created this engine of oppression for use at any time they desired, and had prepared the signal upon which it was to become active. The parties notified were aware of all this, and the defendants also knew that these parties had this knowledge. Further words were unnecessary. The threat would not have been more complete if the notice had expressly stated that all business with Parkinson Company must stop under penalty of a strike of their union workmen. The defendants had arranged this condition of affairs. They cannot escape its effects on the ground that they were simply giving information of action which would inevitably take place and were doing it for the benefit of the contractors so that they might act as requested, and thus avoid the damages otherwise ensuing. If the action of which this notice was given had been that of third persons for whom defendants were in nowise responsible, or with whom they were not in collusion, such a claim might stand. But the action of which they were so kindly noti-

fying the contractors was their own action long before resolved upon. If they had no right to act in this manner for this purpose, the fact that it was previously arranged or decided upon for this or any similar occasion, was immaterial.

It is further argued that the only thing with which the customers were threatened was a strike of these customers' employes; that this threat was made by the men themselves, through their agents authorized to act for them; and that they had a lawful right to strike at any time and for any cause or no cause, and hence that their conduct was not unlawful. The principle settled by the cases cited, however, is that, while men have a right to strike, they have no right by that means to coerce their employers so as to compel them to act to the injury of a third person. The fact that they were to strike in such numbers gave them a power over the threatened customers of plaintiff, which constituted undue influence over them, or coercion or intimidation, as most of the authorities usually express it, and this coercion, exercised for the purpose of injuring a third person, is an unlawful act, and makes the resulting injury an unlawful injury, which may be enjoined if only threatened, and which, if committed, may be redressed by an action for damages. It is the control of another's conduct against his will that is the unlawful element in the proposition. This being unlawful, the resulting injury to a third person is unlawful, although every other act in the transaction is lawful in itself. So far as this unlawful element is concerned, it is immaterial whether that control is obtained by fear produced by the immediate prospect of serious pecuniary loss, as the result of a threatened strike, or by fear produced by a threat of bodily injury.

154 Cal. 644

EVANS v. EVANS. (S. F. 4,769.)

(Supreme Court of California. Dec. 15, 1908.)

1. DIVORCE (§ 310*)—SUPPORT OF WIFE AND CHILDREN—FORFEITURE.

While a wife may abandon or forfeit her own claim to be supported by or from the estate of her divorced husband, she cannot forfeit or abandon the claims of the children to support by their father.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 310.*]

2. DIVORCE (§ 308*)—DECREE—MODIFICATION—SUPPORT OF CHILDREN.

Where a divorce decree gave to the father the custody of certain children, subject to the further order of the court, and required him to maintain and educate them, the court, on subsequently modifying the decree so as to give the custody of the children to the mother, was entitled to require the father to continue to support them.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 308.*]

3. COURTS (§ 474*)—JURISDICTION—PRIORITY.

An application for guardianship of minor children in the superior court of another county on which no letters had been issued did not deprive the court having awarded their custody to the father in a divorce decree of jurisdiction reserved in the decree to so modify it as to award custody to the mother.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 474.*]

Department 2. Appeal from Superior Court, San Benito County; M. T. Dooling, Judge.

Action by Helen M. Evans against Thomas B. Evans. From an order modifying a divorce decree, so as to award the custody of certain children of the parties to plaintiff, defendant appeals. Affirmed.

William A. Bowden, for appellant. Gilmore Agnew, for respondent.

HENSHAW, J. In 1903 the superior court of San Benito county granted plaintiff a divorce from defendant upon the ground of his extreme cruelty. In accordance with an agreement of the parties at that time entered into, the custody of the children was given to the defendant, "subject to the further order of the court," and defendant was "required to maintain and educate them." Defendant moved with the children to the county of Santa Clara, and there remarried and continued to reside. In 1906 this plaintiff made application to the court of San Benito county to award to her the custody of the children, upon the ground that the father had proved, by reason of his cruelty to them, to be an unfit and improper person to have charge of them. To this application was joined a request for an allowance of \$30 per month for their maintenance. The probation officers of Santa Clara county at about the same time had taken charge of the children, and placed them temporarily in the Orphans' Home at San Jose; their father having been arrested for cruelty to them.

These matters were disclosed in evidence before the superior court of San Benito county at the hearing of this application, with further testimony of the cruelty which the father had practiced upon the children. The court then made its order in accordance with the prayer of the petition. Upon appeal the contention is made that the order decreeing payment of a monthly sum for the maintenance of the children was in excess of the jurisdiction of the court, and therefore void, because in the original judgment and decree in divorce no provision had been made for such maintenance, and no reservation of the right to make such provision in the future. This contention, however, is contrary to the facts. By the agreement of the parties, adopted by the court, the wife did relinquish any claim to maintenance or support for herself, but she did not attempt to do this up-

on behalf of her children, and, if she had done so, the act would have been nugatory. A wife may abandon or forfeit her own claims to be supported by or from the estate of her divorced husband, but she cannot forfeit or abandon the claims of the children. Ex parte Gordan, 95 Cal. 374, 30 Pac. 561. Moreover, the decree of divorce distinctly imposed upon the father the duty "to maintain and educate the children." So that the decree is not, as appellant contends, silent upon the matter.

This court had occasion in the recent case of Harlan v. Harlan (Cal.) 98 Pac. 32, to consider the question of the power of the court in cases such as this. The authorities are there reviewed, and the conclusion reached and expressed that the court has power to make future provision for the children's care, custody, education, and maintenance, as was done in this case. It is made to appear that an application for letters of guardianship of the persons of these neglected children was pending in the superior court of the county of Santa Clara at the time the order here appealed from was made by the superior court of San Benito county. Upon this appellant bases an argument to the effect that the superior court of Santa Clara county had acquired jurisdiction, and that the superior court of San Benito county was, therefore, without power to act. To this proposition is sought to be applied the case of Younger v. Younger, 106 Cal. 381, 39 Pac. 779. The Younger Case is not in point. In the Younger Case the custody of an infant child by the decree of divorce had been awarded to the mother. With her consent the child was subsequently regularly adopted by its grandfather, and this court held that such adoption so changed the status of the child that the superior court lost jurisdiction to modify its decree relative to the custody. Such is not the situation here presented. Manifestly the application for guardianship in the superior court of Santa Clara county was for the sole purpose of sheltering and harboring the children until some permanent arrangement could be effected for their care and custody. No letters of guardianship had been issued. The superior court of San Benito county was therefore not without jurisdiction to proceed.

The order appealed from is therefore affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.

RUDDICK et al. v. ALBERTSON et al.
(S. F. 4,735.)

(Supreme Court of California. Dec. 15, 1903.)

1. TRUSTS (§ 61½*)—INVALIDITY—EFFECT.

Where a trust created by a deed of land is invalid for any reason, the legal title remains

in the grantor, and is not conveyed to the trustees freed from the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 86; Dec. Dig. § 61½.*]

2. TRUSTS (§ 9*) — BENEFIICIARIES—UNINCORPORATED VOLUNTARY ASSOCIATIONS.

Under the rule that a valid grant may be made to trustees for an unincorporated voluntary association, and that the title will descend in perpetuity, a deed to Indians in trust for a specified tribe of which they were captains, to be held and used by the tribe as communal property, was valid.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 6; Dec. Dig. § 9.*]

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Dick Ruddick and another, Indians, for and on behalf of the Yokayo Tribe, against F. C. Albertson and others. Judgment for complainants, and defendants appeal. Affirmed.

W. P. L. Held, for appellants. Thomas, Pemberton & Thomas and McNab & Hirsch, for respondents.

HENSHAW, J. The appeal in this case is from the judgment upon the judgment roll alone. The history of the litigation, as disclosed by the findings, is as follows: The Yokayo Indians are a body of native redmen, who, from time immemorial, have been known and recognized as a tribe existing and living in tribal relationship, with their own laws, customs, usages, and rules. The tribe selected chiefs or captains, who under its loose system of government controlled the people as to their tribal affairs, and dealt for them with the outside world. Their ownership of property was communal. They possessed no real property, and their life was nomadic. In October, 1881, the four captains or chieftains of this tribe were Capts. Dick, Charley, Bill, and Lewis. With more knowledge and foresight than the majority of their fellow tribesmen, these captains, recognizing the improvidence of their people, their lack of permanent home, their inability to make provision for the future, decided that they would purchase a rancho, which should become the village and home of the tribe for the benefit of all its members, whereby all might have a permanent abiding place, lands to till, a home while living, and a burial place when dead. According to custom, they called the tribe together at an appointed place, and there was collected from the individual members of the tribe, by voluntary contribution, it not being now ascertainable who were the donors nor the amounts of their donations, the sum of \$800, which was given to the captains. They, through a trusted white man as their agent, undertook with this money the purchase of a certain rancho then owned by one J. H. McPeak. The purchase price of the land was \$4,500. Charles Yates acted as

the agent of the tribe in the matter of this purchase, the \$800 was paid, and Yates, as the agent of the tribe, took a deed to the land in his own name. From time to time, as the tribe under the directions of its captains accumulated money, in farming the land of which they had thus entered into possession, and by the sale of baskets which they manufactured, the land was completely paid for. These later moneys, like the first \$800, came from the voluntary contributions of the tribe's members. So that all of the moneys which paid for the purchase of this property were the joint mingled communal funds of the entire Yokayo Tribe. When the land was finally paid for, the tribe assembled to deliberate as to how they should take title to it, and, as a result of these deliberations, it was in tribal assembly agreed upon that the deed should be made to their four captains for the benefit of the tribe. Such a deed was actually made by Yates on the 20th of October, 1881, the grantees being described as follows: "Dick, Lewis, Bill, Charley, all Indians, and their tribe." Ever since this date the tribe has continued in the ownership, occupation, and use of these lands, farming them under their communal custom. During the lifetimes of the four captains they, individually and collectively, acknowledged, respected, and fulfilled their trust, recognizing always their fiduciary position, and consulting with the various members of the tribe and with the tribe in meeting assembled upon all matters pertaining to the lands. For the transaction of business with the outside world too difficult for them to understand, or too intricate for them to manage, these captains employed a white man as their agent, and since the year 1896 that agent has been F. C. Albertson, one of the defendants herein. This agent, besides transacting business for the benefit of the tribe, such as paying their taxes and protecting them in the making and execution of contracts, was the custodian of the tribal funds, which funds were paid over by him to the captains upon request. These funds were used for various purposes—the purchase of farming machinery and implements, for feasts and barbecues, marriage festivals, and burials, and, in one instance, \$200 was drawn for per capita distribution amongst the members of the tribe. Thus it was the understanding and intention of the tribe and of their captains, the grantees named in this deed, that the land should be held as the communal property of them all, a system which history tells us is the most usual form of the holding of real property upon the part of primitive races emerging from barbarism. And so they lived, the captains, as has been said, always recognizing that their trust and tenure was of the nature indicated. In time two of these captains died, Charley and Bill, and one T. J. Weldon was appointed administrator of the estates of both. Weldon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

laid claim to an undivided one-fourth interest in these lands as the property of the estate of each. Upon the assertion of this claim the living captains, Dick and Lewis, instituted this action on behalf of the tribe, asserting no personal private interest in the property on their own behalf, but asserting a full and complete tribal interest in it for all. F. C. Albertson, the white agent, was made a party defendant for the complete determination of all rights as he was the custodian of the tribal funds. Mr. Albertson joins with the plaintiffs and with the tribe in this effort to preserve their rights. Upon these findings, the court gave judgment that neither the estate of Captain Charley nor the estate of Captain Bill, nor defendant Weldon, as administrator of these estates, had any ownership, right, or title to the lands, or to the moneys in the possession of defendant Albertson.

Appellants' contention, in brief, is that the trust attempted thus to be created in the four captains of the tribe for the benefit of the tribe is void for many reasons, not necessary here to particularize; that from this it results that the deed is to four distinct individuals who take as tenants in common, each an undivided one-quarter; that the legal title was vested by the deed, and that, as there is no trust, the title remains in the designated grantees. We have said that it is unnecessary to particularize the grounds upon which appellant contends that the trust is void. This is so, because, if it were void (a matter which we do not here decide), appellant would be entitled to no relief. Clearly the four captains took as trustees, and, if the trust fails, the legal result is that no title whatsoever passed out of the grantor. The legal title would not then be in the four captains and in their estates, but would remain in their grantor. So that, if the argument for which the appellant contends should prevail, it would result, not in conferring title to any of the land upon these captains living or their estates dead, but would result merely in the determination that the legal title was in Charles Yates, with a resulting trust in favor of those who had contributed the money for the purchase of the land. Appellant's effort is to convert property conveyed in trust to the personal use and benefit of his intestates under his contention that the trust has failed. But such an act is abhorrent to equity, and is never permitted. *Mandeville v. Solomon*, 33 Cal. 44. It follows, therefore, that appellant, having no interest in the subject of this litigation, is not injured by the determination and his position would not be bettered, even if he should prevail in his contention that the trust is void. But, finally, it may be said that it would be a reproach to our jurisprudence if, under all the circumstances shown, those laws should compel that this

tribe be driven from the land which they purchased, and forced again to become wanderers on the earth. But such reproach, we take it, does not attach. At common law, it is true, a deed of conveyance to an unincorporated voluntary association was bad for lack of a capable grantee, and cases will be found which hold that, where the grantee could not take directly, he or it cannot take through the medium of a trustee. But from this grew an abuse which equity was prompt to remedy. So that it is now recognized that a valid grant may be made to trustees for such an unincorporated voluntary association, and that such title will descend in perpetuity. *Penny v. Coke Co.*, 138 Fed. 769, 71 C. C. A. 135; *Liggett v. Ladd*, 17 Or. 89, 21 Pac. 133. And certainly, if ever there was a case where equity would seek to sustain such a grant, it is the case here presented.

The judgment appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(154 Cal. 623)

DAVIS v. BUTLER. (S. F. 4,779.)

(Supreme Court of California. Dec. 11, 1908.)

1. CONTRACTS (§ 94*)—VALIDITY—FRAUD—MISREPRESENTATION.

A single material misstatement knowingly made, with intent to influence another into entering into a contract, is, if believed and relied on by the latter, a ground for the rescission of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 420-427; Dec. Dig. § 94.*]

2. CORPORATIONS (§ 116*)—CAPITAL STOCK—SALES—FRAUD—MISREPRESENTATION.

A representation that the indebtedness of a corporation having an outstanding issue of 430 shares of stock of the par value of \$10 each was only \$1,530, when it was in fact \$2,800, made to influence one to buy 250 shares at par, is a material misrepresentation, justifying the buyer in rescinding the contract.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 116.*]

3. CORPORATIONS (§ 117*)—TRANSFER OF STOCK—RESCISSON—FRAUD—EVIDENCE.

In an action to rescind a contract for the purchase of corporate stock on the ground of misrepresentations as to the indebtedness of the corporation, evidence held to justify a finding that defendant had stated to plaintiff that the indebtedness of the corporation did not exceed \$1,530, while it actually amounted to \$2,800, justifying the granting of relief.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 117.*]

4. CORPORATIONS (§ 116*)—CAPITAL STOCK—SALES—FRAUD—MISREPRESENTATION.

A buyer of corporate stock may rely on the seller's statement as to the amount of the indebtedness of the corporation, where the seller states that there are no books of account showing the corporate indebtedness.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 116.*]

5. SALES (§ 40*)—CONTRACTS—VALIDITY—FRAUD—MISREPRESENTATION BY SELLER.

To justify a buyer to rescind the contract of purchase on the ground of fraudulent rep-

representations, it is sufficient to show that he was induced by false representations to buy property which, if the representations had been true, would have been worth more than it actually was worth.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 79-83; Dec. Dig. § 40.*]

6. CORPORATIONS (§ 117*)—TRANSFER OF STOCK—RESCISSION.

In an action to rescind a contract for the purchase of corporate stock on the ground of misrepresentations, the allegation of the complaint, not denied, that plaintiff tendered to defendant and offered to transfer to him the stock, is an allegation that he offered to do everything, including the delivery of an indorsed certificate, necessary to accomplish such transfer.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 117.*]

7. APPEAL AND ERROR (§ 867*)—JUDGMENT—REVIEW.

An objection to the form of a judgment granting relief in an action to rescind a contract for the purchase of corporate stock, based on the insufficiency of the averment that plaintiff had tendered to defendant and offered to transfer to him the stock, cannot be raised on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3476; Dec. Dig. § 867.*]

8. CORPORATIONS (§ 117*)—TRANSFER OF STOCK—RESCISSION—TIME TO RESCIND.

In a suit to rescind a contract for the purchase of corporate stock on the ground of misrepresentations, evidence held to justify a finding that plaintiff did not delay an unreasonable time in electing to rescind after the discovery of the fraud.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 117.*]

9. CONTRACTS (§ 270*)—TRIAL—QUESTIONS OF FACT.

Whether one induced by fraud to enter into a contract promptly elected to rescind on the ground of fraud, as required by Civ. Code, § 1691, is a question of fact.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1200; Dec. Dig. § 270.*]

Department 1. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by H. E. Davis against T. C. Butler. From an order denying a motion for a new trial, defendant appeals. Affirmed.

Maguire, Lindsay, Houx & Barrett, for appellant. Dougherty & Lacey, for respondent.

SLOSS, J. On November 7, 1905, the defendant sold to the plaintiff 250 shares of the capital stock of the Salinas Valley Bottling Company, a corporation. In January, 1906, the plaintiff, claiming that he had been induced to buy the stock by means of fraudulent misrepresentations made to him by the defendant, undertook to rescind the agreement of purchase and sale. The defendant refusing to restore the money and property received as the purchase price, the plaintiff brought this action, praying a decree that the agreement be rescinded, and that defendant be required to transfer to plaintiff the prop-

erty received as the purchase price of the stock upon plaintiff retransferring the 250 shares of stock. The plaintiff had judgment in the court below. The defendant now appeals from an order denying his motion for a new trial.

The Salinas Valley Bottling Company was engaged in the business of bottling and selling beer which it purchased in bulk. Four hundred and thirty shares of its stock, of the par value of \$10 each, had been issued. The misrepresentations alleged by plaintiff to have been made by defendant had reference to three matters. The complaint averred that the defendant had stated that the indebtedness of the corporation, over and above the money it then had in bank and solvent credits due to it by its patrons, amounted to the sum of \$1,530, and no more, whereas in fact such indebtedness amounted to the sum of \$2,963.64. He had represented that the corporation was and had been marketing and selling two car loads of beer per month, whereas in fact it had not been and was not selling more than one car load per month. The third representation relied upon was that the corporation received a net profit of \$6.15 per barrel on the beer bottled and marketed by it, when as a matter of fact said net profit did not exceed \$3.35 per barrel. A jury impaneled to try the issues raised as to fraudulent representations returned a verdict in favor of plaintiff, and, in addition, the court made findings covering all the issues. It found that representations had been made by defendant, as alleged in the complaint, with reference to the three matters above mentioned. The actual indebtedness of the corporation over and above its money in bank and solvent credits due it was found to be \$2,800, instead of \$2,963.64, as averred in the complaint. It was found that not more than one car load of beer per month had ever been marketed or sold by the corporation, and that the profit per barrel on the beer marketed and sold by it did not exceed \$4.77 per barrel.

The principal point urged by appellant is that these findings are unsupported by the evidence, and a more or less elaborate argument is advanced to show that in each of the three particulars complained of no representations that were not substantially true were made by the defendant. We need not follow counsel into this extended field of discussion, since we are satisfied that there was ample evidence to justify the finding that, at least with regard to the indebtedness of the corporation, the defendant had made false representations. A single material misstatement, knowingly made, with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of

other false representations. It will hardly be contended that a representation that the indebtedness of the corporation was only \$1,530, when in fact it was \$2,800, was not material. There are many corporations having assets and conducting a business of such magnitude that a difference, one way or the other, of a few thousand dollars of indebtedness would not appreciably affect the value of their stock. But the Salinas Valley Bottling Company had a total outstanding issue of only 430 shares, of the par value of \$10 each. The sale to plaintiff embraced 250 shares at par. The difference between \$1,530 and \$2,800, if apportioned among the outstanding shares of stock, amounts to almost \$3 for each of the 430 shares. Such a discrepancy, having a close relation to the value of the stock, would certainly be material in a transaction based on a selling price of \$10 per share. The testimony of plaintiff was clear and direct in support of the allegation and finding that the defendant had stated to him that the indebtedness did not exceed \$1,530. That it actually did amount to as much as \$2,800 was also sufficiently shown. The plaintiff testified that certain amounts were due from the corporation to various creditors. There is no merit in the contention that this evidence must be disregarded because it appeared to be based on demands and statements made by the alleged creditors. The defendant, who was a witness in his own behalf, did not deny that these obligations had been incurred. Furthermore, plaintiff testified that, when he learned of these claims, he demanded of defendant that he "make it good," to which the defendant answered that he would "see about it." The court was justified in treating this as an admission that the debts had been incurred.

The point is made that a car load of beer had without the knowledge of either party come in just prior to the sale of the stock to plaintiff, and that, in so far as defendant's statement of indebtedness failed to include the amount due on this, it was an innocent mistake. It is not clear that the evidence bears out this claim; but, if it did, the effect would merely be to make the misrepresentation less gross, while still leaving it substantial and material. The rule that a party may not complain of misrepresentations regarding matters which he has investigated, or, having the opportunity so to do, has begun to investigate for himself (*Dow v. Swain*, 125 Cal. 681, 58 Pac. 271), has no application here. While the plaintiff, before purchasing, looked over the books of the corporation, the court finds (and the finding is not challenged) that defendant stated to plaintiff that neither he nor the corporation kept any books of account showing the corporate indebtedness. The plaintiff was fully justified in relying upon defendant's statements as to such indebtedness. *Spreckels v. Gorrill*, 152 Cal.

383, 92 Pac. 1011. It is not essential to the right to rescind a contract for the purchase of property that the purchaser should be able to show that the property purchased was worth less than he paid for it. It is enough that he was induced, by false representations, to buy property which would, if the representations had been true, have been worth more than it actually was worth. *Spreckels v. Gorrill*, supra.

If, as is contended by appellant, the delivery of a duly indorsed certificate of stock is necessary to transfer the shares, the allegation of the complaint (not denied) that the plaintiff tendered to the defendant and offered to transfer to him said 250 shares of stock is an allegation that he offered to do everything, including the delivery of an indorsed certificate, necessary to accomplish such transfer. The objection to the form of the judgment, based on this same criticism, cannot be raised on an appeal from an order denying a new trial. *Crescent Feather Co. v. United Upholsterers' Union* (Cal.) 95 Pac. 871. The sale to plaintiff was made on November 7, 1905. The notice of rescission was given on January 11, 1906, and the complaint filed on January 18, 1906. The court found that plaintiff did not delay an unreasonable time in electing to rescind the contract after discovery of the falsity of the defendant's representations. This finding cannot be said to be contrary to the evidence. The total time elapsing between the purchase and the rescission was only a few days more than two months. Just when the plaintiff discovered the facts is not clearly shown, but it does appear that some delay may properly be attributed to the evasive answer given by the defendant when complaint was made about outstanding bills. Whether the defrauded party has acted promptly (Civ. Code, § 1691) is a question to be decided by the trial court upon the facts of the particular case, and there were here no circumstances requiring the court to find that the delay had been unreasonable.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

154 Cal. 647

DEL CAMPO et al. v. CAMARILLO et al.
(L. A. 2,142.)

(Supreme Court of California. Dec. 15, 1908.)

1. EVIDENCE (§ 253*)—DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

Under Code Civ. Proc. § 1870, subd. 6, providing that, after proof of a conspiracy, the declaration of a conspirator against his co-conspirator and relating to the conspiracy is admissible, declarations of one conspirator made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment are admissible against all the conspirators; but a declaration made after the act designed is accomplished, and after the object of

the conspiracy has been obtained or defeated, is admissible only against the person making it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994-1002; Dec. Dig. § 253.*]

2. EVIDENCE (§ 253*)—DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

Under Code Civ. Proc. § 1870, providing that, after proof of a conspiracy, the declaration of a conspirator against his co-conspirator is admissible, etc., declarations of one conspirator made after the act designed is accomplished, and after the object of the conspiracy has been obtained or finally defeated, are inadmissible against a co-conspirator to prove the conspiracy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994-1002; Dec. Dig. § 253.*]

3. EVIDENCE (§ 253*)—DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

Where the object of a conspiracy was to obtain from one her interest in land, and the conspirators secured the execution by her of a deed conveying to them her interest, the object of the conspiracy was accomplished, and a declaration of a conspirator thereafter made was inadmissible against a co-conspirator, though the conspirators remained tenants in common of the land acquired.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994-1002; Dec. Dig. § 253.*]

4. EXECUTORS AND ADMINISTRATORS (§ 315*)—DECREE OF DISTRIBUTION—EFFECT.

Where a will is valid and binding, a decree of distribution under it vests the property devised in the devisee.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1306, 1307; Dec. Dig. § 315.*]

5. COURTS (§ 35*)—JURISDICTION—PRESUMPTIONS.

Where the superior court makes a decree distributing an estate, and the fact of the making of the decree is properly made to appear, it will be presumed that the court has jurisdiction to make it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 140; Dec. Dig. § 35.*]

6. PLEADING (§ 8*)—FACTS AND CONCLUSIONS—SUIT TO IMPEACH JUDGMENT—WANT OF JURISDICTION.

In an action in equity to impeach a judgment of a court of general jurisdiction on the ground of want of jurisdiction, the complaint must set forth the particular defects showing want of jurisdiction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 21; Dec. Dig. § 8.*]

7. PLEADING (§ 8*)—ALLEGATIONS—CONCLUSIONS.

The bare allegation in a complaint, in a suit to impeach a judgment of a court of general jurisdiction for want of jurisdiction, that the court did not have jurisdiction of the proceedings, is an averment of a conclusion of law, contrary to the presumption of jurisdiction existing from the fact of the rendition of the judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 21; Dec. Dig. § 8.*]

8. JUDGMENT (§ 463*)—SUIT TO IMPEACH JUDGMENT—GROUNDS—WANT OF JURISDICTION—TRIAL.

Where a decree of a court of general jurisdiction is attacked for want of jurisdiction which appears on the face of the record, the question of its validity is one of law, to be determined from the record itself.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 463.*]

9. JUDGMENT (§ 460*)—SUIT TO IMPEACH JUDGMENT—GROUNDS—WANT OF JURISDICTION—PLEADING.

Where it is sought to impeach a decree for want of jurisdiction appearing on the face of the record, the pleader should either exhibit the record or state the particular defects therein.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 460.*]

10. JUDGMENT (§ 460*)—SUIT TO IMPEACH JUDGMENT—GROUNDS—WANT OF JURISDICTION—PLEADING.

Where it is sought to impeach a decree for want of jurisdiction because of facts outside the record, the complaint must aver the facts.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 460.*]

11. COURTS (§ 35*)—JURISDICTION—PRESUMPTION.

Where the complaint in a suit to impeach a decree distributing the estate of a testator for want of jurisdiction avers no facts showing want of jurisdiction, either on the record or outside of the record, the court will assume that the order admitting the will to probate and the decree of distribution were made after the court had acquired jurisdiction by the necessary notice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 140; Dec. Dig. § 35.*]

12. JUDGMENT (§ 461*)—SUIT TO IMPEACH JUDGMENT—GROUNDS—WANT OF JURISDICTION—BURDEN OF PROOF.

Where, in a suit to impeach a judgment for want of jurisdiction, the answer put in issue the allegation of the complaint of lack of jurisdiction, plaintiff had the burden of proving want of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 461.*]

13. JUDGMENT (§ 461*)—SUIT TO IMPEACH JUDGMENT—EVIDENCE—ADMISSIBILITY.

In a suit to impeach a judgment for want of jurisdiction, the entire record of the cause should be exhibited, and an offer of only a part thereof for the purpose of showing want of jurisdiction was improper.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 461.*]

14. COMPROMISE AND SETTLEMENT (§ 19*)—AVOIDANCE—RETURN OF CONSIDERATION—NECESSITY.

A party accepting money and property in satisfaction of her claims, based on the fraudulent acquisition of real estate, cannot retain the property, and prosecute a suit for the fraud.

[Ed. Note.—For other cases, see Compromise and Settlement, Dec. Dig. § 19.*]

15. WILLS (§ 718*)—RIGHT TO DENY VALIDITY—ESTOPPEL.

One cannot hold property under a will, and deny the validity thereof, and seek to have it declared void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1717; Dec. Dig. § 718.*]

16. DEEDS (§ 211*)—SUIT TO SET ASIDE—FRAUD—EVIDENCE.

A party who seeks relief against frauds occurring seven, nine, and fourteen years before the beginning of the action, and who asks the court to cancel a contract and deed which imply a settlement of the wrongs inflicted by the frauds, must allege a clear case, and prove it by satisfactory and convincing evidence, and must clearly show that he did not discover the commission of the frauds until a reasonable time before the commencement of the action, that he proceeded promptly on such discovery,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and that his failure to make the discovery sooner was not due to his lack of diligence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 645; Dec. Dig. § 211.*]

17. CANCELLATION OF INSTRUMENTS (§ 34*)—ACTION TO SET ASIDE DEED—FRAUD—LACHES—EVIDENCE.

Evidence in an action to set aside a deed of a decedent as obtained by fraud of the grantees held to show such knowledge of the fraud on the part of the decedent's heirs to justify the dismissal of the suit because of their subsequent delay in the commencement of the suit.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 34.*]

18. EVIDENCE (§ 75*)—PRESUMPTIONS.

Evidence withheld by a party is presumed to be adverse to him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95; Dec. Dig. § 75.*]

19. WILLS (§ 427*)—PROBATE—EFFECT.

A valid and effectual probate of a will operates to establish the will according to its tenor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 916; Dec. Dig. § 427.*]

20. WILLS (§ 421*)—PROBATE—SUIT TO SET ASIDE.

An order admitting a will to probate made by a court of probate jurisdiction in a proceeding for that purpose cannot be vacated by a court of equity for direct fraud in establishing it, consisting either of perjured testimony or a false will, produced before the court at the time of the hearing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 904; Dec. Dig. § 421.*]

21. WILLS (§ 421*)—PROBATE—SUIT TO SET ASIDE.

Where a court of probate jurisdiction in a proceeding for that purpose admitted a will to probate, the devisee therein cannot be declared a trustee in favor of the heirs in a suit in equity by the heirs because of fraud produced before the court at the time of the hearing for the probate of the will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 421.*]

22. WILLS (§ 421*)—PROBATE—SUIT TO SET ASIDE.

Fraud, consisting of producing a will to the court in proceedings for its probate, introducing evidence establishing its due execution, and avoiding a disclosure of an alleged attempted revocation and fraudulent preservation thereof, relates to the validity of the will, and the only remedy therefor is by a proceeding to contest the will and revoke the probate thereof, which, under Code Civ. Proc. § 1327, may be begun within a year after the probate.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 421.*]

23. EXECUTORS AND ADMINISTRATORS (§ 315*)—DECREE OF DISTRIBUTION—EFFECT.

Where the probate of a will devising real estate to devisees named was valid and effectual, any error in the distribution of the estate could not be taken advantage of by heirs disinherited by the will, but the devisees might have the decree amended.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 315.*]

Department 1. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Aldegunda C. Del Campo and others against Adolfo Camarillo and another.

From a judgment of nonsuit, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Barnes & Selby, Knight & Heggerty, and B. T. Williams, for appellants. J. S. Chapman, Orestes Orr, Blackstock & Orr, Robert M. Clarke, and Henley C. Booth, for respondents.

SHAW, J. This is an action to rescind and cancel a deed from the plaintiffs and others to the defendants, purporting to convey to the defendants two tracts of land in Ventura county, and also all of the interest of the grantors in the estates of Juan Camarillo, deceased, Martina H. Camarillo, deceased, and Jose Camarillo, deceased, except certain property held by the plaintiff Wolfsohn under devise by the will of said Juan Camarillo, and to declare defendants trustees of plaintiffs as to a certain interest in the property. The principal tract in controversy consisted of a ranch known as "Rancho Calleguas," containing over 10,000 acres. The complaint also seeks to have the defendants declared trustees for the plaintiffs as to the undivided $15/28$ of the property described in the deed, and for an accounting of the rents and profits thereof. Upon the trial, after the plaintiff's evidence was introduced, the court granted separate motions of the defendants for a nonsuit. Thereafter plaintiffs moved for a new trial, and the motion was denied. The plaintiffs appeal from the judgment of nonsuit, and also from the order denying their motion for a new trial.

The ground of the action is the alleged fraud of the defendants in procuring the execution of the deed, and the subsequent fraud alleged to have been committed by the defendants in preventing the revocation of the will of Martina H. Camarillo, whereby the said will, which seems to have been favorable to the defendants, was preserved, and was subsequently admitted to probate. It will be necessary to state briefly the facts alleged in the complaint. Juan Camarillo, who died in 1880, was the husband of Martina H. Camarillo, by whom he was the father of the defendants and of the plaintiffs Aldegunda C. Del Campo, Maria C. De Arnaz, Adelaide C. De Moraga, and Arcadia C. Mahoney, and the grandfather of the plaintiff William Wolfsohn, who was the son of his deceased daughter. By his will, and by descent as community property, five-eighths of the property in controversy was given to his widow aforesaid and one-eighth each to the two defendants, the other one-eighth being given to his son Jose Camarillo, who died in 1884 unmarried, and leaving his mother as his only heir. She thereby became invested with a three-fourths interest in the property. On May 14, 1891, the said

Martina, desiring to convey her interest in the said rancho to the plaintiffs and defendants in equal shares, directed the defendants to have a deed of gift to that effect prepared so that she could execute the same. She was unable to read or write, except that she could write her name, and she had great confidence in the honesty and fidelity of the defendants. Intending to deceive and defraud the plaintiffs and their said mother, the defendants had a deed prepared purporting to be a conveyance by her to the said defendants alone of her said interest in the said rancho as a gift from her to them. This they induced her to execute by representing to her that it purported to convey the said rancho in equal shares to all of her said expectant heirs, including plaintiffs and defendants. By this means they caused the deed to be executed, and under this deed they claim to hold the three-fourths interest in the said rancho. This deed was not recorded until January 19, 1897. On April 13, 1885, said Martina executed her will, and on September 2, 1889, she executed a codicil thereto. In December, 1896, she determined to destroy this will and codicil, and, with that intent, she sent for the document. The defendant Adolfo, intending to deceive her, intercepted the will on its way to her, and represented to her that a certain other document which he had in his possession was the will and by that false representation caused her to destroy the other document, believing it to be the will, at the same time preserving the will in his own possession, and thus preventing its destruction. This was done with full knowledge of the codefendant Juan. Martina, the widow, died on April 15, 1898. Upon the petition of defendants, the said will and codicil were admitted to probate by an order of the superior court of Ventura county, and on April 22, 1899, a decree of distribution of her estate was made by the said court. The contents of this will are nowhere stated in the complaint, and neither the will itself nor the decree were introduced in evidence. The rancho was not described in the decree of distribution. The complaint and the evidence are alike devoid of express statement on the question whether or not the decree contained any general terms giving to the defendants the estate of the widow not specifically described. Because of these frauds, the plaintiffs claim that the defendants hold as trustees for the plaintiffs that portion of the land which would have descended to the plaintiffs if the widow Martina had died intestate and possessed of the three-fourths interest in the said rancho. The deed which they seek to cancel was executed on September 16, 1898, by the plaintiffs claiming as heirs of Martina H. Camarillo and her deceased husband Juan Camarillo, and by Thomas B. Bishop, Charles S. Wheeler, L. M. Hoefler, William Rix, and Guy C. Earl, as grantees from the said plaintiffs of a one-third part of their in-

terest, and quitclaims all interest of the said grantors to the defendants in consideration of the sum of \$25,000, which was therein declared to be in full settlement and satisfaction of all their claims and interests in and to the estates of Juan Camarillo, Martina H. Camarillo, and Jose Camarillo, deceased. There were other allegations made for the purpose of showing the ignorance of the plaintiffs of the frauds committed, and that they did not discover the same until shortly before the beginning of this action. The answers put in issue all the allegations of the complaint relating to the alleged frauds and the ignorance and discovery thereof by the plaintiffs. Each defendant answered separately.

There are several sufficient grounds upon which the ruling granting the nonsuit may be supported. The defendants each separately moved for a nonsuit, and, although they both assign the same grounds, the motions were separate and independent. So far as the rancho is concerned, and it is by far the most valuable part of the property involved, it is immaterial whether or not there was any fraud in preserving and probating the will which was intended to be destroyed, provided the deed executed in 1891 was not shown to be invalid. With respect to Adolfo, there was no evidence of any substantial character tending to show that there was any deception or fraud in connection with the execution of that deed. The only evidence on the subject consisted of the testimony of certain witnesses to the effect that on March 28, 1905, the defendant Juan E. Camarillo confessed or declared to the plaintiff Mrs. Mahoney that in December, 1896, his mother Martina had sent a letter to Adolfo, asking him to bring her the said will, stating that she wanted to destroy it, so that all her sons and daughters, in case of her death, would share equally in her estate, as expressed in her deed, and that thereupon Adolfo perpetrated upon her the deception alleged in the complaint by substituting another document for the will and causing her to burn such other document, supposing it to be the will; that at that time, in 1905, Juan gave the letter to Mrs. Mahoney, and also stated to her that when the deed to Adolfo and himself was made, in 1891, one de la Guerra was called to interpret the deed to his mother, and that he translated it wrong, representing that it purported to convey the land to all her sons and daughters alike, instead of to her sons only, as the fact was. The theory of the plaintiffs is that this confession or declaration of the codefendant Juan is evidence against Adolfo, as a declaration of a co-conspirator relating to the conspiracy. Code Civ. Proc. § 1870, subd. 6. Many authorities are cited by the respective counsel in regard to the rule concerning the admissibility and effect of such declarations. There is no serious disagreement on the subject. The rule

is that such declarations of one conspirator, made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment, are admissible against both. But, if made after the act designed is fully accomplished, and after the object of the conspiracy has been either attained or finally defeated, the declaration will be admissible only against the person who made it. *People v. Aleck*, 61 Cal. 139; *People v. Moore*, 45 Cal. 20. Nor are such declarations admissible against a co-conspirator to prove the formation of the conspiracy. *Section 1870, supra*; *People v. Irwin*, 77 Cal. 502, 20 Pac. 56. The plaintiffs contend that in the present case, at the time this declaration was made by Juan E. Camarillo in March, 1905, the object and purpose of the conspiracy had not been accomplished, and hence that the declaration was evidence against Adolfo. Their theory is that the purpose of the conspiracy was to obtain the interest of their mother in the property and to keep possession thereof as long as they lived, and that at any time during the life of the two conspirators, while they remained in possession and ownership of the property, the declaration of either as to the conspiracy would be admissible against the other. In our opinion this theory is absolutely untenable. The object of the conspiracy, if there was any, was to obtain from the mother her interest in the rancho. That object was fully accomplished when they secured the execution of a deed from her to them conveying to them her interest. The deed, being executed, immediately vested in them whatever interest the mother had. Nothing further remained to be done in furtherance of the conspiracy, or to effect the object for which it was formed. The fact that they thereafter remained tenants in common of the land thus obtained does not operate as a continuance of the scheme, nor make declarations of one of the tenants in common, made years after the execution of the deed, with respect to its execution, admissible as to the other. The other parcel of real estate described in the deed of September 16, 1898, here sought to be canceled, was a house and lot in the town of San Buena Ventura, which is described in the deed by metes and bounds and also as "the home place of said Martina H. de Camarillo." There is no direct allegation that this parcel ever belonged to Mrs. Camarillo, or that the plaintiffs ever had any legal or equitable estate or interest in it. It is alleged in that behalf that the superior court on April 22, 1899, made its decree of distribution of the estate of Martina H. Camarillo, deceased, whereby there was distributed to the defendant Juan E. Camarillo the said house and lot above mentioned. This implies that Martina H. Camarillo died seised of this parcel, so that plaintiffs would have inherited interests in it as her heirs if she had died intestate. This fact was practically conceded throughout the trial. If the

will is valid and binding, the decree of distribution would vest that parcel in the defendant Juan, and not in Adolfo. Consequently, in that event, there could be no recovery against Adolfo on account of this tract of land.

The plaintiffs apparently seek to avert any such consequence arising from this decree of distribution by the allegation that the court making the decree, the superior court of Ventura county, had no jurisdiction of the estate of Mrs. Camarillo, or of the proceeding for the probate of the will and for the administration and distribution of the estate. But it appears from the complaint that she was a resident of Ventura county at the time of her death; that the said will and codicil thereto and the petition for the probate thereof were filed in and presented to said court; and that a decree of distribution of her said estate was made as aforesaid. When the superior court makes a decree distributing an estate, if the fact of the making of the decree is properly made to appear, it will be presumed that the court had jurisdiction to make it. The presumption in this respect is the same as in the case of any other judgment of a court of general jurisdiction. In *re Griffith*, 84 Cal. 109, 23 Pac. 528, 24 Pac. 381; *Burris v. Kennedy*, 108 Cal. 338, 41 Pac. 458; *Luco v. Bank*, 70 Cal. 342, 11 Pac. 650. In an action in equity to impeach a judgment of a court of general jurisdiction on this ground, where the complaint alleges the giving of such judgment by the court, it is necessary for the plaintiff to set forth in his complaint the particular defects in the record which show a want of jurisdiction. The bare allegation that the court did not have jurisdiction of the proceeding is an averment of a conclusion of law contrary to the presumption of jurisdiction which exists from the fact of the rendition of the judgment. In *re Griffith*, *supra*; 23 Cyc. 1040; 11 Ency. Plead. & Prac. 1187; *Herbert v. Herbert*, 47 N. J. Eq. 14, 20 Atl. 290; *Masterson v. Ashcom*, 54 Tex. 324. If the decree was void because of a want of jurisdiction appearing on the face of the record, the question of its validity would be a pure question of law to be determined from the record itself (*People v. Davis*, 143 Cal. 673, 77 Pac. 651), and, in order to show its invalidity, it would be necessary for the pleader either to exhibit the record itself, or to state the particular facts and defects in the record which in law would make it void. If the lack of jurisdiction was because of facts outside the record, then those facts should have been averred. The complaint in this case does not aver any facts of either character, and consequently the order admitting the will to probate and the decree of distribution must be assumed to have been made after the court had acquired jurisdiction by the necessary notice in that behalf.

Furthermore, even if it were conceded that a general averment of lack of jurisdiction would be sufficient in a pleading of this character, the answers denied the allegation, put the fact in issue, and placed upon the plaintiffs the burden of proving the absence of jurisdiction. This they utterly failed to do. No evidence was introduced tending to prove the allegation. They offered an affidavit of the county clerk showing the mailing of notice of the time appointed for proving the will to all the heirs of Mrs. Camarillo, except the plaintiff William Wolfsohn and the two defendants, neither of whom were mentioned therein; the defendants being the petitioners for its probate. At that time the plaintiffs' counsel had before them all the papers in the estate, and stated that they did not propose to introduce the other parts of the record relating to jurisdiction. This affidavit was properly excluded by the court on the objection of the defendants that, for the purpose of showing lack of jurisdiction, the entire record on the subject should be exhibited, and that an offer of only a part of it for that purpose was improper. No other evidence on the subject was offered, and this affidavit cannot be considered even if it could be supposed to furnish evidence tending to prove a failure to obtain jurisdiction. The decree of distribution is therefore to be deemed valid, so far as this point is concerned. It shows that Adolfo has no interest in the home place distributed to Juan. It follows that no case was made against Adolfo with regard to either tract of land in controversy and as to him the nonsuit was properly granted. With respect to the plaintiff Mrs. Mahoney, the evidence shows a complete estoppel, at least so far as the defendant Juan is concerned. The alleged confession of the defendant Juan was made to her. During that interview Juan gave her \$5,000 in money and property amounting in value to \$3,500, in consideration whereof she executed to him the following contract: "For and in consideration of the sum of eighty-five hundred dollars to me in hand paid by Juan E. Camarillo, I hereby acknowledge satisfaction of all claims of every kind and character, I may have against him or his interests in the estates of my deceased father Juan Camarillo and my deceased mother Martina H. Camarillo, and my brother Jose Camarillo. Dated this 28th day of March, 1905. [Signed] A. C. Mahoney." According to her present contention, Juan at that time held title to an interest in the property in controversy, as trustee for her as heir at law of Mrs. Camarillo, and the right to enforce this trust was one of the claims she then held against him. The above instrument acknowledges the receipt from him of full satisfaction of all such claims. The confession was made to her before the contract was fully closed, and before she had received all of the money which he then

paid to her. If she did not have any previous knowledge of the frauds which she now asserts as the basis of her right to set aside the deed and the will, it must be admitted that this confession fully informed her thereof. Yet with this knowledge she closed the transaction, and received and accepted the money and property given to her in satisfaction of the claims she now asserts. Instead of then and there offering to rescind the contract, restoring what she had received and refusing to receive any further payment, she kept the said property and money, and immediately thereafter paid one-half of the money to an attorney as a retainer for the prosecution of a suit to enforce the claim which she had just relinquished. So long as she retains the property thus received, she is clearly estopped to prosecute any suit to enforce the claim for which that property was received in satisfaction.

The plaintiff Wolfsohn is also estopped to assert the invalidity of the will. It appears that this will specifically devised to him a house and lot known as the "Old Camarillo Homestead." This fact was recited in the deed which is here attacked, and it was therein expressly excepted from the operation of the general conveyance of all his interest in the estate of Mrs. Camarillo. He still retains that part of her estate, and has never offered to restore it to the defendants or to relinquish it for the benefit of the heirs. He cannot be allowed thus to hold property under and by virtue of the will and at the same time deny its validity and seek to have it declared void.

The remaining points in support of the nonsuit apply equally in favor of both defendants. The deed of plaintiffs which is attacked was made nearly seven years before this action was begun. The alleged fraud in the execution of the deed from Mrs. Camarillo to the defendants occurred, if at all, in 1891, more than 14 years before the beginning of the action. The alleged deception in regard to the attempt to burn the will was in December, 1896, almost nine years prior to the action. In seeking relief against the effects of frauds occurring so long ago, and in asking a court to cancel the contract and deed, which, in itself, implies a settlement of the wrongs inflicted by those frauds, the plaintiffs are required to allege a clear case, and to prove it by satisfactory and convincing evidence. They must clearly show that they did not discover the existence or commission of the alleged frauds until within a reasonable time before the action was begun, that they proceeded promptly upon such discovery, and that their failure to make the discovery sooner was not due to their own lack of diligence. All this must be shown, not merely by a bare statement of the conclusions as we have stated them, but by a detailed statement of the facts and circumstances which caused the ignorance,

which prevented an earlier discovery, and which constitutes the diligence in seeking a discovery, including also a statement of all facts previously known to them tending to indicate the existence of the frauds. *Truett v. Onderdonk*, 120 Cal. 588, 53 Pac. 26; *Lady Washington Consol. Co. v. Wood*, 113 Cal. 486, 45 Pac. 809; *People v. San Joaquin, etc.*, Ass'n, 151 Cal. 807, 91 Pac. 740.

The evidence shows that, shortly before the mother's death, she told several of the plaintiffs that her property would go to all her children in equal shares, and that all the plaintiffs were soon afterwards informed of this statement. The deed of 1891, from her to the defendants, was duly recorded on January 19, 1897. A lease from the defendants to the Union Oil Company, purporting to cover the entire interest in the oil underlying 3,707 acres of the ranch, was recorded in June, 1896. Maria Tico, whose testimony was the only evidence of the episode of December, 1896, the attempt to burn the will, and the prevention thereof by Adolfo, also testified that within three weeks after the mother's death she related the occurrence to the plaintiff Mrs. Del Campo. The mother had for many years a small tin box in which she was known to keep her valuable papers. This box was at her bedside at the time she died, and the defendants and several of the plaintiffs were then present. The plaintiff William Wolfsohn testified that within five minutes after her death he saw Adolfo with this box in another room upstairs, and saw him take a paper from his pocket, place it in the box, and then shut the box, and that he then knew it was his grandmother's private box. The plaintiffs Mrs. Arnaz and Mrs. Del Campo each testified to the fact of seeing Adolfo take the box from his mother's room a few minutes after her death. This occurred on April 15, 1898. On June 6, 1898, the plaintiffs executed to the law firm of Bishop & Wheeler in San Francisco a deed and agreement whereby they conveyed and transferred to said firm the undivided one-third of all their rights, interests, and estates in and to the said ranch, and in and to the estates of Martina H. Camarillo and Jose Camarillo, in consideration whereof said firm agreed to institute, maintain, and prosecute all such suits and actions as should be necessary to establish the invalidity of said will and codicil of Mrs. Camarillo and of her deed of gift to the defendants conveying to them her interest in said rancho, and said firm were thereby empowered, with the consent of plaintiffs, to compromise and settle such suits and receive for their compensation one-third of the proceeds; the plaintiffs agreeing not to settle or compromise without the consent of said firm. Both the complaint and the evidence are silent as to grounds upon which it was then proposed to invalidate the said will and deed and also as to the proceedings and inquiries made by the plaintiffs and the said firm with respect

thereto. A compromise was effected, however, and in pursuance thereof the defendants paid to the plaintiffs and to said firm the sum of \$25,000, and the plaintiffs and said firm conveyed to the defendants by quitclaim all their rights, titles, and interests in and to the property here in controversy. It is this deed, made on September 16, 1898, which the plaintiffs now seek to have canceled. This contract with Bishop & Wheeler expressly recites that said gift deed had been executed, and that the petition for the probate of said will had been filed, that the plaintiffs challenged the validity of said deed and of said will, and that the defendants asserted the validity thereof and claimed the said ranch and other property of the mother under the said deed and will. After Bishop & Wheeler obtained the conveyance from the plaintiffs of one-third of the plaintiffs' interests on June 6, 1898, and until the execution of the compromise deed of September 16, 1898, the said firm was interested as part owners, in common with the plaintiffs, in making inquiries for evidence to avoid the deed and will. Not only so, but the said firm was by said agreement specially employed to make such inquiries, and it was the duty of its members to exercise diligence in the search. It is evident that a contest of the will and a suit to avoid the deed were then contemplated, if not actually instituted, and that the deed of 1898 was made in settlement of those claims and to avoid the expected litigation. The complaint herein does not explain the reason of this compromise nor aver that said firm of attorneys, who were then interested parties, were ignorant of the frauds now alleged, and of the evidence now produced or other evidence sufficient to prove them, nor does it show that said attorneys used diligence in prosecuting inquiries and searching for evidence, nor that they were not negligent in that respect. And there is no evidence on these points. Both before and since the mother's death the plaintiffs and defendants have frequently met in friendly relations. It does not appear that either of the plaintiffs, or any one of said firm of attorneys, has ever asked the defendants to explain the alleged statements of the mother to plaintiffs that all her property was to go equally to all the heirs. Due diligence required that such inquiry should have been made, and also that they should inquire of each other. Notwithstanding anything in the complaint and proof, Bishop & Wheeler, during their employment, may have had knowledge of the frauds now alleged and of evidence in support thereof. The compromise then made, with at least some knowledge of the frauds now alleged, the delay of seven years in suing to avoid it, the lapse of time after the execution of the deed of gift, and before the donor's death, and all the other circumstances above detailed, with no better or more complete excuse than is here given, are sufficient to jus-

tify a court of equity in dismissing the action on the ground of laches.

It is rather remarkable that, while the plaintiffs apparently object to the provisions of this will, manifestly considering it injurious to them and advantageous to defendants, and allege its fraudulent preservation as one of the wrongs upon which their present action is based, they do not set out its contents in the complaint and did not introduce it in evidence, although it was before them at the time of the trial. While there is thus an absence of direct allegation and evidence on the subject, the whole case, as exhibited in the complaint and as shown by the evidence, necessarily implies that this will purported to devise the ranch to the defendants. If it did not do so, the whole charge of fraud in its preservation would be immaterial in so far as Adolfo was concerned. The fact that its contents were not shown raises an inference that it did devise the ranch to the defendants. Evidence withheld is presumed to be adverse. *Bagley v. McMickle*, 9 Cal. 446. The allegations imply this fact also. It is alleged that by virtue of the will Adolfo procured a distribution of "the greater part" of his mother's estate to himself and Juan. No other property could answer this description. The inventory, which was introduced in evidence, shows that her entire estate was of the value of \$6,750, of which \$750 was personal property, \$5,000 was the home place, devised by the will to Juan and distributed to him by the decree, and \$1,000 was "the Old Camarillo Homestead," devised and distributed to William Wolfsohn. If she then also owned the ranch, as the plaintiffs contend, it constituted the greater part of her estate, and it would be this ranch which Adolfo by procuring the probate of the will contrived to have distributed to himself and Juan. It does not appear that Adolfo got any part of the property described in the inventory except one-half of the personal property if any remained after paying debts and expenses, and yet, according to the complaint, he and Juan obtained by the decree of distribution "substantially all of her estate." The decree does not expressly mention the ranch. The only rational explanation from the standpoint which plaintiffs have chosen to occupy is that the will, after some specific provisions in favor of Juan and William Wolfsohn, gave the residue of the estate to Juan and Adolfo, and that the decree of distribution, by a general clause, gave them all of her estate not therein specifically mentioned. This latter clause would include the ranch, if the deed of gift to the defendant were void, as the plaintiffs claim. In addition to all these circumstances, there is the direct testimony of Adolfo, while a witness for the plaintiff, that his mother told him that the will gave the ranch to him and Juan, and that afterwards he saw the will and was present at the execution of the codicil substituting him and Juan as executors

thereof. From all these circumstances the trial court may rightfully have concluded that the will devised the ranch to the defendants. There is no evidence to the contrary.

The fact that the will purports to give the ranch to the defendants has an important bearing on the motion for a nonsuit. The will was duly probated. If this probate was valid and effectual, it operated to establish the will according to its tenor, and thus it gave the ranch to the two defendants, regardless of the validity of the deed from their mother. If this were the case, the mere fact, if it be a fact, that the decree of distribution did not carry out this disposition of the will, would be of no benefit to plaintiffs. If they cannot be allowed to set aside the probate of the will, nor change its effect, it would avail them nothing to have the distribution vacated. In that event the only thing that could be done would be to have a new decree of distribution made expressly distributing the ranch to the defendants in accordance with the provisions of the will. It is the established law of this state, as well as of many other jurisdictions, that an order admitting a will to probate duly made by the court of probate jurisdiction in a proceeding for that purpose cannot be vacated by a court of equity for direct fraud in establishing it, consisting either of perjured testimony or a false will, produced before the court at the time of the hearing, and, further, that the devisee therein cannot be declared a trustee in favor of the heir in a suit in equity by the heir based on such fraud. The fraud here complained of consisted of producing this will to the court, introducing evidence establishing its due execution and in avoiding a disclosure of the alleged attempted revocation and fraudulent preservation thereof. All these were facts relating to the validity of the will, which was the very fact to be then determined by the court. This character of fraud comes within the same class as perjured testimony or the fraudulent production and proof of a false will previously forged. The only remedy for a fraud so committed is the remedy afforded by the probate statute; that is to say, a proceeding to contest the will and to revoke the probate thereof, which under section 1327 of the Code of Civil Procedure may be begun within a year after such probate. This short limitation is made in order to prevent the unsettling of titles and the reopening of contests over estates of deceased persons. These propositions are firmly established by the following decisions: *State v. McGlynn*, 20 Cal. 234, 271, 81 Am. Dec. 118; *Kieley v. McGlynn*, 88 U. S. 503, 22 L. Ed. 599; *Langdon v. Blackburn*, 109 Cal. 19, 41 Pac. 814; *Bacon v. Bacon*, 150 Cal. 483, 89 Pac. 317; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117; *Estate of Davis*, 151 Cal. 327, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105. It follows, therefore,

that the provisions of the will, as established by the probate thereof, would, in any event, operate to vest the ranch in the defendants. If the decree of distribution failed to dispose of it at all, the defendants could have the decree amended in that respect. And, as the probated will would be conclusive as to the disposition of the ranch made by the testator, the plaintiffs would have no interest therein which would entitle them to maintain any action or proceeding in relation to it. This is also true of the home place devised to Juan Camarillo by the will and distributed to him by the decree.

For all of these reasons, we think the nonsuit was properly granted.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

154 Cal. 628

In re GRUENDIKE'S ESTATE.
(L. A. 2,279.)

(Supreme Court of California. Dec. 15, 1908.)

WILLS (§ 496*)—CONSTRUCTION—DESIGNATION OF BENEFICIARIES—"TO HIS WIFE."

Testator provided that the part going to a nephew should be divided into three parts, "one-third to be paid to him, one-third to his wife, and one-third to his child." At the time of the execution of the will, the nephew had been married and his wife had procured a divorce and had remarried. Testator knew the facts. There was evidence that testator had been informed that the nephew intended to contract another marriage, but such marriage had not taken place. *Held*, that under Civ. Code, §§ 1325, 1340, providing that where, in applying a will, it is found that no person exactly answers the description of the beneficiary, any omission therein must be corrected, etc., the words, "to his wife," in the quoted clause, referred to the nephew's divorced wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1066; Dec. Dig. § 496.*]

Department 1. Appeal from Superior Court, San Diego County; N. H. Conklin, Judge.

In the matter of the estate of Jacob Gruendike, deceased. From a part of the decree of final distribution of the estate of the deceased, Charles D. Elfers and another appeal. Affirmed.

L. L. Boone, for appellants. Chas. C. Boynton and H. E. Doolittle, for respondent.

SHAW, J. This is an appeal from a part of the decree of final distribution of the estate of Jacob Gruendike, deceased.

The appeal concerns the interpretation of the third clause of his will. The testator was a bachelor. He was over 80 years of age at the time of his death, and left surviving a brother and three sisters and a large number of nephews and nieces; the appellant Abbott being one of the nephews. He left an estate of the value of something near \$300,000. After providing for the burial of his body and giving a legacy of \$1,000 to his

nephew Edwin Phillips, he devised the residue of his estate by the third clause of the will. This clause provides that the residue shall be equally divided between his brothers and sisters and all of his nephews and nieces living at the time of his death, each to take per capita and as a class; that is to say, a nephew or niece was to take the same share as a sister or brother. The appellant Abbott being one of the nephews, the effect of this clause, if it had not been qualified, would be to vest in him an equal share in the residue with the other nephews and nieces, brothers and sisters. The will, however, in the last sentence of the third clause provides with respect to Frank W. Abbott as follows: "The proportion going under this paragraph to my nephew, Frank Abbott, is to be divided into parts, one-third (1-3) to be paid to him, one-third (1-3) to his wife, and one-third (1-3) to his child." The appellant Elfers is the assignee from Frank Abbott of all of the estate and property covered by the phrase "one-third to his wife" in the above-quoted provision of the will.

Upon the face of the will this provision is entirely clear. It divides the portion going to Frank Abbott, into three parts, giving one part to him, another to his wife, and another to his child. It appeared, however, upon the hearing that at the time the will was made, and at the time of the death of the deceased, Abbott had no wife. The fact was that he had been married in the year 1883 to the respondent Effie A. Smith, and that in the year 1893 she obtained a divorce from him and afterwards married one Smith. Frank W. Abbott had never been married to any other person at the time of the death of the testator. The court decided that the person intended in the provision of the will above quoted by the term "his wife," was the respondent Effie A. Smith, and distributed to her one-third of the proportion otherwise going to Frank W. Abbott as a nephew. The appeal is from this portion of the decree. To explain the meaning of this phrase in the will and clear up the latent ambiguity, it was shown by extrinsic evidence that the deceased lived in the county of San Diego; that he knew of the marriage of Abbott and the respondent Effie A. Smith; that he had visited with them in Merced county some years prior to the divorce; that shortly after the divorce was granted in 1893, Abbott lived with him in San Diego for several months, was employed by him on one of his ranches; and that he was then informed by Abbott of the fact that Abbott had been divorced from his wife. The date of the execution of the will does not appear in the record, but it affirmatively appears that it was made long after the divorce and after the subsequent marriage of the divorced wife of Abbott, Effie A. Smith. Evidence was also given for the same purpose, on behalf of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the appellants, showing that he had been informed that Abbott also intended to contract another marriage, but there is no evidence that the testator was ever informed or believed that such marriage had taken place, and in fact no such marriage had occurred. Under these circumstances, it is argued that, since the testator knew that she was not then the wife of Abbott, he could not have referred to her as such, and could not have intended her by that reference. The fact that she was not then, in fact, the wife of Abbott, is not conclusive as to the intention of the testator to designate her by the phrase "to his wife." It is the testator's intention which is to be ascertained and which must prevail. He was over 80 years old at the time he made the will. The child referred to in the clause under consideration was the only child of Frank Abbott and the former wife, and he had been in the custody of his mother. It is not surprising that aged members of a family, in speaking of the divorced wife of a nephew who has not remarried, should refer to her as the wife of such nephew. The other members of the family, living with or near the testator, often referred to her as "Frank Abbott's wife." She had been so designated by them in his presence, but there is no evidence that he had thus described her. The provision itself indicates that, in the estimation of the testator, the character and family relations of Abbott were different from those of the other relatives mentioned, else he would not have thus divided and apportioned that particular legacy. The others were not thus treated. The same sentence refers to the boy as "his child," meaning the child of Abbott. As the testator's mind, for the time being, reverted to the situation of Frank Abbott, and became imbued with the desire to divert a part of the legacy from Frank and bestow it on those connected with and related to him instead, it would be natural at his age that the earlier conditions should vividly return to his memory and that he should refer to the former wife, the only person he had known in that relation, simply as "his wife," and to the only child as "his child." It is presumed that he intended thereby to refer to some person in being, and this is the most obvious and reasonable interpretation deducible from the circumstances and the context.

A will must be so construed as to give every expression some effect rather than so as to make any expression inoperative. Civ. Code, § 1325. If, in applying a will, it is found that no person exactly answers the description of the beneficiary, any omission in such description must be corrected, if the error of omission appears from the context, or from extrinsic evidence. Civ. Code, § 1340. Applying these rules, considering all the circumstances, and viewing the will, as

near as may be, from the situation of the testator, we are of the opinion that the trial court did not err in holding that the person intended by the words "one-third to his wife" was none other than Effie A. Smith, the former wife of Frank W. Abbott, and that the apparent omission should be supplied by correcting the phrase in question so as to make it read "one-third to his former wife."

The information given to the testator to the effect that Frank Abbott was contemplating a remarriage was communicated to him as mere vague hearsay, and was not likely to impress him seriously. No such marriage in fact occurred. It was shown that such important family matters as a marriage were usually communicated to those members of the family with whom the testator associated. The court below may reasonably have considered the evidence as to this information to be insufficient to prove that the testator believed that Abbott was about to marry again, or had remarried, and, because of such belief, made the provision for the new wife. In view of its decision, we must presume that this evidence was rejected or disregarded.

The part of the judgment from which this appeal is taken is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

154 Cal. 638

In re FRETWELL'S ESTATE.

CRABTREE v. FRETWELL et al.

(S. F. 4,884.)

(Supreme Court of California. Dec. 15, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 190*)—WIDOW'S ALLOWANCE—APPLICATION—DELAY.

That a family allowance to the estate of the deceased was not applied for until more than three years after letters of administration had been issued did not impair the widow's right thereto.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 703; Dec. Dig. § 190.*]

2. EXECUTORS AND ADMINISTRATORS (§ 194*)—FAMILY ALLOWANCE—TERM.

Code Civ. Proc. § 1406, declares that, if an estate is insolvent, the family allowance shall not be longer than for one year "after granting letters testamentary." Held that, where an allowance was not applied for until more than three years after administration granted, the fact that an order granting it provided that it should run for 12 months from decedent's death was a nonprejudicial irregularity.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 194.*]

3. EXECUTORS AND ADMINISTRATORS (§ 184*)—FAMILY ALLOWANCE—BAR OF RIGHT.

That a former administratrix loaned or gave to the widow without authority funds of the estate did not affect the widow's right to a family allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 184.*]

4. EXECUTORS AND ADMINISTRATORS (§ 106*)—LOAN TO WIDOW—ADMINISTRATOR'S LIABILITY.

An administrator is directly responsible to the estate for moneys improperly loaned to or expended for the benefit of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 433; Dec. Dig. § 106.*]

Department 2. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Application for family allowance by Annie S. Fretwell, as widow of Edwin Fretwell, deceased. From an order granting an allowance, Lotta M. Crabtree, a creditor, appeals. Affirmed.

See, also, 152 Cal. 573, 93 Pac. 283.

John Flournoy, for appellant. Barclay Henley, Crittenden Thornton, and Jas. K. Hawkins, for respondents.

HENSHAW, J. This is an appeal by a creditor from an order of family allowance made in favor of the widow of the deceased. The application for family allowance was made and granted more than three years after the letters of administration had been issued, but this fact, of course, did not impair the widow's rights. In *re Welch*, 106 Cal. 427, 39 Pac. 805. The court found that the widow had no income, that no order had been made exempting any of the property, and that the sum of \$150 per month was reasonable, and ordered a family allowance in that amount "commencing from the time of the death of said deceased and running for twelve months. This order is made without prejudice to another application for family allowance in case hereafter said estate shall turn out to be solvent." The court, for the purposes of the order which it made, treated the estate as insolvent. An objection is presented to the form of the order, in that it is made to continue one year from the death of the deceased, instead of from the time letters of administration were granted. Section 1466 of the Code of Civil Procedure declares that, in case of an insolvent estate, the allowance must not be longer than one year "after granting letters testamentary." But the irregularity here is without prejudice, since the order is limited in its operation to 12 months, and it cannot matter to appellant whether the 12 months began to run from the date of the death or from the date of the issuance of letters testamentary. In either case the result is the same, and, as the time has long since elapsed, the order couched in either form amounts to nothing more than a direction to the administrator to pay to the widow for her support the sum of \$1,800.

The principal contention of appellant is that to grant any family allowance was improper because the petitioner before mak-

ing application for a family allowance had received from the former administratrix of the estate nearly \$5,000 of the funds of the estate which she had not repaid. If it be a fact that the former administratrix of the estate loaned or gave to the widow, without authority, some \$5,000 of the funds of the estate, it cannot affect the widow's right to an order of family allowance. In such a case the administratrix would be directly responsible to the estate for the moneys thus improperly loaned or expended. But such advancements to the widow, even if made improvidently and without authority, cannot be held to operate as a bar to the right of a family allowance which the statute accords. Whether or not the present administrator would be entitled to set off the award of family allowance against the advancements already made is a matter entirely without the consideration of this case.

The order appealed from is affirmed.

We concur: BEATTY, C. J.; LORIGAN, J.

154 Cal. 679

GRUMBACH v. LELANDE et al. (L. A. 2,260.)

(Supreme Court of California. Dec. 18, 1908.
Rehearing Denied Jan. 14, 1909.)

1. MUNICIPAL CORPORATIONS (§ 590*)—LEGISLATIVE POWER—POWER OF CITY COUNCIL.

It will require a clear enunciation in the organic law of a city to lead to the conclusion that it was intended to deprive the council thereof of a portion of its legislative power, including the power of making and enforcing police regulations, as authorized by Const. art. 11, § 11.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1309; Dec. Dig. § 590.*]

2. INTOXICATING LIQUORS (§ 61*)—GRANT AND REVOCATION OF LICENSES—AUTHORITY OF POLICE COMMISSIONERS.

Section 95a, Los Angeles Freeholders' Charter (Laws 1903, p. 570, c. 6), added in 1903, providing that the board of police commissioners may grant, "under and in conformity to the ordinances" of the city, liquor permits, and may revoke such permits, etc., confers a limited and quasi judicial power on the board, but does not deprive the council of the legislative authority, vested in the municipal corporation, to license and regulate the liquor business, and, on compliance with the regulations prescribed by the ordinance, the duty of the board to grant a permit is ministerial, while, as to revocation of permits, the functions of the board are quasi judicial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 60; Dec. Dig. § 61.*]

3. MUNICIPAL CORPORATIONS (§ 611*)—POLICE POWER—REGULATION OF LIQUOR BUSINESS.

It is within the police power of a city to limit the conduct of the liquor or other businesses coming within the regulatory scope of the city, or to exclude such businesses from specified districts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1344; Dec. Dig. § 611.*]

4. CONSTITUTIONAL LAW (§ 296*)—DUE PROCESS OF LAW—REGULATION OF BUSINESS.

A regulation of the liquor business excluding it from a district where it is then in operation is not invalid because it impairs or destroys the business of those so located.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 296.*]

5. INTOXICATING LIQUORS (§ 15*)—ORDINANCES—REASONABLENESS—VALIDITY.

A municipal ordinance which prohibits the wholesale liquor business within described territory of the municipality, but which permits saloons and liquor selling restaurants to continue to operate in such territory, is not invalid on the ground that it is unreasonably discriminatory, in the absence of a satisfactory showing to that effect.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 15.*]

In Bank. Application for mandamus by Theodore Grumbach against H. J. Leland and others to compel the issuance of a wholesale liquor permit. Petition denied.

Isidore B. Dockweiler, Frank James, and C. W. Pendleton, amici curiæ, for petitioner. Leslie R. Hewitt, City Atty., Lewis R. Works, Asst. City Atty., for respondents.

HENSHAW, J. This is an original application for a writ of mandate, by which petitioner seeks to compel the clerk of the city of Los Angeles and the other proper municipal authorities to issue to him a permit and license to conduct a wholesale liquor establishment. The facts are the following: Ordinance No. 5746 (N. S.) of the city of Los Angeles defined a "wholesale liquor establishment," distinguishing it from a "retail liquor establishment," commonly designated a "saloon." It prescribed that no license should be issued to carry on either class of business until a permit in writing should have been granted by the board of police commissioners authorizing such issue and filed with the city clerk, and that such board "shall have power to issue such permits and revoke the same at any time." The ordinance further provided that the board of police commissioners should not grant a permit for a license for any retail liquor establishment, or for the transfer of any existing license for such establishment, to be conducted outside of a portion of the city of Los Angeles described therein. Petitioner conducted a wholesale liquor establishment under permit and license, as required by this ordinance at the time it was amended. The amendment made new boundaries for the inhibited territory or zone, and declared that the police commissioners should not grant any permit for the issuance or transfer of any retail liquor dealers', wholesale dealers', license, or restaurant liquor license, for any establishment to be conducted outside of the described portion of the city. The place of business of petitioner was situated outside of the described portion. The

ordinance was then further amended, so as to declare "that all permits heretofore granted by the said board of police commissioners for wholesale dealers' licenses for establishments to be conducted outside of the aforesaid portion of the city of Los Angeles shall continue until the first day of April, 1908, and thereupon all such permits shall expire and be of no further force or effect; and that it shall be unlawful for any person, firm or corporation to establish, conduct or maintain any wholesale liquor establishment outside of that portion of the city of Los Angeles hereinbefore described, after the first day of April, 1908." The petitioner, who had been conducting his business under a permit and license formerly granted, made application for a renewal thereof, and his application was refused, the refusal being based on the provisions of the amended ordinance above quoted. He seeks by mandate to compel their issuance.

The first proposition which he advances is that under the charter of the city of Los Angeles the board of police commissioners, and not the city council, are invested with plenary power over the matter in question. Upon this petitioner's argument is that the charter of the city of Los Angeles until 1903 vested the regulation of the liquor traffic in the city council, and that the police commissioners drew such power as they may have possessed in this matter from the grant of the city council, which in the original ordinance No. 5746 (N. S.) authorized the police commissioners to issue and revoke liquor permits at any time. It is pointed out that in 1903 (Laws 1903, p. 570, c. 6) the freeholders' charter of the city was amended and a new section added thereto, which section is numbered and reads as follows: "Sec. 95a. The board of police commissioners shall have power to grant permits, under and in conformity to the ordinances of said city, authorizing the city clerk to issue licenses to persons desiring to engage in the sale of liquors, and to revoke any such permit when it shall appear to the board that the business of the person to whom such permit was given is conducted in an illegal, disorderly, or improper manner. Without such permit no person shall engage in the business of selling liquor." Petitioner contends that the meaning and effect of this provision is, to confer upon, and vest in, the board of police commissioners exclusive jurisdiction with reference to the granting of permits authorizing the issuance of licenses to persons desiring to engage in the sale of liquors; that the city council is deprived of the power which formerly it had over the matter, and that its ordinance prescribing that after a certain date licenses shall no longer be issued is inoperative and void if it conflicts with, or is designed to curtail, the power of the board of police commissioners;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that this board has full power to grant permits, and that when a permit is so granted, it is the imperative ministerial duty of the clerk, upon payment of the required fee, to issue the license thereon. Could we construe section 95a as does petitioner, the conclusion at which he arrives would be irresistible, but this cannot be done. The legislative power of a municipality is usually vested in its mayor and city council. Regulatory ordinances in the exercise of the police power granted to all cities (Const. art. 11, § 11) constitute a most important part of its legislative functions. It would be unusual to find the council thus shorn of a portion of this power; and, while we are not to be understood as implying that this may not be done, it would require a clear enunciation in the organic law of a city to lead to the conclusion that it was intended to be done. This court recently had occasion to construe the charter of this city with reference to the constitutionality of the provisions therein contained for the initiative and referendum, and it declared that "the effect of the provisions of the Los Angeles charter as amended is to give the legislative power vested in the city [by the Constitution] to the council and mayor, subject to such control by the electors as is given to them by the initiative and referendum provisions." *In re Pfahler*, 150 Cal. 71, 84, 88 Pac. 270, 11 L. R. A. (N. S.) 1092. Section 95a itself makes recognition of the authority of the council by limiting the power of the police commissioners to grant permits, and declaring that the exercise of that power shall be "under and in conformity to the ordinances of said city." Article 1, § 2, subd. 13, of the charter (St. 1889, p. 455, c. 1) vests in the municipal corporation the power "to license and regulate the carrying on of any and all professions, trades, and occupations," and, as has been said, the general legislative control of these matters rests with the council and the mayor. A design to deprive those officers of the right to regulate the liquor traffic requires more complete expression than is found in section 95a. There is no inconsistency nor conflict in the provisions of the charter as we read it. Section 95a confers powers of a limited and quasi judicial nature upon the board of police commissioners. The power to grant permits is subordinate to the power of the council to make regulations and prescribe rules governing the conduct of the business. Where one has complied with the regulations and rules, the duty of the police commissioners to grant a permit is ministerial merely, and they may not arbitrarily refuse to perform it. In the matter of the revocation of permits actually granted their functions are quasi judicial. They act upon the individual case as it may be presented, and are empowered to revoke when it shall appear to them that the business of the person is conducted in an illegal, disorderly, or improper manner. It

would always be their duty to refuse to issue a permit or to revoke a permit already issued if the applicant for or the holder of the permit did not bring himself within the terms of the legally existing ordinances of the city bearing upon the matter.

Petitioner's second contention that the ordinance as to him is void in that its enforcement deprives him of property and vested rights without compensation or due process of law is without support in reasoning or authority. It is well settled that it is entirely within the police power to limit the conduct of the liquor or other businesses coming within its regulatory scope, or to exclude such businesses from specified districts. *In re Linehan*, 72 Cal. 114, 13 Pac. 170; *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; *White v. Bracelin*, 144 Mich. 332, 107 N. W. 1055; *Strauss v. City of Galesburg*, 203 Ill. 234, 67 N. E. 836; *Shea v. City of Muncie*, 148 Ind. 14, 46 N. E. 138. Moreover, where a liquor regulation excludes the conduct of a business from a given district in which such establishments are already in operation, it is no objection to the validity of the regulation that its effect is to impair or render valueless the business of those operating such establishments. *Mugler v. State of Kansas*,¹²³ 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *Newson v. City of Galveston*, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797; *Brown v. State*, 82 Ga. 224, 7 S. E. 915; *New Orleans v. Faber*, 105 La. 208, 29 South. 507, 53 L. R. A. 165, 83 Am. St. Rep. 232.

Petitioner finally urges that the ordinance is unreasonably and unjustly discriminatory, and therefore void. In this connection he points out that within the prohibited zone or territory there are, besides wholesale liquor establishments, saloons and restaurants. The ordinance permits these saloons and liquor selling restaurants to continue in operation while denying the same license and privilege to wholesale vendors of liquors; that if reasons can be shown for permitting the former classes to continue in existence, every such reason applies with greater force to the less obnoxious business of wholesale vending, or conversely, that if the design of the ordinance be to protect the residents of the district of the city from the presence of an annoying, disagreeable, or offensive business, there was more reason to suppress the saloon and the liquor selling restaurant than there was to put the wholesale business under the ban; that there is thus presented a clear case of unreasonable discrimination in violation of the general rules justifying the creation of such by-laws (*Ex parte Bohlen*, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618; *Los Angeles v. Cemetery Ass'n*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75; *Cooley on Const. Lim.* [7th Ed.] p. 280), as well as a violation of the particular provision of sub-

division 13, § 2, of the charter, which expressly prohibits such discrimination. The question thus presented is not without difficulty. The reasons which may have induced the council of the city to suppress the one class of business, while permitting the other, are not obvious. But, upon the other hand, there may have been reasons actuating the council, good and sufficient in themselves, though not clearly appearing from a mere reading of the ordinance itself. Thus, it is not improbable that the so-called wholesale liquor houses within the prohibited district were but adjuncts to retail grocery stores. The regulations governing the conduct of saloons forbid the presence at or about them of women or girls. These regulations do not apply to the wholesale houses, and it is conceivable that abuses may have sprung up from the sale to or use by women and girls of liquors purchased from such grocery stores. While designated "wholesale dealers," liquors are allowed to be vended by such houses in such small quantities as pints, and the presence of women and girls in grocery stores where liquor in such small quantity could be vended might have resulted in an evil not attached to the existence of the saloon, which by law all women and girls and children are forbidden to enter. It certainly is not made clear that good reason does not exist for the discrimination; and, in the absence of a satisfactory showing to this effect, a court leans to the upholding of such regulatory provisions.

For the foregoing reasons the petition is denied.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.

154 Cal. 685

MUZZY v. D. H. McEWEN LUMBER CO. (S. F. 5,055.)

(Supreme Court of California. Dec. 18, 1908.)

1. EXCEPTIONS, BILL OF (§ 32*) — APPEAL FROM ORDER—AUTHENTICATION OF PAPERS.

The proper method of authenticating the papers on appeal from an order is by bill of exceptions signed by the judge, and not by certificate of the clerk.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. § 40; Dec. Dig. § 32.*]

2. EXCEPTIONS, BILL OF (§ 56*)—AUTHENTICATION OF PAPERS—RULES—COMPLIANCE.

Under Sup. Ct. Rule No. 29 (64 Pac. xii), providing that, on appeal from orders of the superior courts, the papers and evidence used on the hearing must be incorporated in a bill of exceptions, except where another mode of authentication is provided by law, a certificate of the clerk, on appeal from an order, that the transcript contained true copies of the original papers on file in his office, all of which were used on the hearing, was insufficient, as failing to show that the transcript contained all of the papers used on the motion.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. § 94; Dec. Dig. § 56.*]

In Bank. Appeal from Superior Court, Sonoma County; T. C. Denny, Judge.

Action by H. B. Muzzy against the D. H. McEwen Lumber Company. From an order changing the place of trial on defendant's motion, and transferring the cause for trial to the county of defendant's residence, plaintiff appeals. Appeal dismissed.

T. T. C. Gregory and James W. Oates, for appellant. Aitken & Aitken, for respondent.

HENSHAW, J. This is an appeal by plaintiff from the order of the court changing the place of trial upon motion of defendant, and transferring the cause for trial to the county of defendant's residence. The action was to recover damages for breach of contract. Respondent on the appeal moves its dismissal, upon the ground that there is no bill of exceptions nor other authentication of the papers on appeal, as required by rule 29 (64 Pac. xii) of this court. The transcript contains the complaint, the notice of motion to change the place of trial, the supporting affidavit and demand for change of place of trial, filed with defendant's demurrer to the complaint. To these papers is appended the order of court granting the motion. There is no attestation nor authentication to any of these papers other than the certificate of the clerk to the effect that the transcript contains full and true copies of original papers on file in his office, "all of which were used on the hearing of said motion." That this is not a proper method of authentication may not be doubted. The proper method, of course, is by a bill of exceptions, certified to by the judge. Moreover, waiving the question of the power of the clerk, the authentication is incomplete; for while it states that these papers were used upon the hearing of the motion, it is nowhere made to appear that they were all of the papers, and thus additionally this certificate of the clerk is subject to the same objection considered fatal in *Shain v. Eikerenkotter*, 88 Cal. 13, 25 Pac. 966. There the papers embodied in the appeal bore the indorsement of the judge that they were read upon the motion. This court said that there was no bill of exceptions or other proper certification to show "that all of the papers used on the hearing in the court below are before us in this transcript." To this, however, respondent makes answer that his case comes within the exception noted in *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345, 639. But the case does not come within the exception noted in *Miller v. Lux*. It is there specifically pointed out that section 951, Code Civ. Proc., makes it the duty of a person appealing from an order to furnish this court with a copy of the order appealed from, and copies "of papers used on the hearing in the court below," which means, as construed in 88 Cal.,

supra, all of the papers used in the court below. It is said: "This rule was only intended to apply to those appeals in which the order is sought to be reversed because of matters alleged to be shown by affidavits or evidence used or taken upon the hearing of the court below." Such is precisely the case here presented. The motion was based upon at least one affidavit, and we are not advised by any authentication whether other affidavits were or were not before the trial court. The exceptional case illustrated by *Miller v. Lux*, supra, was upon an appeal from an order settling the accounts of the executors, and the point of attack was that the court had failed to charge the executors with interest upon money which it found had been improperly paid by them to the widow as a family allowance. It is manifest that this order, in the nature of a final judgment, was reviewable upon the face of the record itself, and for this reason constituted an exception to the general rule.

Such, as has been said, is not the situation presented upon this appeal, and the motion to dismiss is therefore granted.

We concur: SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.

(154 Cal. 663)

CRAGG v. LOS ANGELES TRUST CO.
(L. A. 2,165.)

(Supreme Court of California. Dec. 16, 1908.)

1. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé by the sudden starting of a passenger elevator as he entered, evidence held to support a finding that the starting of the elevator was due to the failure of the operator to leave the operating lever in a secure position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 969, 970; Dec. Dig. § 278.*]

2. NEGLIGENCE (§ 6*)—VIOLATION OF STATUTE OR ORDINANCE—EFFECT.

The violation of any valid statutory or municipal regulation established for the benefit of private persons is a sufficient breach of duty to sustain a private action for negligence brought by a member of the protected class, where the other elements of actionable negligence concur, and the violation of such statute or municipal regulation is conclusive evidence of negligence, where such violation is not excused by other evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.*]

3. MASTER AND SERVANT (§ 170*)—INJURY TO SERVANT—INCOMPETENCY OF FELLOW SERVANT—LIABILITY OF MASTER.

Under Civ. Code, § 1970, providing that an employer is not required to indemnify his employé for injuries through the negligence of a co-employé in the same general business, unless the employer fails to use ordinary care in the selection of a capable co-employé, an employer is liable to an employé for injuries from the mere negligence of a fellow servant, where he

failed to use ordinary care in the selection of such fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*]

4. MASTER AND SERVANT (§ 169*)—INJURIES TO SERVANT—COMPETENCY OF SERVANTS—LICENSING ELEVATOR OPERATORS.

Where, in an action for injuries to an employé by the sudden starting of a passenger elevator, the evidence showed that the starting of the elevator was caused by the neglect of the operator, that the employer violated a municipal ordinance providing for the examination and licensing of operators of elevators and prohibiting the employment of unlicensed persons, and that the operator was not licensed, and there was no evidence excusing a violation of the ordinance, there was evidence of negligence of the employer in the selection of the operator authorizing a recovery, though the employé and the operator were fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 334, 344; Dec. Dig. § 169.*]

5. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—EMPLOYMENT OF FELLOW EMPLOYÉ—DELEGATION TO FELLOW SERVANT.

The duties of an employer which are personal to him, and which include the duty of using ordinary care in the selection of fellow servants, cannot be delegated to an employé, and, when such duties are confided to an employé, such employé in the performance of such duties is the representative of the employer, and not a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 420; Dec. Dig. § 185.*]

6. MASTER AND SERVANT (§ 281*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for injuries to an employé by the sudden starting of a passenger elevator, evidence held to support a finding that the plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 987; Dec. Dig. § 281.*]

7. PLEADING (§ 11*)—COMPLAINT—PLEADING EVIDENCE.

Under the California system of pleading, it is improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

8. MASTER AND SERVANT (§ 264*)—INJURY TO SERVANT—COMPLAINT—EVIDENCE—ADMISSIBILITY.

In an action by an employé for injuries by the sudden starting of a passenger elevator, through the negligence of the employer in not employing a competent operator, a municipal ordinance requiring the examination and licensing of operators and prohibiting the employment of unlicensed persons, accompanied by proof that the operator was unlicensed, was admissible, though not pleaded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 867; Dec. Dig. § 264.*]

9. MUNICIPAL CORPORATIONS (§ 122*)—ORDINANCES—PRESUMPTIONS—CONTINUANCE.

Where a municipal ordinance is introduced as evidence of the duty of a party in the selection of employés, it is not necessary for the adverse party to show that it had not been repealed, for the presumption in the absence of evidence is that it continued in force.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 284; Dec. Dig. § 122.*]

10. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR — EXAMINATION OF WITNESSES — STRIKING OUT UNRESPONSIVE ANSWERS.

Where an answer of a witness was a complete answer, and also contained matter not responsive to the question asked, the striking out of the unresponsive matter was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4140; Dec. Dig. § 1048.*]

11. EVIDENCE (§ 471*)—OPINIONS—FACTS OR CONCLUSIONS.

In an action for personal injuries by the sudden starting of a passenger elevator, the statement of a witness that plaintiff was at the time of the accident in the possession of his faculties, given in response to the question whether plaintiff was holding on like a man who was hurt or a man in the possession of his faculties, was objectionable as a mere conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2167, 2168; Dec. Dig. § 471.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Allen Cragg against the Los Angeles Trust Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Hunsaker & Britt, for appellant. Wellborn & Wellborn, for respondent.

ANGELLOTTI, J. This is an appeal by defendant from a judgment and order denying a new trial in an action brought by plaintiff, an employé of defendant, to recover damages on account of personal injuries sustained in the falling of an elevator in defendant's building, alleged to have been due to the negligence of defendant. The action was tried by the court, without a jury, and the principal claim of defendant on this appeal is that the evidence is insufficient to sustain the findings in several respects.

The allegation of negligence in the complaint as amended was as follows: "That on said 26th day of October, 1906, * * * as plaintiff entered said elevator * * * said defendant negligently allowed and caused said elevator suddenly and unexpectedly to be abruptly and improperly started in such a manner as to, and defendant did thereby, precipitate plaintiff against the wall of the shaft in which said elevator ascended and descended, and crushed said plaintiff between said elevator car and wall; * * * that plaintiff is informed and believes, and therefore alleges, that said negligence consisted in hiring, and causing and permitting to operate said elevator, an inexperienced, and unsafe operator or elevator boy, who left his station in said car and directed and permitted plaintiff to enter the same when it was not, by reason of the condition of the machinery operating it, and of the starting mechanism of it, and the condition the same was left in by said operator, safe so to do, all of which caused said car to start as alleged." The trial court found

in accord with this allegation, and that defendant was guilty of negligence in hiring and permitting to operate said elevator, such inexperienced, inexperienced, and unsafe fellow servant, and also that the negligence of defendant was the cause of the injury to plaintiff. These findings are attacked as wanting sufficient support in the evidence.

Plaintiff was a janitor in defendant's employ, in its building on the corner of Second and Spring streets, in Los Angeles. It was one of his duties early each morning to take down to the lower floor a large can in which had been placed the waste paper and refuse collected from the various offices and halls in his charge, and empty the same into a large box kept for that purpose. For this purpose, he was authorized to use the two elevators maintained and operated by defendant in said building for the accommodation of its tenants. He was engaged in the performance of this duty at the time of the accident. The evidence shows that he approached the elevator shaft on the second floor with his garbage can as one of defendant's two elevators came down the shaft and stopped at the second floor. The operator, a young man named Eagle, who had been in the employ of defendant only a few days, opened the door, and stepped out into the hallway to leave a paper at an office door some 50 feet away. It appears to have been his custom to deliver papers at various offices. He told plaintiff that he would take him down as soon as he delivered this paper, and, as he stepped out of the elevator, plaintiff stepped into it with his can. For some reason, the elevator suddenly started down, going to the bottom, and in some way plaintiff was severely injured during the progress downward, among other things his lower jaw being fractured in two places. The evidence clearly showed that there was no defect of any kind in the machinery itself. The elevator was operated by means of a lever in the car, thrown in one direction along a quadrant to move the car up, and in the other direction to move it down. When the lever was at the point midway between the two ends of the quadrant—in other words, on the center—the car would not move in either direction. When squarely on the center, a sort of locking device held the lever so it could be moved in neither direction without releasing or lifting a latch located at the handle of the lever. The evidence was of such a nature as to warrant a conclusion that Eagle, when he stopped the car at the second floor on the occasion in question, and left it for the purpose of delivering the paper, did not leave the lever squarely on the center and locked, but negligently left it to one side in such a position that, when the plaintiff stepped into the car with his garbage can, the weight thus suddenly imposed, and the probable jarring or shaking result-

ing therefrom, caused the lever to slip along the quadrant and put the car into motion. The machinery being in perfect condition, there is no other theory accounting for the starting of the car, except the theory suggested that plaintiff himself moved the lever by striking it with his can or pressing against it in some way. It seems unlikely that this could have happened if the lever had been squarely on the center, and plaintiff testified that the car commenced to move the moment he put his can on the floor thereof. We are satisfied that the trial court was warranted in concluding that the starting of the car was due to the failure of Eagle to leave the operating lever in a secure position.

There was an ordinance of the city of Los Angeles enacted in April, 1905, providing for the examination and licensing of operators of passenger elevators. It made provision for examination by competent officers of all persons desiring to operate any such elevator, as to age, knowledge of mechanical construction, and principal parts of passenger elevators, their practical experience in operating the same, and their ability and competency to properly operate them. It provided for the issuance of a license to such as were found competent, and made it unlawful for any one to operate any such elevator unless licensed to do so. It further made it unlawful for the owner in charge and control of any building to employ or permit any person to operate a passenger elevator therein who was not duly licensed to do so under the provisions of the ordinance. This ordinance was introduced in evidence by plaintiff, and it was further shown that Eagle had never been licensed to operate an elevator, and that defendant, through the superintendent of its building, had hired him without making any inquiry in regard thereto. This, according to the record, constituted the only substantial evidence tending to show incompetency on the part of Eagle, except in so far as such incompetency may have been shown by the circumstances of the accident, or negligence on the part of defendant in hiring him.

There can be no doubt under the decisions in this state, and in most of the other states where the question has arisen, that the failure of the defendant to comply with the provisions of the ordinance by hiring and permitting to operate an elevator one who was not licensed was negligence per se. The general rule, which is the one adopted in California, is thus stated in 1 Shearman & Redfield on Negligence, in section 13: "The violation of any statutory or valid municipal regulation, established for the benefit of private persons, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence brought by a person belonging to the protected class if the other elements of actionable negligence concur." It is further said in the same section

that it is the opinion of the writers that the true rule is that the violation of such a statute or ordinance is presumptive evidence of negligence, which, if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive, and, as an example of what is meant by the expression as to excusing evidence, it is said that, under special circumstances, a jury might excuse an omission to give signals required by a statute as prudent under those circumstances. No attempt was made in this case to show anything in the way of excuse for failure to comply with the ordinance, and we need not consider that branch of the rule. As said above, the quotation from Shearman & Redfield states the rule adopted in this state. See *Siemers v. Eisen*, 54 Cal. 418; *Driscoll v. Market Street, etc., Ry. Co.*, 97 Cal. 553, 565, 32 Pac. 591, 33 Am. St. Rep. 203; *McKune v. Santa Clara, etc., Co.*, 110 Cal. 480, 485, 42 Pac. 980.

Both the allegations of the complaint and the findings of the court imply negligence on the part of defendant in the operation of the elevator by Eagle, as well as negligence in the hiring and selection of Eagle as such operator. As we have seen, the evidence was sufficient to warrant the conclusion that the starting of the elevator at the time of the accident was caused by the negligence of Eagle in the operation thereof. Such negligence on Eagle's part would ordinarily, as to third persons injured thereby, constitute negligence on the part of his employer, the defendant. It is assumed by plaintiff's counsel, however, in response to defendant's claim to that effect, that plaintiff and Eagle were fellow servants, "employed by the same employer in the same general business," and defendant therefore claims that it cannot be held responsible to plaintiff for the negligence of Eagle. We will assume for the purpose of this case that Cragg and Eagle were fellow servants, employed by the same employer in the same general business. Our statutory provision on this subject (section 1970, Civ. Code) was at the time of this accident as follows: "An employer is not bound to indemnify his employee for losses suffered by the latter * * * in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee." (The italics are ours.) Under this statutory provision, an employer is liable to an employé for injuries resulting from the mere negligence of a fellow servant, where he had failed to use ordinary care in the selection of such fellow servant. The ordinance and its violation in the selection of Eagle constituted, upon the record before us, conclusive proof of negligence on the part of defendant in the selection of the culpable

fellow servant, rendering the defendant liable to any other employé for damages caused by his negligence—in other words, making the negligence of such culpable servant its own negligence as to other employés, as well as to other persons.

The suggestion that the selection of Eagle was made by a fellow servant of plaintiff, in that Eagle was directly selected and employed by the manager of the building, who had full charge thereof for defendant, and hired all the help therein, is without force. It is too well settled to admit of discussion that such duties of an employer as are considered personal to him, among which is the duty to use ordinary care in the selection of fellow servants, cannot be delegated to another servant, and that, when such duties are confided to another employé, such employé, in the performance of those duties, is the representative of the employer, and not a fellow servant. See *Skelton v. Pacific Lumber Co.*, 140 Cal. 507, 511, 74 Pac. 13, and cases there cited. We think that there was sufficient evidence to warrant the trial court in finding that the injuries to plaintiff were caused by the sudden starting and progress downward of the elevator under the circumstances shown, and that plaintiff was not guilty of any negligence contributing thereto.

It is claimed that the court committed several errors on the trial. The ordinance hereinbefore referred to was not alleged in the complaint; plaintiff simply alleging negligence in the manner we have specified. It is urged that it was necessary to plead the ordinance in order to make it available as evidence, and that the trial court therefore erred in admitting it over the objections of defendant. The precise question thus presented appears never to have been decided by this court, but it appears to us that upon elementary principles it was admissible without having been pleaded. The cause of action here alleged was not a violation of the ordinance, but the negligence of the defendant, and the ordinance was simply evidence offered to show such negligence. Under our system of pleading, it is both unnecessary and improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action. In *Brasington v. South Bound R. R. Co.*, 62 S. C. 325, 40 S. E. 665, 8 Am. St. Rep. 905, an action for damages for injuries for falling into an excavation left unguarded in violation of the provisions of an ordinance where the complaint simply alleged negligence in leaving the excavation unguarded and did not properly allege the existence of any ordinance, it was held that the ordinance was admissible to show the alleged negligence, and the court quoted approvingly from an earlier case as follows: "This is not an action to enforce the performance of any duty imposed by an ordinance of the city of Charleston, or to enforce the payment of any tax or penalty imposed by such ordinance, but the cause of action

here is the negligence of the defendant company resulting in the death of the intestate, and the ordinances of the city are only referred to as showing such negligence." In *Bragg v. Met. St. Ry. Co.*, 192 Mo. 331, 350, 91 S. W. 527, 532, where a similar question was presented, it was said: "Should it [the ordinance] be excluded because not pleaded? We think not. Where a suit is based on an ordinance, it should be pleaded, * * * but, where the ordinance is merely sought to be introduced as an evidential fact, it would seem on principle that it need not be pleaded. And this is so because it is necessary to plead only the ultimate and substantial facts necessary to constitute the cause of action." See, also, *Riley v. Wabash, etc., Ry. Co.*, 18 Mo. App. 385. These cases appear to us to state the true rule. Some of the cases cited by counsel for defendant were cases where it was not attempted to allege any negligence other than the violation of an ordinance, and the ordinance was not well pleaded. If the allegation as to the ordinance was stricken out, nothing remained to show negligence. Of these *Lake Erie & W. R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488, is an example. In such cases it is held that the ordinance must be properly pleaded, and that the complaint should also aver that the ordinance was in force at the time of the occurrence of the act complained of. Such ruling does not appear to us to be inconsistent with our conclusion. Treating the ordinance simply as evidence of the obligation resting on defendant in the matter of the selection of employés, it was not necessary for plaintiff to show that it had not been repealed. The presumption, in the absence of evidence, was that it was still in force.

What we have said upon this point is also a sufficient answer to the claim that the testimony showing that Eagle had never been licensed should not have been admitted. There would be much force in some of the claims of learned counsel for defendant in relation to the effect of this ordinance if the allegations of the complaint and the findings did not sufficiently show any negligence other than the selection of an incompetent elevator operator; but, as we have said, they do sufficiently show negligence in the operation of the elevator by the operator, for which negligence defendant, by reason of its failure to use ordinary care in the selection of such operator, is responsible to any other employé injured thereby without fault on his own part. There was no prejudicial error in striking out the concluding portion of an answer given by witness Macomber to a question asked him on cross-examination by defendant's counsel. The portion stricken out was in no way responsive to the question, and the portion allowed to remain constituted a complete answer.

There was no error in striking out an answer given by witness Collon to the somewhat vague question: "What was Cragg do-

ing holding on to the grill work? Was he holding on like a man who was hurt, or a man who was in the possession of his faculties?" Collon was in the lobby on the lower floor, adjacent to the elevator shaft, and had testified that he saw the elevator coming down, and the plaintiff, therein, endeavoring to hold on to the grill work of the elevator, with his feet above the bottom of the car, until, as the elevator nearly reached the bottom, he fell to the floor of the cage. He answered the above question: "Well, I should say he was in possession of his faculties." We think it manifest that this was a mere conclusion of the witness upon a matter concerning which, under the circumstances, he was in no better condition to judge than would be any other person to whom the acts of plaintiff, as detailed by Collon, might be related, and that the rule of *People v. Manoggian*, 141 Cal. 592, 75 Pac. 177, and other like cases has no application.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

(154 Cal. 672)

BOOKER v. CASTILLO et al. (L. A. 2,191.)
(Supreme Court of California. Dec. 16, 1908.)

1. HUSBAND AND WIFE (§ 262*)—"COMMUNITY PROPERTY"—PRESUMPTIONS—STATUTORY PROVISIONS.

Under the provisions of Civ. Code, § 164, before the amendment of March 19, 1889 (St. 1889, p. 328, c. 219), that all property acquired after marriage by a husband or wife, or both, except by gift, bequest, devise, or descent, is community property, the presumption was that property conveyed to a husband or wife after their marriage by other than a deed of gift was community property, which presumption could be overcome only by showing that it was acquired by gift, bequest, devise or descent, which, under sections 162 and 163, would make it their separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1343, 1344; vol. 8, p. 7608.]

2. HUSBAND AND WIFE (§ 114*)—COMMUNITY PROPERTY—PRESUMPTIONS—STATUTORY PROVISIONS.

The amendment of March 19, 1889 (St. 1889, p. 328, c. 219), to Civ. Code, § 164, providing that property conveyed to a married woman by a writing shall be presumed to be her separate property, and that the presumption shall be conclusive in favor of a purchaser or incumbrancer in good faith for a valuable consideration, was not retroactive.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 395; Dec. Dig. § 114.*]

3. HUSBAND AND WIFE (§ 262*)—ACTION BY HUSBAND TO RECOVER LAND CONVEYED BY WIFE—COMMUNITY PROPERTY.

The amendment of March 3, 1893 (St. 1893, p. 71, c. 62), to Civ. Code, § 164, providing that where married women have conveyed land acquired prior to May 19, 1889, the husband, his heirs, or assigns shall be barred from suing to show that the land was community property, or to recover it after July 1, 1894, and

the amendment of March 4, 1897 (St. 1897, p. 63, c. 72), making the provision applicable where a wife shall thereafter convey, and providing that, as to future conveyances, the action must be commenced within a year from the filing for record of the conveyances, were simply statutes of limitation, and did not change the presumption that land conveyed to a wife before the amendment of March 19, 1889 (St. 1889, p. 328, c. 219), which took effect May 19, 1889, by other than a deed of gift, was community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

4. STATUTES (§ 199*)—CONSTRUCTION—"CONVEY"—"CONVEYED"—"CONVEYANCES."

The words "convey," "conveyed," and "conveyances," as used in the amendments of March 3, 1893 (St. 1893, p. 71, c. 62), and March 4, 1897 (St. 1897, p. 63, c. 72), import a transfer of the title, according to their ordinary meaning when used in reference to real property, and the amendments do not apply to a married woman's mortgage on land to secure a debt, a mortgage being merely a lien which transfers no title in view of Civ. Code, § 2872, defining a lien; section 2877 providing that mortgages shall be subject to all the provisions of the chapter (on liens), and section 2888 declaring that a lien transfers no title in the property subject thereto.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 199.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1570-1575; vol. 8, p. 7618; vol. 2, pp. 1575-1584; vol. 8, p. 7619.]

5. MORTGAGES (§ 1*)—CONSTRUCTION—"CONVEYANCES."

Civ. Code, § 1215, defining the term "conveyance," as used in the recording act, to be any instrument in writing by which any estate or interest in real property is mortgaged, etc., applies only to the recording act, and does not make a mortgage a conveyance of real property in any other sense.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1; Dec. Dig. § 1.*]

Department 1. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by L. W. Booker, executor of Tennessee A. Andrews, against Gregorio Castillo, whose true name is Gregorio Valencia, and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Wm. Mallagh and Wm. Shipsey, for appellants. R. V. Bouldin and Carpenter & Gibbons, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from a judgment and an order denying their motion for a new trial in an action commenced by plaintiff on June 12, 1905, to have it determined that the estate of his testatrix is the owner of a tract of land containing some 160 acres in San Luis Obispo county, and that defendants' claims thereto are without right. Plaintiff's claim, sustained by the findings and judgment, is that the estate of Mrs. Andrews owns the whole property. The defendants' claim is that such estate owns only an undivided eight-twelfths thereof; that four of the de-

fendants, surviving children of Juan Castillo, deceased, each owns an undivided one-twelfth; and that the whole property is subject to administration in the matter of the estate of Juan Castillo, of which one of said children, Graciano Castillo, is administrator.

The material facts are clearly set forth in the findings of the trial court. Plaintiff's claim is based entirely on a sheriff's deed executed after sale in foreclosure proceedings on a mortgage given on the interest of Gorgonia Valencia in said property by the administrator of her estate on order of the court duly made in the administration of her estate. It was authorized to be given and was given to secure a loan of \$1,100, made by plaintiff's testator, Mrs. Andrews, to enable the administrator of Mrs. Gregorio Valencia's estate to satisfy a foreclosure decree on a prior mortgage on the property, given by her and her husband, Gregorio Valencia, on November 9, 1895, to one B. Sinsheimer, and assigned to the Andrews Banking Company, and the money loaned was used for the authorized purpose. The mortgage of November 9, 1895, was given to renew a former mortgage given by the same parties on December 2, 1889, which had been given to renew a mortgage on the same property executed to Sinsheimer by Gorgonia alone on December 4, 1883, while she was the wife of Juan Castillo. It is not disputed by defendants that the sheriff's deed vested in the estate of Mrs. Andrews whatever interest Gorgonia Valencia's estate had in the property; the claim being that, as to an undivided four-twelfths thereof, neither Gorgonia nor her estate ever had any interest. From July 5, 1860, to October 6, 1884, Juan Castillo and said Gorgonia were husband and wife. This relation was terminated on the last named date by the death of Juan. For at least 10 years next preceding his death, they, with their children, resided on this property. During this time, viz., on October 17, 1882, one Joaquin Dughi made and delivered to said Gorgonia, the wife, a deed purporting to grant, bargain, sell, and convey the property to her for the expressed consideration of \$650. Accepting the theory most favorable to plaintiff, said Dughi was at the time of the execution of this deed the owner of the property. It is not intimated that the purchase price was not paid from community funds. The only evidence on the question is the deed itself. No conveyance of the property was ever made by Juan to his wife. Juan left six children, two of whom (Juanita and Ellnora) died before Gorgonia, never having attained the age of majority, married, or had issue. The other four children are defendants here. Letters of administration on the estate of said Juan were issued to Graciano Castillo, one of said children, who is both personally and as such administrator a defendant here, and said estate is still pending, unsettled and

undistributed. From the time of Juan's death to her marriage with Gregorio Valencia, February 18, 1886, Gorgonia, with her children by Juan, continued to reside on this property. From the death of Gorgonia, December 27, 1895, her surviving husband, Gregorio, with her surviving children by Juan, except Graciano, and her children by Gregorio, continued to reside thereon.

If the property at the time of the death of Juan was community property, Gorgonia then succeeded to six-twelfths thereof as surviving wife, and subsequently to the two-twelfths of the children Juanita and Ellnora, who died pending administration of their father's estate, as hereinbefore specified, and the remaining four-twelfths belonged to the four surviving children of Juan. Plaintiff's claim that the estate of Gorgonia had any greater interest than an undivided two-thirds is necessarily based on the contention that the property must here be regarded as having constituted separate property of Gorgonia at the time of the death of Juan Castillo.

Upon the foregoing facts, it is clear that it must be held that the property was community property at the time of the death of Juan, October 6, 1884, and that the wife's interest therein up to that time was only such interest as she would succeed to upon his death. Prior to the adoption of the amendment of March 19, 1889 (St. 1889, p. 328, c. 219), to section 164 of the Civil Code, the presumption was that property conveyed to either husband or wife after their marriage by a conveyance other than a deed of gift was community property (see *Nilson v. Sarment* [Cal.] 96 Pac. 315, and cases there cited), and this presumption could be overcome only by a showing that the property was in fact acquired by the spouse in such a way as to make it separate property under the provisions of sections 162 and 163 of the Civil Code. As we have said, there was no attempt to make any such showing in this case, and the presumption that it was community property is therefore controlling. The amendment of March 19, 1889, to section 164 of the Civil Code, changed this presumption by adding to the section the words, "but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property," and provided that such presumption should be conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration. As to this amendment, it was said in *Nilson v. Sarment*, supra: "It is thoroughly settled that the amendment of 1889 is not retroactive, and has no application to property acquired by husband or wife before its enactment." This statement is fully supported by the authorities. *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95; *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103; *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132. There was

no further change in the law until March 3, 1893, when section 164 was again amended. From what has been said, it is clear that up to this time the wife's only interest in the property was such as she had acquired under the laws of succession from her husband, Juan, and from her two children who had died pending the administration of his estate.

On March 3, 1893, section 164 of the Civil Code was again amended by the addition of the following: "And in cases where married women have conveyed real property, which they acquired prior to May nineteenth, eighteen hundred and eighty nine, the husbands, or their heirs or assigns, of said married women shall be barred from commencing any action to show that said real property was community, or to recover said real property from and after July first, eighteen hundred and ninety four." St. 1893, p. 71, c. 62. On March 4, 1897, this provision was amended in such a way as to make it applicable to future, as well as past conveyances, by inserting the words "or shall hereafter convey," and by providing that as to future "conveyances" the action must be commenced within "one year from the filing for record in the recorder's office of such conveyances. * * *" St. 1897, p. 63, c. 72. Neither of these amendments purported to change the presumption arising out of a conveyance made to a married woman prior to May, 1889, when the amendment to March, 1889, took effect, and both were simply statutes of limitation. It was said in *Peiser v. Griffin*, 125 Cal. 9, 13, 57 Pac. 690, speaking of the amendment of 1893: "This is a perfectly valid statute of limitations fixing the time within which an action to avoid such a past conveyance of the wife must be brought."

We do not consider it necessary to discuss certain constitutional objections made by defendants to these provisions, which it is said were not brought to the attention of the court in *Peiser v. Griffin*, *supra*, for we are of the opinion that neither is applicable under the facts of this case. We are satisfied that neither provision has any application to a case where the married woman has simply purported to mortgage property as security for a debt. The language of the provision is "where married women have conveyed real property," etc., "where married women have conveyed or shall hereafter convey real property," etc., and "as to conveyances," etc. The words "conveyed," "convey," and "conveyance" when used in reference to real property ordinarily import a transfer of the title. With us a mortgage is a mere lien, which transfers no title to the property subject to the lien. Civ. Code, §§ 2872, 2877, 2888. There is nothing in the language of section 164 of the Civil Code, as amended, to indicate that these words were used therein in a different sense. Plaintiff's counsel points to section 1215 of the Civil

Code in support of his claim that a mortgage is a conveyance within the meaning of section 164 of the Civil Code, but, as was said in *Stewart v. Powers*, 98 Cal. 514, 518, 33 Pac. 486, "this section defines the term 'conveyance' only 'as used' in the recording act, and does not imply that a mortgage is in fact a conveyance of real property, but rather the contrary; for if it were a conveyance, and so regarded and understood, it need not have been included in the definition." We can find no warrant for extending the effect of this statute of limitations to make it include cases not fairly within the meaning of the language used. It must therefore be held that at the time of her death the wife had not conveyed the property, and that up to that time the statute had no application.

As we have said, there was a mortgage executed by the administrator of the estate of the deceased wife, under order of the court having jurisdiction of her estate for purposes of administration, a foreclosure thereof, and a sheriff's deed to plaintiff, as purchaser at the sale. It may well be doubted whether the amendments under consideration can be construed as applying to transactions of the legal representative of a wife, after her death. But, if we concede that they are applicable to such transactions, it cannot avail plaintiff. What we have said as to the mortgages executed by the wife is equally applicable to the mortgage executed by the administrator. If the sheriff's deed executed after sale on foreclosure of the mortgage is regarded as a conveyance by the wife, plaintiff is not in position to derive any benefit from this statute of limitation, for the statute had not run at the time of the commencement of this action. As to conveyances made after the amendment of 1897, the time prescribed when the husband, his heirs, or assigns would be barred was "from and after one year from the filing for record in the recorder's office of such conveyances respectively." It does not appear when this sheriff's deed was filed for record, but it does appear that it was not executed and delivered until April 15, 1905, and that the amended complaint in this action was filed within five months thereafter.

In view of our conclusion on these matters, it is unnecessary to consider other reasons advanced by defendants why the amendments of 1893 and 1897 are not applicable here. For the reasons stated, they do not bar defendants from showing that the property was community property of Juan Castillo at the time of his death, or from asserting their rights therein as such community property. It follows that the estate of Mrs. Andrews acquired no interest in the property by virtue of the foreclosure proceedings, and the deed based thereon, other than such interest as the surviving wife, Gorgonia, has acquired under the law of succession, *viz.*, an undivided eight-twelfths; that the surviving children of said Juan and

said Gorgonia, viz., defendants Angelita Castillo, Graciano Castillo, John Castillo, and Joseph Castillo, each own an undivided one-twelfth thereof, and the whole property is subject to administration in the matter of the estate of Juan Castillo, deceased.

In view of the findings of ownership of the property in the estate of Mrs. Andrews, and the right of possession thereto of the executor of her will, we do not feel warranted in directing a judgment in favor of defendants on the findings.

The judgment and order denying a new trial are reversed.

We concur: SLOSS, J.; SHAW, J.

154 Cal. 632

WELDON v. ROGERS et al. (L. A. 2,--1.)

(Supreme Court of California. Dec. 15, 1908.
Rehearing Denied Jan. 14, 1909.)

1. APPEAL AND ERROR (§ 1225*)—AFFIRMANCE—LIABILITY ON UNDERTAKING.

An ex parte judgment against defendant on an undertaking given under Code Civ. Proc. § 942, to stay proceedings on his appeal from an order refusing to vacate an order for an execution on an old judgment, awarded on affirmance of the order, is void, where he did not sign the undertaking, no new proceeding or action was instituted against him, and no summons, notice, or other process was served upon him.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1225.*]

2. APPEAL AND ERROR (§ 1236*)—UNDERTAKINGS—JUDGMENTS—VALIDITY.

Code Civ. Proc. § 942, authorizes an undertaking to stay proceedings on an appealed judgment or order directing the "payment of money," and provides for an ex parte judgment or order. Section 685 authorizes a court to allow a judgment to be carried into execution after the lapse of five years. The superior court, under section 685, ordered execution to issue on an old judgment against defendant, specifying the amount thereof, the amount of interest, and the total amount due. Defendant appealed from an order refusing to vacate such order and refusing to quash the execution, and furnished an undertaking under section 942 in double the amount of the judgment, providing that, on affirmance of the order appealed from, defendant would pay the "amount directed to be paid" by such order. Held, that the appeal was not from an order directing the "payment of money," and did not authorize an undertaking under section 942; the order allowing the execution being unauthorized so far as it purported to direct the payment of money, so that no judgment could properly be entered on the undertaking against the signers or against defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4778-4784; Dec. Dig. § 1236.*]

3. APPEAL AND ERROR (§ 485*)—STAY OF PROCEEDINGS.

Under the express terms of Code Civ. Proc. § 949, on the giving of an undertaking under section 941 on appeal from an order refusing to vacate an order allowing an execution on an old judgment, proceedings on the order were stayed so far as there could be any proceedings upon such order, but proceedings on the judgment

and the execution were not, and could not be, stayed thereby.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 485.*]

4. APPEAL AND ERROR (§ 1237*)—UNDERTAKING FOR SUPERSEDEAS—HOW ENFORCED.

An undertaking on supersedeas ordered by the Supreme Court could be enforced by action only, and not by a summary judgment, without process or notice as specially provided in case of an undertaking given under Code Civ. Proc. § 942, on appeal from a money judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1237.*]

Department 1. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Sophie B. Weldon, T. J. Weldon's executrix, against Ralph Rogers and others. From a judgment against defendant and his sureties on an undertaking upon appeal, they appeal. Reversed.

See, also, 151 Cal. 432, 90 Pac. 1062.

Rehearing denied; Beatty, C. J., dissenting.

McNutt & Hannon, for appellants. Louis Luckel, for respondent.

SHAW, J. Appeals are here presented from a judgment of the superior court, entered, ex parte, against Ralph Rogers, defendant in a former judgment, and Mabel Bailey Rogers and Hugh Glassell as sureties in an undertaking, given upon a former appeal in the cause for the purpose of securing a stay of proceedings. See Weldon v. Rogers, 151 Cal. 432, 90 Pac. 1062, decided in this court June 22, 1907. On April 2, 1891, a judgment was entered in the superior court for \$3,979.15 in favor of T. J. Weldon against Ralph Rogers. This judgment remains unpaid. On April 10, 1905, on motion of the present respondent, who was then and is now acting as executrix of the estate of T. J. Weldon, deceased, an order was made in that cause the material part of which is as follows, to wit: "It is now therefore ordered that execution issue, and that the said judgment be enforced in favor of Sophie B. Weldon, executrix of the last will and testament of said T. J. Weldon, deceased, plaintiff herein, and against the defendant Ralph Rogers, for the sum of \$3,979.15, with interest from April 2, 1891, at the rate of 7 per cent. per annum, now amounting to \$7,879.44." Ralph Rogers moved the said court to set aside this order and recall and quash said execution, and on May 22, 1905, the court made an order denying said motion. From the latter order said Rogers appealed, giving the usual \$300 undertaking on appeal, under section 941, Code Civ. Proc. Upon this undertaking, he applied to this court for a supersedeas staying proceedings on the judgment and execution aforesaid. On October 16, 1905, this court denied the said application. Thereafter, on October 23, 1905, the undertaking now in question,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

executed by Mabel Bailey Rogers and Hugh Glassell, but not by Ralph Rogers, was filed in the superior court. It is in double the amount of the aforesaid judgment, declares that it is given to stay proceedings on the order for the issuance of the execution and also on the order refusing to vacate the said order and recall the execution, and, as prescribed by section 942, Code Civ. Proc., it provides that if the order appealed from should be affirmed, and said Ralph Rogers should fail for 30 days after the filing of the remittitur to pay the "amount directed to be paid" by the "order appealed from," then judgment might be rendered against said sureties "for such amount," in favor of the plaintiff. The order referred to as the order appealed from was affirmed on June 22, 1907. On September 3, 1907, the superior court on motion of respondent, without notice, and on the supposed authority of this undertaking and of the provisions of section 942, Code Civ. Proc., entered judgment in favor of the plaintiff against Ralph Rogers, the defendant, and the two sureties aforesaid, for \$0,202.32, being the amount of said original judgment of \$3,979.15, and interest thereon to September 3, 1907. The present appeals are from this judgment; one appeal being by Ralph Rogers and the other a joint appeal by the two sureties.

The new judgment against the original defendant, Ralph Rogers, cannot be sustained on any theory. He did not sign the undertaking, no new proceeding or action had been instituted against him, and no summons, notice, or other process had been served upon him. The new judgment, as against him, was given without jurisdiction, and is not only erroneous, but wholly void. The judgment against the two sureties is also without support. Section 942, Code Civ. Proc., provides for an undertaking of the form here used and for an ex parte judgment thereon against the sureties only upon appeals "from a judgment or order directing the payment of money." The order appealed from on the previous appeal did not direct the payment of any money. It was purely negative in effect, merely denying the motion to vacate the former order and quash the execution. This former order, even if it can be considered as a part of the latter order so as to make the appeal include both, cannot properly be considered as an order directing the payment of money. So far as it purported to direct the payment of money, it was without authority. The superior court, when applied to ex parte for leave to have execution issued, as provided in section 685, Code Civ. Proc., had no power to direct the payment of money, but only to give leave that the former judgment be "carried into execution." The amount to be specified in such execution was to be determined, in the present case, solely by the terms of the judgment upon which it was to be founded, and such amount could not be enlarged or diminished by anything

said by the court in an order made under section 685, given ex parte, and without the consent of the judgment defendant or notice to him. In so far as it purported to direct that the execution should be for a named amount, it was useless and void. For these reasons the former appeal cannot be considered as an appeal from an order directing the payment of money, and section 942 gave no authority for an undertaking thereon to stay the proceedings on the judgment or on the execution. It cannot be considered as a statutory undertaking upon which a judgment could be given as prescribed in that section. The judgment rendered in pursuance thereof was without authority and void. *Powers v. Chabot*, 93 Cal. 269, 28 Pac. 1070; *McCallion v. Hibernia, etc., Soc.*, 98 Cal. 444, 33 Pac. 329; *Central, etc., Co. v. Center*, 107 Cal. 132, 40 Pac. 334; *Reay v. Butler*, 118 Cal. 113, 50 Pac. 375.

The case is practically the same as *Carit v. Williams*, 67 Cal. 580, 8 Pac. 93. There a motion to recall an execution on a money judgment was denied, and an appeal was taken from the order denying the motion, the undertaking on appeal for \$300 was waived, as the law provides it may be, and this court was asked to stay the proceedings on the execution. The application was denied, the court saying: "The waiver of the undertaking is sufficient to stay any execution of the order appealed from, were any stay necessary. But it is manifestly insufficient to stay execution on the judgment referred to even if any such stay could be granted on an appeal from an order made after the judgment. This court has no authority under the statute for ordering any such stay. The stay of execution on a judgment for the payment of money is only allowed on an appeal from the judgment, and giving the undertaking in double the amount, etc., as required by the statute. Code Civ. Proc. § 942. Section 949 of the Code of Civil Procedure only refers to a stay of execution of the order of judgment appealed from in cases not provided for in sections 942, 943, 944, and 945. In this case there is no appeal from a judgment. The appeal is from an order made after the final judgment, denying Charles' motion for an order, for which no stay is requisite." *Reay v. Butler*, supra, and *Credits Com. Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009, are of similar effect, though not precisely the same in point of fact.

It is apparent that, under section 949, Code Civ. Proc., upon the giving of the \$300 undertaking on the previous appeal, the proceedings on the order therein appealed from were stayed, so far as there could be any proceedings upon such an order, but the proceedings on the judgment and execution were not stayed, and could not be stayed by that undertaking. It is intimated in *Carit v. Williams* that this court, by virtue of its inherent power to make an appeal effectual, could order a supersedeas after requiring a sufficient

bond from the appellant as security therefor. We express no doubt of this proposition, although, as it is not before us, we do not affirm it. The present undertaking was not given in pursuance of any such proceeding for a supersedeas from this court, and, if it had been so given, it could be enforced by action only, and not by a summary judgment without process or notice as specially provided in a case of an undertaking given under section 942, Code Civ. Proc. The cases of *Fulton v. Hanna*, 40 Cal. 278, *Owen v. Pomona, etc., Co.*, 124 Cal. 332, 57 Pac. 71, *Holland v. McDade*, 125 Cal. 353, 58 Pac. 9, and *Baldwin v. Superior Court*, 125 Cal. 584, 58 Pac. 185, declare that on an appeal from an order denying a motion for a new trial, after a money judgment, an undertaking in double the amount of the judgment may be given under section 942, and that execution on the judgment will be stayed thereby pending such appeal. This is the sole exception to the rule, and it rests on the reasons which are pointed out in *Holland v. McDade*, supra, and *Credits Com. Co. v. Superior Court*, supra. These reasons are not applicable to an order such as that here involved, and this distinction is pointed out in the two decisions mentioned. There is no ground upon which the judgment can be upheld either against the original defendant or the sureties in the undertaking.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

9 Cal. App. 290

CRANE CO. v. DRYER et al. (Civ. 516.)

(Court of Appeal, Third District, California.
Nov. 7, 1908.)

1. PARTNERSHIP (§ 183*)—PARTNERSHIP AND INDIVIDUAL DEBTS—APPLICATION OF FIRM ASSETS.

The right to have partnership debts discharged out of the partnership property before the individual debts of the members of such partnership are thus discharged can be waived by the mutual consent of the partners, and creditors of such partnership have no right to the enforcement of their demands out of such partnership property as is affected by such waiver, and this right is not affected by Civ. Code, § 2405, providing that "each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance, if any, to him."

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 333; Dec. Dig. § 183.*]

2. FRAUDULENT CONVEYANCES (§ 115*)—PREFERENCES.

Under Civ. Code, § 3432, providing that a debtor may pay one creditor in preference to another, or give to one creditor payment in security for his demand in preference to another, a debtor may prefer one creditor to another when such preference is not founded in or induced by motives which do not amount to a

fraud on the rights of other persons or creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 370; Dec. Dig. § 115.*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by the Crane Company against E. O. Dryer and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. D. Edwards, for appellant. J. R. Webb and S. L. Strother, for respondents.

HART, J. The defendants, E. O. Dryer and George Machen, constituted the firm of Dryer & Machen, engaged in the plumbing business at the city of Fresno during the years 1904, 1905, and 1906. On the 9th day of August, 1905, in consideration of and for the payment of an indebtedness due said firm, the firm of C. S. Pierce and others conveyed to George Machen, a member of the said first-mentioned firm, the lots involved in this action. On July 12, 1906, while the firm of Dryer & Machen was indebted to plaintiff in the sum of \$1,240, said George Machen conveyed said lots to his father, W. W. Machen, one of the defendants herein. A note had been executed and delivered by Dryer & Machen to the plaintiff in the sum of \$1,445.56, and in the month of September, 1906, the latter brought an action against the former on said note, and on the 13th day of October, 1906, judgment was rendered in said action in favor of the plaintiff herein and against said Dryer & Machen for the amount of said note. Immediately upon the entry of said judgment, execution thereon was issued and placed in the hands of the sheriff of Fresno county, who in January, 1907, returned said execution to the superior court without being satisfied either in whole or in part, the said return disclosing that said officer was unable to find any property belonging to Dryer & Machen out of which said judgment could be satisfied. The object of this action is to secure a decree of the court declaring and adjudging the conveyance of the lots in controversy by George Machen to his father, W. W. Machen, to be "fraudulent and void as to this plaintiff, as a firm creditor of said Dryer & Machen, and that the said property thereby conveyed be subject to plaintiff's execution upon its said judgment, and that plaintiff's claim thereto is superior and paramount to any claim of said W. W. Machen, or any individual creditor of any firm upon said property," etc. The defendants Dryer & Machen failed to answer the complaint, and, upon such default, judgment was ordered and entered against them. The court, however, gave the defendant W. W. Machen judgment, from which and an order denying it a new trial the plaintiff takes this appeal.

The complaint alleges that said George

Machen, "fraudulently and with intent to hinder, delay, and defeat the claims of this plaintiff as a firm creditor of said firm" of Dryer & Machen, "conveyed and transferred the legal title to said real estate to W. W. Machen, his own father, by deed of conveyance duly acknowledged and certified, so as to entitle it to be recorded, and it was duly filed and recorded about the same last-named date in the office of the county recorder for Fresno county, Cal.; that there was no other consideration for said conveyance than an alleged individual indebtedness of said George Machen to said W. W. Machen, and said firm and the members thereof were then disposing of and trying to dispose of their property in contemplation of insolvency and were then and are now insolvent, and have no property or assets out of which this plaintiff can have its judgment aforesaid satisfied," etc. It is further charged that the defendant W. W. Machen was fully aware of the facts and circumstances, as alleged in the complaint, leading to the conveyance of the real estate involved in this litigation to him by his son. W. W. Machen in his answer specifically denies the material averments of the complaint, and, in addition, asks the court, by way of affirmative relief, that he be reimbursed in a certain sum for expenses incurred by him in relation to the property, in the event the plaintiff establishes his right to the relief demanded by the complaint. The contention of the plaintiff is that the transfer of the property concerned in this dispute by George Machen to W. W. Machen, being in payment of the individual indebtedness of said George Machen, was and is at least a constructive fraud against the plaintiff as a partnership creditor of said firm of Dryer & Machen.

The evidence shows that the property in dispute was transferred to George Machen by Pierce et al. for the purpose of liquidating a debt due the firm of Dryer & Machen from the former, and that the said firm was the real owner of said property at the time it was conveyed to W. W. Machen by George Machen. The testimony of George Machen is to the effect that he was indebted to his father in an amount approximating the sum of \$2,000, the same having been borrowed by him to put into the business of the firm of Dryer & Machen when it was formed; that he transferred the property to his father with the express consent of his partner, Dryer, and that, while the firm owed other persons, no one was pressing it for payment of bills due from it; that there was sufficient property of the firm remaining after said conveyance to his father to meet all outstanding claims against the firm. He testified that his father "wanted his money," and that "goods in the place," accounts due the firm, and other property belonging to the firm were enough to meet all the other obligations of the firm. He positively de-

nied that he transferred the real estate to his father with a view of defrauding other creditors. E. O. Dryer, the other member of the firm, testified in part as follows: "The troubles of the firm were considerable about this time. They were crowding us for money. We were being pressed by creditors. Attachment suits were threatened. Disposing of our property was talked over. I and George Machen were figuring whether there could be some way to pay it out, whether there couldn't be, and how it would come out, and it was suggested, I believe, that George deed this property to somebody else and try to save it. * * * I couldn't say that W. W. Machen knew the exact condition of the firm. He knew we were financially distressed. I knew he knew that. It was talked over at the time he took the deed from George Machen. I was not present when the deed was made. I came to Ingersoll's office afterwards." T. D. Ingersoll, who drew the deed conveying the property to W. W. Machen, testified that previously thereto he had a conversation with E. O. Dryer and George Machen; that "they both said George had better deed that Effie street property to his father for money George got from him to put in the firm. The deed was drawn up in pursuance to instructions given me by Dryer and George Machen in the conversation just referred to, which was on the day before the execution of the deed, when Dryer and George Machen only were present, * * * and the deed was taken and acknowledged before Van Meter in the presence of Dryer." Immediately upon the execution of the deed and its acknowledgment before Van Meter, a notary, Ingersoll delivered the same to W. W. Machen in the presence of George Machen and Dryer. The grantee thereupon said to George Machen that he would "get the note and credit him with it." W. W. Machen testified that his son, George Machen, was indebted to him for money advanced to be put into the business of Dryer & Machen, that he desired the return of the money, and that his son gave him a deed to the property in dispute for the purpose of paying off said indebtedness. He testified that he knew nothing, except in a general way, of the firm's financial embarrassment, and that he took the property in good faith in payment of a debt due him from George and not with any intention of aiding said firm in hindering, delaying, or defrauding its creditors, and without any knowledge that said firm desired or intended to hinder or delay the payment of its just debts, if the members thereof had any such intention. Thus we have given a synopsis of all the evidence from which the court below found the facts of which the judgment is predicated.

The court found "that on the 12th of July, 1906, the property described in plaintiff's complaint stood in the name of George Ma-

chen, who held it in trust for said firm of Dryer & Machen"; "that on said 12th of July, 1906, said George Machen conveyed to the defendant W. W. Machen, by the consent and with the authority of E. O. Dryer, the other member of said firm of Dryer & Machen, the said property in plaintiff's complaint described, which said conveyance was not made with any fraudulent intent by George Machen to hinder, delay, or defraud the plaintiff or any other person as a firm creditor of said Dryer & Machen, but that said conveyance by said George Machen to W. W. Machen was made in good faith for a valuable consideration, to wit, an indebtedness owing by said George Machen to said W. W. Machen, and which said conveyance was made a long time prior to the date of the judgment of the plaintiff herein against said firm of Dryer & Machen"; "that at the time of said conveyance herein described said defendant W. W. Machen had no knowledge of the financial condition of said firm of Dryer & Machen, as to whether said firm was insolvent or not, or that it was indebted to plaintiff, and took said conveyance in good faith and for a valuable consideration, to wit, in payment of said indebtedness owing him by said defendant, George Machen." It is apparent, upon a mere inspection of the record, that the evidence abundantly supports the findings of the court. It is consequently clear that the property in dispute was conveyed by George Machen to his father with the consent and authority of Dryer, in settlement of an indebtedness due from the son to the father, and that said conveyance was not due to any desire or intention on the part of any of the parties to that transaction to hinder, delay, or defraud plaintiff or other creditors of the firm of Dryer & Machen.

The single question, then, for consideration, is whether the act of George Machen in conveying partnership property in payment of an individual indebtedness is, as to creditors of the firm to which said George Machen belongs, constructively fraudulent. Or, to put appellant's contention in another form, whether debts of a partnership must be discharged from the joint property before any portion of it can be applied to the individual debts of the partners.

The contention of the appellant, as thus stated, is evidently inspired by the provisions of section 2405 of the Civil Code. That section provides: "Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance if any to him." The authorities cited by counsel for appellant only go to the extent of reaffirming the rule as thus declared in our Civil Code. As applied to cases coming within the purview of that section of the Code, those authorities

most assuredly state the law correctly. Undoubtedly the Code rule proceeds from and is therefore in perfect harmony with the soundest principles of equity; for what conceivable reason, unless one not founded in common sense, can be suggested why a member of a partnership should not be authorized to require and compel the application of the partnership property to the discharge of the partnership debts, in preference to the payment by such means of the individual debts of the members of such partnership? Indeed, it would be a distinctly singular and anomalous principle either of equity or of law which would sustain the act of a single member of a partnership in extinguishing his individual obligations out of the partnership effects against the protest and consent of his copartners. But it is well settled by the decisions of the courts that whether the partnership debts shall be discharged out of the partnership property before the individual debts of the members of such partnership are thus discharged, or vice versa, is a matter which rests primarily and entirely with the members of the partnership. In other words, the right to the application of partnership property to the payment of partnership debts is one exercisable alone by the individual partners. This being so, it follows that partners can, by mutual consent and agreement, waive such right, and, where that right has been waived or parted with by the joint, mutual act of the members of a partnership, creditors of such partnership no longer have a right to the enforcement of their demands out of such partnership property as is affected by such waiver. The equity of such creditors, in other words, is lost the moment the partners waive or destroy their right to have the firm debts discharged out of the partnership assets by their mutual agreement to first apply the same to the extinguishment of the individual debts of the members of the partnership, for the equity of the partnership creditors must be worked out through the medium of the equity of the partners. *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370; *Smith v. Smith*, 87 Iowa, 93, 54 N. W. 73, 43 Am. St. Rep. 359; *Baker's Appeal*, 21 Pa. 76, 59 Am. Dec. 754; *Reyburn v. Mitchell*, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 905, 30 L. Ed. 971; *Caldwell Bank & Trust Co. v. Porter et al.* (Or.) 95 Pac. 1; *Am. & Eng. Ency. of Law*, p. 238.

In *Smith v. Smith*, supra, the rule is thus stated: "The creditors of a firm have no lien on, or equity in, the partnership property. Therefore, with the consent of the partners, it may be applied to the payment of their individual debts, although the firm is insolvent. The partnership creditors are not entitled to set aside such payment as fraudulent as against them. * * * As

the rule exists for the protection of the partnership, they may waive its benefits, and, when they have done this, the creditors have no ground of complaint." In the case of *Ladd v. Griswold*, 9 Ill. 25, 42 Am. Dec. 445, it is said: "The right in equity of the joint creditors to seek payment out of the partnership effects, to the exclusion of separate creditors of the partners, results solely from the right of the partners to have the joint estate thus applied. The rule is for the benefit of the partners themselves. The equity of the creditors is of a dependent, subordinate character, and has to be worked out and enforced through the medium of the equity of the partners—citing *Story's Eq.* § 676, and *Story on Partnerships*, §§ 360, 361. The partners may part with their right to have the joint property applied to the payment of the joint demands, and, when they do so, the equity of the creditor is at an end."

In the case at bar the evidence, as seen, shows, and the court finds, that the transaction resulting in the payment of George Machen's individual debt out of the partnership property took place about two months before the plaintiff brought this action; that said transaction was had and carried out with the express consent of the only other member of the firm; and that it was had in good faith and with no intention on the part of the members of the firm to defraud other creditors. It is plainly apparent that section 2405 of the Civil Code and the authorities cited by counsel for the appellant have no application to the facts as they were proved and found in the present case. The partners having waived their right to have so much of their partnership property as is involved here applied to the payment of an individual debt of a member of the partnership, the plaintiff as a creditor of the partnership, has no equity which it can enforce against said property. It may be added that there is no rule of law in this state forbidding a preference by a debtor of one creditor over another, when such preference is not founded in or induced by motives which would amount to a fraud on the rights of other persons or creditors. To the contrary, Civ. Code, § 3432, in express terms gives a debtor the right to pay one creditor in preference to another, or give to one creditor security for the payment of his demand in preference to another.

Some exceptions to the rulings of the court are urged, but they do not appear to be of sufficient importance to compel special notice.

The judgment and order are, for the reasons herein stated, affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

9 Cal. App. 275

LAVENTHAL v. FIDELITY & CASUALTY CO. OF NEW YORK. (Civ. 473.)

(Court of Appeal, First District, California.
Nov. 5, 1908. Rehearing Denied by
Supreme Court Jan. 4, 1909.)

1. INSURANCE (§ 146*)—CONSTRUCTION OF CONTRACTS IN GENERAL.

A policy is but a contract, and, like others, must be construed from the language used, and, when the terms are plain and unambiguous, the courts should hold the parties thereto.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 294; Dec. Dig. § 146.*]

2. INSURANCE (§ 524*)—ACCIDENT POLICY—CONSTRUCTION—TOTAL DISABILITY—IMMEDIATE DISABILITY—"IMMEDIATELY."

An accident policy which provides for a certain indemnity in the case of total disability by reason of an injury which shall "immediately" disable the insured does not cover such disability where the injury did not wholly disable the insured till 22 days after the accident.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 524.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3403-3410.]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Joseph J. Laventhal against the Fidelity & Casualty Company of New York. From a judgment for plaintiff, defendant appeals. Reversed.

Chickering & Gregory, for appellant. Otto Irving Wise and Louis Hirsch, for respondent.

COOPER, P. J. Plaintiff recovered judgment for \$1,475 upon an accident insurance policy. This appeal is from the judgment on the judgment roll with a bill of exceptions.

On January 2, 1903, the defendant issued to plaintiff an accident insurance policy, which provided that the company "does insure the person described in said schedule [the plaintiff herein] for the period of one year from noon, standard time, the day this contract is dated, against disability or death resulting directly, and independently of all other causes, from bodily injury sustained through external, violent and accidental means. * * * (1) If said injuries shall immediately, continuously and wholly disable and prevent the insured from performing every and any kind of duty pertaining to his occupation, the company will pay * * *. (3) If such injuries shall not wholly disable the insured, but shall prevent him from performing fully work essential to his duty or duties, the company will pay the insured * * *." On November 10, 1903, while the policy was still in force, the plaintiff received an injury while on a railroad train at San Jose, by being bruised in the abdomen by coming in contact with a suit case. He returned to San Francisco, and thereafter went as usual to the office of the company by which he was employed, and attend-

ed to his duties there until December 1, 1903, when he became totally disabled from the injury he had received, and thereafter could not leave his bed for 27 weeks. The complaint alleged that "in consequence of which said injuries he was totally disabled from performing any work whatsoever from and after the 1st day of December, 1903, and said total disability continued from said 1st day of December, 1903, to and including the 9th day of June, 1904, to wit, for a period of 27 weeks and 3 days." Among the special interrogatories submitted to the jury was the following: "How much time elapsed between the date of the accident complained of and the beginning of the continuous disability?" To the above interrogatory the jury answered: "22 days." The question, and the only question, in the case, is as to whether or not the defendant is liable under the total disability clause in the policy.

The policy is but a contract, and, like all other contracts, it must be construed from the language used. When the terms are plain and unambiguous, it is the duty of courts to hold the parties to such contract. The defendant agreed, in case the plaintiff by accident should receive a bodily injury, that, "if said injury shall immediately, continuously and wholly disable and prevent the insured from performing every and any kind of duty pertaining to his occupation, the company will pay. * * *" Plaintiff received a bodily injury. The injury, however, did not immediately and wholly disable and prevent the plaintiff from performing every duty pertaining to his occupation. The language is plain, and any one can at once see that the plaintiff was not immediately disabled and prevented from performing the duties or part of the duties pertaining to his occupation. The defendant had the right to make its liability depend upon the fact as to whether or not the plaintiff was immediately disabled by the injury from performing every duty pertaining to his occupation. It had the right to take the question out of the category of such uncertainties as might be raised by experts, or oral testimony as to whether or not the final total disability was caused by the injury or by other complications or conditions. It made its insurance policy with these conditions, and evidently fixed its rate or premium in accordance with the risk it assumed. To these conditions the plaintiff gave his assent when he accepted the policy. If he was not immediately disabled, he cannot in law or in morals hold the defendant liable. If we were to adopt the rule contended for here by plaintiff, it would place such a contract in the realm of uncertainty. If where 22 days elapsed before the injury finally overpowered and disabled the plaintiff we should hold that such disability was immediate, the same reasoning would apply if the period had been 50 days, and so on for months and

perhaps years. It is said by medical writers that cases have been known where a slight injury received in youth, from which the patient apparently recovered, has been the proximate cause of death in old age. After days and months, and perhaps years, have elapsed, it is evident that the question as to whether or not the injury of itself finally wholly disabled the party would be a question, at least in many cases, difficult to determine. It might finally be solved in favor of the party who was most industrious in procuring witnesses, and particularly expert witnesses. We are of opinion that it is a much safer rule to hold the parties to the plain, unambiguous reading of their contract. The policy here contained a provision as to the liability for injuries which shall not wholly disable the assured; and this shows that the injuries insured against were of two classes.

The identically same provision in accident policies has been frequently construed by the highest courts of other states; and the great weight of authority is in favor of the conclusion we have reached in this case. One of the best considered cases is *Williams v. Preferred Mut. Accident Ass'n*, 91 Ga. 698, 17 S. E. 982. In that case the plaintiff was injured by a blow on the head caused by a restive horse which he was holding while the animal was being shod. The injury was at first quite trivial, but afterwards became serious, and just 30 days, or one month, after the injury, the plaintiff was taken to his bed and there confined for some time. The language of the policy was practically the same as in the present case, being "independently of all other causes, immediately, wholly and continuously disable * * * from transacting any and every kind of business pertaining to his occupation." The court held the company not liable, and said: "It would perhaps be going too far to say that in a policy like the present this word means precisely the same thing as 'instantly' or 'momentarily,' but it necessarily implies that the injury must be such that the insured cannot proceed regularly and in due course with his occupation; that he cannot go on with his work or business as if he had received no injury, and then, upon becoming worse, cease the transaction of his business or labor, and hold the company responsible for the loss of his time. It seems to us that there was excellent sense and reason in the employment of the words used in this policy to prevent liability on the part of the company under just such circumstances as are disclosed in this case; and we are quite sure that this was deliberately intended by the draftsman. It often happens that considerable difficulty arises in determining whether or not a particular thing is the proximate or remote cause of an injury and its consequences; and, to avoid this difficulty in the numerous and ever-varying

cases which might arise, we think the company meant to have it understood that it would not be responsible for loss of time resulting from physical injury unless it was plain and manifest that the injury directly, alone, without delay, occasioned such loss of time, and that it would not be liable for loss of time which might result from other intervening causes taking effect after the injury was actually received."

The following additional cases are directly in point, and support the conclusion we have reached: *Vess v. United Benevolent Society of America*, 120 Ga. 411, 47 S. E. 942; *Preferred Accident Ass'n of America v. Jones*, 60 Ill. App. 106; *Pepper v. Order of United Commercial Travelers*, 113 Ky. 918, 69 S. W. 956; *Merrill v. Travelers' Ins. Co.*, 91 Wis. 329, 64 N. W. 1039; *Letherer v. Phoenix Mut. Acc. Ass'n*, 145 Mich. 313, 108 N. W. 492; *Letherer v. U. S. Health & Accident Ins. Co.*, 145 Mich. 310, 108 N. W. 491; *Hagadorn v. Masonic Equitable Accident Ass'n*, 59 App. Div. 321, 69 N. Y. Supp. 831; *Continental Casualty Co. v. Wade (Tex.)* 105 S. W. 35. The latter case was decided by the Supreme Court of Texas on November 13, 1907, and is the latest reported authority to which our attention has been called. The court gave to a similar provision of an accident policy the same construction that we have given it in this case, and that is given by the other cases cited herein.

The judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

9 Cal. App. 271

JOHN BREUNER CO. v. KING. (Civ. 391.)

(Court of Appeal, First District, California.
Nov. 5, 1908.)

1. CHATTEL MORTGAGES (§ 47*)—DESCRIPTION.

A description of chattels mortgaged, both in the complaint and in the mortgage, as "all the furniture, upholstery, carpets, draperies, china ware and other household goods of every kind, located in" a specifically described building, was sufficient between the parties.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 87; Dec. Dig. § 47.*]

2. CHATTEL MORTGAGES (§ 79*)—FRAUDULENT REPRESENTATIONS—EVIDENCE.

Where, in a suit to foreclose a mortgage on the furniture in an apartment house, the defense was fraudulent representations by the mortgagee as to the amount of business conducted in the apartment house in which the property was installed, and defendant had testified as to the income and expenses of the business, evidence as to the source from which she secured the money which had been paid on the mortgage debt was inadmissible to show that the business had been conducted at a loss.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 567; Dec. Dig. § 79.*]

3. EVIDENCE (§ 383*)—DOCUMENTS—LETTERS—ADMISSION OF PART.

Where a part of a letter was admitted, but the balance was irrelevant to any issue in the case, defendant was not entitled to the admis-

sion thereof under Code Civ. Proc. § 1854, providing that, where part of an instrument is admitted by one party, the other shall be entitled to the admission of the balance.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1676; Dec. Dig. § 383.*]

4. APPEAL AND ERROR (§ 1057*)—RULINGS ON EVIDENCE—HARMLESS ERROR.

The exclusion of evidence as to the circumstances under which a letter was written was immaterial where the witness thereafter fully answered the question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4194-4196; Dec. Dig. § 1057.*]

5. CHATTEL MORTGAGES (§ 277*)—FORECLOSURE—EVIDENCE.

Where, in an action to foreclose a chattel mortgage on furniture to secure a note given for the price, there was no allegation of misrepresentations made by plaintiff as to the value of the furniture, plaintiff's books showing the original cost of the furniture were irrelevant.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 565; Dec. Dig. § 277.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the John Breuner Company against Sara L. King. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, she appeals. Affirmed.

Curtis Hillyer, for appellant. Rigby & Rigby, for respondent.

KERRIGAN, J. This is an action to foreclose a chattel mortgage given by defendant to plaintiff. The case was tried before an advisory jury, a decision was rendered in favor of plaintiff, and a decree of foreclosure was entered. From the judgment and from an order denying her motion for a new trial, the defendant prosecutes this appeal.

Appellant urges that the court erred in not sustaining her demurrer to the complaint, on the ground that the complaint is uncertain, in that it fails to sufficiently describe the property, either in the body of the complaint or in a copy of the mortgage attached thereto as an exhibit and made a part thereof. We cannot agree with this contention. A description of the chattels mortgaged is contained both in the complaint and in the mortgage, and is in the following terms: "All the furniture, upholstery, carpets, draperies, china ware and other household goods of every kind, located and contained in and about that certain building, in said City and County of San Francisco, known as the 'Haddon Hall Apartment House,' and also known as No. 951 Eddy street, said building being situated on the lot on the south side of Eddy street, 68 feet 9 inch front, 120 feet deep, and commencing 137½ feet easterly from the southeast corner of Gough and Eddy streets." This description shows where the property was located, and that it was all of a certain kind of property, and not that it was an indefinite part of it, which was in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the building at the time the mortgage was executed. Under the authorities the description is ample—especially as this action is between the parties to the mortgage. Jones on Chattel Mortgages (5th Ed.) § 53 et seq.; 6 Cyc. p. 1022 et seq. The rule as to the description of personal property in chattel mortgages is thus stated in Cyc., supra: "As against third persons, the mortgage must point out the subject-matter so that the third person may identify the property covered by the aid of such inquiries as the instrument itself suggests. But, between the parties, it is only necessary to identify the chattels so that the mortgagee may say with a reasonable degree of certainty what property is subject to his lien."

The court committed no error in refusing to permit appellant to testify as to the source of the payments which she made on account of the note. Appellant in her answer alleged that respondent had misrepresented to her that the business conducted at Haddon Hall, an apartment house, in which this property was installed, had been when filled conducted at a profit of \$600 per month, which amount, she claims, would have been sufficient to enable her to discharge the obligation assumed by her. It had already appeared that the appellant had made three payments on account of the principal of her indebtedness. The object of the question was doubtless, as claimed, to show that the alleged representations were false, and that the business was conducted at a loss. But the witness had already testified directly to this effect by showing the income and expenses of the business; and it is very questionable if this testimony would have been strengthened by showing the sources from which the witness obtained the money with which to make the payments in question. Indeed, it can hardly be said that there is any legitimate inference that a given business is unprofitable from the fact that funds are obtained elsewhere to meet notes given in payment of property used in such business.

No error was committed by the trial court with reference to the letter of appellant, the first part of which was admitted in evidence, being to the effect that, after being in possession of Haddon Hall for nearly two months, appellant did not desire to give it up. This evidence tended to disprove the alleged false representations as to the income and profit of the house, and was therefore admissible. On redirect examination appellant sought, so she claims, to introduce the remainder of the letter on the theory that, part of the letter having been admitted in evidence, she was entitled under section 1854, Code Civ. Proc., to have the entire letter go in. At this point there is some confusion in the record, and it really does not show that the remainder of the letter was offered in evidence; but, assuming that it

was, yet inasmuch as it is not explanatory of the part admitted, and was not relevant to any issue in the case, the court was right in rejecting it. In this connection appellant was asked by her counsel a question calling for the circumstances under which the letter was written, to which question the court sustained an objection. Whether or not this ruling was error is immaterial, because subsequently the witness fully answered the question, and stated the circumstances under which the letter was written.

Appellant further claims that the court should have admitted in evidence the books of the respondent, offered by appellant, to show the original cost of the furniture. It is not one of the allegations of the answer that there were any misrepresentations made as to the value of the furniture. Therefore the contents of the books on this point were immaterial.

The evidence is sufficient to support the decision. The record discloses no error, and the judgment and order should be affirmed; and it is so ordered.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 279

PEOPLE v. LEWIS. (Cr. 80.)

(Court of Appeal, Third District, California.
Nov. 6, 1908.)

1. RAPE (§ 19*)—LIABILITY OF PERSON NOT PRESENT.

In view of the statute (Pen. Code, §§ 30, 31, 971), which abrogates the distinction between an accessory before the fact and a principal, and provides that all persons concerned in committing a felony, whether they directly commit the act or aid or abet its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged against such an accessory than are alleged against his principal, one charged with rape need not be shown to have been present in order to justify a conviction on evidence which otherwise clearly shows that he aided and abetted in the perpetration of the crime by another as effectually as if he had witnessed it.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 22; Dec. Dig. § 19.*]

2. CRIMINAL LAW (§ 59*)—PARTIES TO OFFENSES—"AID" AND "ABET."

The word "aid" does not imply guilty knowledge or felonious intent, whereas the definition of the word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel, and encouragement in the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 81; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 1, pp. 15, 289-291.]

3. CRIMINAL LAW (§ 371*)—ADMISSIBILITY OF EVIDENCE—OTHER OFFENSES—RAPE.

In a prosecution of defendant for rape of his stepdaughter who was under the age of consent, wherein it was claimed that he was an accessory before the fact, evidence of prior sexual intercourse between the parties in question, shown to have been instigated by defendant, and limited by the court "for the purpose of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

showing plans and designs," was admissible as acts of lascivious conduct and sexual intercourse with defendant's knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 880; Dec. Dig. § 371.*]

4. INDICTMENT AND INFORMATION (§ 1*)—NECESSITY OF INDICTMENT OR PRESENTMENT.

It is within the power of the state to abolish the grand jury, and authorize procedure by information.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 1.*]

5. INDICTMENT AND INFORMATION (§ 2*)—PROCEEDING BY INFORMATION DURING SESSION OF GRAND JURY.

Const. art. 1, § 8, provides that "offenses heretofore required to be presented by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment as may be prescribed by law," and that "a grand jury shall be drawn and summoned at least once a year in each county." Pen. Code, § 915, makes it the duty of the grand jury to "inquire into all public offenses committed or triable within the county, and present them to the court by indictment." Held, that there was nothing therein making it illegal to proceed by information when the jury is in session.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 2.*]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Frank Lewis was convicted of rape. From orders denying motions in arrest and for a new trial, and from the final judgment, he appeals. Affirmed.

Ross Campbell, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Asst. Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was charged in the information with the crime of rape upon a small child under the age of 16 years. The jury returned a verdict of guilty as charged. Defendant appeals from the order denying his motion in arrest of judgment, from the order denying his motion for a new trial, and from the final judgment of conviction.

1. Defendant was convicted as an accessory before the fact. The prosecutrix was the stepdaughter of defendant. There is no evidence that defendant had sexual intercourse with her, or that he was present at the commission of the crime, but there was abundant evidence that he aided and abetted its commission by one Alon Wheeler, a youth of about 17 years of age. Defendant's contention is that because he was not personally present when the crime was committed the evidence must be held to be insufficient to justify the verdict—citing *People v. Schoedde*, 126 Cal. 373, 58 Pac. 859. That was the case of prosecution for the crime of mayhem. The court held that, if the defendant was not present when the crime was committed, the verdict had not sufficient support, and under the evidence there was not "disclosed that

aiding and abetting by defendant which would make him a principal in the crime." It was claimed by the people that, conceding that defendant did not actually participate in the commission of the crime, still he was an aider and abettor. The court said: "The general principle here contended for is sound, but its application to the facts of this case is wanting." It would seem, therefore, that the peculiar circumstances of the case took it out of the rule. The statute is plain and clear. It abrogates the distinction between an accessory before the fact and a principal, and it provides that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal." Pen. Code, §§ 971, 30, 31; *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Nolan*, 144 Cal. 79, 77 Pac. 774. The evidence was that defendant on several occasions solicited Wheeler to have sexual intercourse with the defendant's stepdaughter. He brought them together under circumstances calculated to arouse their animal passions, and to bring about his wicked design. He advised Wheeler to procure vaseline to be used in the act of coition, if found necessary, and he also procured medicated capsules or suppositories, and gave them to the girl and instructed her in Wheeler's presence how to use them to prevent conception. The evidence is altogether too indecent and revolting to be here recorded. It was said in *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50: "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." The evidence here clearly shows that defendant both aided and abetted the perpetration of the crime as effectually as if he had witnessed it. To have been personally present as a witness of the act which he brought about would have but added one more to the many other disgusting features of the performance. *People v. Nolan*, supra, was a case where the precise point here contended for was raised. There the defendant was informed against as a principal jointly with others who were charged with robbery. The part played in the crime by defendant Nolan was in knowingly having given information as to where certain diamonds were to be found and how they might be successfully stolen. The judgment of conviction was sustained, although the defendant did not participate in the robbery.

2. The act charged in the information was alleged to have been committed in Sonoma

county, of which the proof was sufficient. It is urged as error that the commission of a like prior offense between the prosecutrix and Wheeler was allowed to be proven over defendant's objection. There was evidence that about Christmas, 1907, defendant took his stepdaughter and Wheeler to San Francisco, as the evidence showed, in furtherance of his said design previously urged upon Wheeler. They occupied a small room in which was one bed, and all three slept in it. The second night they occupied a different room, in which were two beds. Defendant slept in one and Wheeler and the girl in the other. The conduct of the defendant there showed conclusively that it was in furtherance of his design that these two young people were taken to San Francisco by him, and the evidence as to what took place was limited by the court "for the purpose of showing plans and designs." The evidence was admissible as acts of lascivious conduct and sexual intercourse with defendant's knowledge, and were admissible whether committed before or after the particular act charged. *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463. It was shortly after their return from San Francisco that, under the direction and with the connivance of defendant, Wheeler and the prosecutrix renewed their sexual relations at defendant's home on which the information is based.

3. An instruction was asked by defendant and refused by the court to the effect that he could not be found guilty unless present at the time of the sexual intercourse charged. For the reasons already stated, the instruction was properly refused.

4. It is also contended that the information was filed while the grand jury was in session, and that under section 915 of the Penal Code it was the duty of the district attorney to lay the matter before that body, and he could not legally present an information at that time. It is within the power of the state to abolish the grand jury and authorize the procedure to punish crimes by information. *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232. The state may authorize the procedure to be by both indictment and information, and it is competent to adopt the latter while the grand jury is in session. Article 1, § 8, Const., provides as follows: "Offenses heretofore required to be presented by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county." Section 915 of the Penal Code makes it the duty of the grand jury to "inquire into all public offenses committed or triable within the county, and present them to the court by indictment." There is nothing in the Constitution

or statute making it illegal to proceed by information when the grand jury is in session. The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

CALIFORNIA REPORTER

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154 Cal. 688

RUDOLPH HERMAN CO. et al. v. CITY
AND COUNTY OF SAN FRAN-
CISCO et al. (S. F. 4,612.)

(Supreme Court of California. Dec. 19, 1908.)

1. BOUNDARIES (§ 20*)—DESCRIPTION—PUBLIC
GROUNDS—CALL FOR SIDE OF HIGHWAY.

The legal eastern boundary of the Presidio military reservation was due north from a monument at the southeasterly corner thereof, but the land actually occupied by the military authorities was only that up to a certain fence somewhat west of the due north line, the land between it and the due north line being occupied by squatters. The United States, by Act Cong. May 9, 1876, c. 93, 19 Stat. 52, relinquished to the city of San Francisco as a street a tract commencing at the southeasterly corner of the reservation, thence due north, thence westerly to a point 80 feet westerly of the east line "as established by the United States authorities." *Held*, that the line referred to by the act as established by the authorities was the line of the old fence, there being no other line answering to that description.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 128; Dec. Dig. § 20.*]

2. BOUNDARIES (§ 48*)—OF MILITARY RESER-
VATION—AUTHORITY OF MILITARY OFFICERS.

The commandant of a military reservation owned by the United States could fix the line of his occupation at any point within the legal limits of the reservation, and whether such line was on the legal boundary was immaterial to persons whose rights did not depend upon the accuracy of the true boundary.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 239; Dec. Dig. § 48.*]

3. DEDICATION (§ 64*)—STATUTORY DEDICA-
TION OF STREET—DIVERSION.

A part of a military reservation relinquished to the city of San Francisco for a street and dedicated for that purpose forever by Act Cong. May 9, 1876, c. 93, 19 Stat. 52, was effectually dedicated as a street, and the city could not alienate it.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 108; Dec. Dig. § 64.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Suit by the Rudolph Herman Company and another against the City and County of San Francisco and others. From a judgment for defendants, plaintiffs appealed. Affirmed.

Francis J. Heney, C. A. S. Frost, and Heney & Cobb, for appellants. Percy V. Long, City Atty., and Thomas E. Hayden, Asst. City Atty., for respondents.

SHAW, J. The officers of the city and county of San Francisco were about to remove the obstructions upon the lands described in the complaint so as to make them fit for use as a public street, claiming that the same constituted a part of Lyon street in the city. It is alleged that the lands were the

property of plaintiff, Rudolph Herman, who was in possession, the corporation plaintiff being the owner of an interest in remainder. The action was to restrain the defendants from entering upon said premises and from opening it as a public street. Judgment went for the defendants, and the plaintiffs appeal upon the judgment roll. An agreed statement of the evidence was adopted by the court below as its findings.

The land in controversy is claimed by the defendants to be a portion of Lyon street lying north of the northerly line of Lewis street and south of the waters of the bay, and adjoining the easterly line of the United States military reservation known as the "Presidio." The claim of the plaintiffs is that the true line of the Presidio reservation is situated a considerable distance westerly of the inclosure and possession of the military authorities, that the true line of Lyon street is immediately adjoining the true line of the Presidio and extending 80 feet east thereof, and that, if the Presidio and street are so located, the land claimed by them is not a part of Lyon street, but is a part of the lands ceded to the city by the United States government by the act of Congress of May 9, 1876, c. 93, 19 Stat. 52. The accuracy of this contention is the sole point to be decided in the case. A somewhat extended statement of the facts is necessary to a clear understanding of the question.

On November 6, 1850, President Fillmore made an order reserving for military purposes a tract including with the present Presidio reservation the lands lying between it and the Ft. Mason reservation. One Dexter R. Wright was then pressing a claim under an alleged Mexican grant to a large tract of land covering all of the lands reserved and considerable of the adjoining lands. This claim was afterwards adjudged to be invalid. General Riley, at that time in command of the military post at San Francisco, considered it of sufficient importance to enter into negotiations on behalf of the United States with him for a settlement of his claim as far as it affected the Presidio reservation. A provisional agreement was made between them whereby the military occupation was to be withdrawn from all the land lying easterly of a line drawn parallel with Larkin street in San Francisco and extending on said course northerly to the bay from a certain cannon planted by Capt. Keyes on May 17, 1850, on the top of the hill, near the present southeastern corner of the Presidio reservation. This agreement was reported by General Riley to the War Department, and it was thereupon disapproved and rejected by the Secretary of War. No further action was ever taken regarding it. While it was pending in the War Department, General Riley withdrew possession of the United States from the territory situated east of the line parallel with Larkin street, as that line was then supposed to be located, and a fence was erected

on said supposed line. In the meantime it had been reported to the President that the original reservation contained more land than was necessary for military purposes, and that squatters were in possession of some of the land lying easterly of the present reservation. On December 31, 1851, the President issued another executive order changing the former order by declaring that there was reserved for the United States for military purposes on the San Francisco peninsula "all the land north of a line running in a westerly direction from the southeastern corner of the Presidio tract to the southern extremity of a pond lying between Fort Point and Point Lobos, and passing through the middle of said pond and its outlet to the channel of entrance from the ocean." The southeastern corner of the Presidio tract had then been established as the point where the cannon had been planted by Capt. Keyes as aforesaid. The line described in the order was the southern boundary of the Presidio tract as established by the previous order. The order of 1851 was understood, as its words properly interpreted should be understood, to fix, as the easterly boundary of the reservation, a line extending from the said cannon planted as the southeastern corner of the Presidio tract, due north to the bay shore. Thereafter, until the enactment of the act of Congress of May 9, 1876, this line constituted the legal boundary line of the Presidio, on the easterly side. The line was never laid off or designated by any monuments. The actual occupation of the military authorities extended east only to the line of the fence aforesaid. Private persons, presumably understanding that this was the extent of the limits claimed by the United States, entered upon the intervening lands lying east of the fence and west of the due north line, claiming right thereto. Various surveys were made from time to time by different engineers of the United States, some acting under the authority of the Interior Department and some acting under the authority of the War Department, but no authoritative location of the true line of the military reservation was made. In 1870 a survey by Lieut. Wheeler of the United States army disclosed the fact that the fence was not built on a line parallel with Larkin street, which was on a course running north 9° 15' west, but was on a course running north 7° 30' west. The matter had been reported to Congress by the Secretary of War, and on May 9, 1876, Congress passed an act for the purpose of relinquishing the land not claimed by the military authorities in San Francisco as a part of the military reservation, and of enabling the persons in possession of the lands east of the fence to obtain title to their lands. By this act it was declared that all the right and title of the United States to the portion of the Presidio reservation therein described was relinquished to the city of San Francisco and its successors "for the benefit of

persons who, if the said land had not been reserved for public use, would have been entitled thereto" under City Ordinance No. 800 and the act of the Legislature of California of March 27, 1868. The boundaries of the tract relinquished, as described in the act, was as follows: "Commencing at the south-easterly corner of said Presidio or Fort Point reservation, and thence running in a direct line due north to the shore line of the bay of San Francisco, thence westerly along the said shore line to a point eighty feet westerly of the easterly line of the said Presidio, or Fort Point reservation, as established by the United States authorities, said eighty feet being relinquished for a public highway or street, named Lyon street; thence southerly to a point on the southerly line of said reservation, where the west line of Lyon street intersects said line; thence easterly to the point of commencement, to conform as near as possible to the plan of the city map of the streets of San Francisco outside of reservation, said plan being now on file in the office of the War Department of the city of Washington: Provided, that Lyon street shall be extended to the bay of San Francisco, eighty feet wide, and is hereby dedicated for a public highway and street forever." It will be observed that the easterly line of the Presidio reservation according to this declaration was to be a line 80 feet westerly of the easterly line thereof "as established by the United States authorities." The entire case depends upon the interpretation to be given to this phrase.

It is claimed on the part of the appellant that by reason of the agreement between General Riley and Wright regarding the boundary line to which the military occupation should extend, and certain correspondence and reports on the subject, the true line established by the military authorities was a line parallel with Larkin street—that is, a line running northerly from the point where the cannon was planted to the bay shore on a course north $9^{\circ} 15'$ west—and that this was the line intended to be fixed as the boundary by the said act of Congress.

The facts stated in the findings show that this line never was established by the United States authorities. General Riley did make an attempt to establish such a line in pursuance of his agreement with Wright. But he was without authority to make any final determination of the matter. He reported the agreement to the War Department, with his recommendation, and the proposition was disapproved. The correspondence between the respective army officers and the reports made by them, in several instances, refer to the "line parallel with Larkin street" as the eastern boundary of the Presidio, but that line was never marked out or observed, and there was no change ever made either in the legal boundary or in the line of actual occupation and possession. The legal boundary remain-

ed the due north line running northerly from the cannon to the bay shore, and the line of possession continued to extend to the fence aforesaid, the military authorities occupying all the space westerly of the fence, and squatters and claimants occupying the lands between the fence and the due north line fixed by presidential order. This was the condition of affairs when the act of 1876 was passed. Although the fence was not the true legal boundary, it was manifestly then well known as the actual visible line of the military occupation, and in that sense it was the easterly line of the reservation established by the United States authorities in charge and possession. The language of the act shows that by the designation of an easterly line of the Presidio reservation "established by the United States authorities," lying westerly of the true legal line thereof, some line was there intended other than the true line. There was no other line answering the description of a line established by the United States authorities, except the line of this old fence, the line actually established and maintained as the boundary of their possession by the military authorities in command of the Presidio. This, therefore, must have been the line referred to in the act as the landmark 80 feet west of which the new line was to be run.

This construction of the act of 1876 was the one adopted by the authorities charged with the execution of the act. The military authorities in charge of the Presidio reservation, in accordance with instructions from the War Department, immediately thereafter took down the old fence and erected a new fence as such boundary, placing it on a line beginning on the bay shore 80 feet westerly of the old fence line, and running to the point where the westerly line of Lyon street intersected the southerly line of the Presidio reservation some 110 feet westerly from the said cannon set as the southeast corner of the reservation, and from that time until the present the line so fixed and the fence so erected has marked the eastern boundary of the Presidio reservation, and the possession of the United States has extended easterly to that point and no further. The Interior Department caused a survey to be made establishing the line of this fence, and thereafter, under its recommendation, a patent was issued to the city of San Francisco in accordance with the act of 1876, granting all the lands included in the original reservation and extending westerly to this line, but not beyond. It is true, there were a number of preliminary surveys, one of which attempted to fix as the boundary a line on a course parallel with Larkin street, and one of which assumed that the only line established by the United States authorities was the due north line fixed by the presidential order of 1851. There were also varying decisions of a preliminary character made by

the Commissioner of the Land Office and the Secretary of the Interior concerning the true interpretation of the act of 1876. But the final decision of the Secretary of the Interior was that the "line established by the United States authorities" therein mentioned was the line of the old fence above referred to, and a patent was issued in accordance with that decision. The authorities of the War Department contended from the first that this old fence was the easterly line of the Presidio reservation referred to in the act of 1876, and their contention was finally acceded to by the Interior Department.

At the time the old fence was located and established, the entire property was within the reservation of the United States, the legal line thereof being situated some distance easterly of the line of the fence. It was therefore entirely within the power of the commandant of the Presidio to establish the line of his occupation at any point within the reservation and westerly of the true line. His superior officers might countermand his orders and compel him to change his line, but no private individual occupying lands within the legal lines of the military reservation would have any right to dispute his authority in establishing the line where the fence was located. It appears with reasonable certainty that the intention was to locate this fence on a line parallel with Larkin street, but by some mistake it was not correctly located. If private persons had any rights depending upon the accuracy of this location, it may be conceded that they would have a right to dispute its accuracy; but they had none. The land all belonged to the United States, and the question whether it was located on a true parallel with Larkin street, or on some line supposed to be so, but not actually so, was a matter of no concern to mere squatters, whether outside or inside the legal bounds of the Presidio. They would have no right to a resurvey or inquiry to determine whether the fence line which Congress referred to was or was not originally located by the subordinate officers on the precise course directed by their superiors. Its actual course was the course intended by Congress.

The strip of land 80 feet wide, immediately east of the new line located in pursuance of the act of 1876, was effectually dedicated as a public street, and could not be alienated by the city. The city had ample authority to clear obstructions from this territory, and open it up so as to make it passable for public travel. The injunction was properly refused.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.

154 Cal. 759

BONE v. HAYES et al. (S. F. 4534.)

(Supreme Court of California. Dec. 22, 1908.)

1. APPEAL AND ERROR (§ 867*)—REFUSAL OF NEW TRIAL—SCOPE OF REVIEW.

On appeal from an order denying a new trial, only such matters as are made grounds upon which the trial court was authorized to act will be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3481; Dec. Dig. § 867.*]

2. NEW TRIAL (§ 18*)—GROUNDS—ERRONEOUS RULING ON DEMURRER.

Erroneous overruling of a demurrer to a complaint is not a ground for a motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 27; Dec. Dig. § 18.*]

3. TRUSTS (§ 101*) — INVOLUNTARY TRUST — "TRUSTEE."

Under Civ. Code, § 2219, making one who voluntarily assumes a relation of personal confidence with another a trustee, and, under section 2229, prohibiting use of trust property by the trustee for his own benefit, if defendant, in purchasing bonds as decedent's agent and with decedent's money, received from the sellers, in consideration of the purchase, a stock bonus and did not account for it to decedent, he was chargeable with it as trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 152; Dec. Dig. § 101.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7128-7133, 7822.]

4. APPEAL AND ERROR (§ 867*)—REVIEW.

Where a cause of action is sufficiently pleaded as to one defendant, its insufficiency as to another defendant or defects of form cannot be considered on plaintiff's appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3478; Dec. Dig. § 867.*]

5. CORPORATIONS (§ 472*) — BONDS—"UNDERWRITING"—WHAT CONSTITUTES.

Corporate bonds are "underwritten" where one buys them from the corporation guaranteeing their sale.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 472.*]

6. EVIDENCE (§ 75*)—PRESUMPTIONS—FAILURE TO OFFER EVIDENCE.

When evidence tends to prove a material fact imposing a liability on a party, and he can produce evidence rebutting the case made against him if it is not founded on fact, but refuses to do so, it must be presumed that the evidence, if produced, would operate to his prejudice and support his adversary, especially where one charged with suspicious or apparently dishonorable conduct has an opportunity to explain it and fails to do so.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95; Dec. Dig. § 75.*]

7. APPEAL AND ERROR (§ 999*)—REVIEW—ISSUES OF FACT.

The Supreme Court cannot on appeal make an original finding on an issue of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912, 3913; Dec. Dig. § 999.*]

8. APPEAL AND ERROR (§ 1001*)—REVIEW—FINDINGS—CONCLUSIVENESS.

The findings of a trial court are conclusive on appeal to the Supreme Court, unless that

court can say as a matter of law that they are unsupported.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.*]

9. APPEAL AND ERROR (§ 989*)—REVIEW—FINDINGS.

In determining whether the evidence supports findings below, the Supreme Court, like the trial court, must be guided by rules of law governing the effect of the production or withholding of particular evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3897; Dec. Dig. § 989.*]

10. TRUSTS (§ 289*)—TRUSTEES—DUTY.

Trustees must render to their beneficiaries a full account of their dealings with the trust fund.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 408; Dec. Dig. § 289.*]

11. TRUSTS (§ 325*)—NEGLIGENT KEEPING OF ACCOUNTS—EFFECT.

Where a trustee has negligently failed to keep true accounts or has refused to account, all presumptions are against him on a settlement.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 483; Dec. Dig. § 325.*]

12. TRUSTS (§ 332*)—TRUSTEES—ACCOUNTING—SUFFICIENCY.

That an agent employed to buy bonds denied that he received any bonus in the transaction did not meet his duty to give his principal complete and satisfactory information respecting his dealings with the trust estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 495; Dec. Dig. § 332.*]

13. TRUSTS (§ 110*)—EVIDENCE—SUFFICIENCY.

Evidence held to show that one employed to buy bonds obtained for himself a secret profit in the way of a stock bonus, which could and should have been obtained for his principal.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 110.*]

14. TRUSTS (§ 110*)—FRAUD OF TRUSTEE—EVIDENCE—CONSTRUCTION.

Though, in a suit to charge an agent as trustee of stock received as a bonus in a purchase of bonds for his principal, the burden of proof is on plaintiff, equity will not, to save the agent from liability, strain the evidence for a possible ground of exculpation, where he has not suggested one.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 110.*]

15. TRUSTS (§ 108*)—INVOLUNTARY TRUSTS—EVIDENCE.

In a suit to charge an agent as trustee of stock received as a bonus in a purchase of bonds for his principal, plaintiff can show the terms on which bonds were sold to other purchasers, after showing that all the bonds were disposed of according to a particular plan.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 108.*]

In Bank. Appeal from Superior Court, City and County of San Francisco. J. M. Seawell, Judge.

Action by Charles Bone, Charles Main's administrator, against Mary E. Hayes, Thomas R. Hayes' executrix, and others. From an order denying a new trial, plaintiff appeals. Reversed.

Joseph M. Nougues and M. J. Waldheimer (Geo. W. Towle, Jr., of counsel), for appel-

lant. W. J. Bartnett, Marcel E. Cerf, and Charles W. Slack, for respondents.

SLOSS, J. This action was begun by Charles Main against Thomas R. Hayes, individually and as executor of the will of C. E. Hayes, deceased, to compel the transfer to plaintiff of 300 shares of the stock of the Standard Portland Cement Company, issued to Thomas R. Hayes, and a like number issued to C. E. Hayes. The cement company was made a party defendant for the purpose of preventing a transfer of the stock pending the litigation.

Plaintiff's amended complaint contained three counts. The first alleged that on September 29, 1902, the defendant Thomas R. Hayes, acting as plaintiff's agent, purchased for plaintiff 15 bonds of the Standard Portland Company, of the par value of \$1,000 each. In consideration of the purchase, which is alleged to have been made with moneys of plaintiff to the amount of \$15,000 theretofore intrusted to Thomas R. Hayes, a bonus of 300 shares of the capital stock of the Standard Portland Cement Company was delivered by the sellers of the bonds, but not as a gift or gratuity to Thomas R. Hayes or to C. E. Hayes, his son. Both Thomas R. and C. E. Hayes knew that payment for the bonds was made with the moneys of Main. Thomas R. Hayes accounted to plaintiff for the bonds, but never accounted for or delivered to him the 300 shares of stock. It is alleged that, without the knowledge or consent of plaintiff, Thomas R. Hayes had 200 of the 300 shares issued and delivered to himself, the other 100 shares being, by the direction of C. E. Hayes, issued and delivered to said C. E. Hayes. On the death of C. E. Hayes, Thomas R. Hayes became executor of his will. He has refused to comply with plaintiff's demands upon him, individually, that he turn over the 200 shares issued to him, and, as executor, that he turn over the 100 shares issued to his son, C. E. Hayes.

The second and third counts are of the same general character, being based upon similar transactions occurring at different times. The second alleges a purchase of 5 bonds on October 4, 1902, and the receipt of a bonus of 200 shares of stock, 100 shares being issued to Thomas R. Hayes, and 100 to C. E. Hayes. The third sets forth a purchase of 5 bonds, and the issuance of 100 shares of stock to C. E. Hayes. The transaction relied on in this count took place in January, 1903.

The defendants filed separate answers, raising issues as to most of the material allegations of the complaint. The court found that the purchases of bonds, as alleged in the complaint, had been made by Thomas R. Hayes as agent of plaintiff and with plaintiff's money intrusted to him, and that

C. E. Hayes knew that payment for the bonds had been so made. It found that Thomas R. Hayes had, at the times alleged by plaintiff, caused to be issued and delivered to himself various certificates aggregating 300 shares of stock of the cement company, and that C. E. Hayes had likewise had issued to himself certificates for 300 shares. It was found, however, that said shares of stock were not delivered by the sellers of the bonds in consideration of the purchase of the bonds or as a bonus to Thomas R. Hayes or to C. E. Hayes. Upon these findings judgment was entered in favor of defendants. The plaintiff appealed from an order denying his motion for a new trial. Since the taking of this appeal, both Main and Thomas R. Hayes have died, and personal representatives have been substituted for them as parties plaintiff and defendant respectively.

The points urged by appellant on this appeal are, first, that the evidence was insufficient to justify the findings in favor of defendants, and, second, that the court erred in excluding certain evidence offered by plaintiff.

The respondents object to a consideration of the evidence on the ground that the amended complaint was not sufficient to entitle the plaintiff to relief against any of the defendants. In making this objection, they recognize the well-settled rule that, on an appeal from an order denying a new trial, the appellate court may consider only such matters "as are made grounds upon which the superior court is authorized to grant or deny the motion." *Green v. Duvergey*, 146 Cal. 379, 80 Pac. 234; *Crescent Feather Co. v. United Upholsterers' Union* (Cal.) 95 Pac. 871, and cases cited. The erroneous overruling of a demurrer to the complaint is not one of those matters. It is argued, however, that insufficiency of the evidence to sustain a finding will be ground for reversal only where the finding relates to a material issue (*McCourtney v. Fortune*, 57 Cal. 619; *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186), and that the failure to state a cause of action may be looked into to determine whether the pleading tendered any material issue upon which a finding was required. If the rule precluding, on an appeal from an order denying a new trial, a review of the rulings upon demurrers, be regarded as subject to this modification, it is plain that the amended complaint here cannot be said to be wanting in averment of facts showing a liability on the part, at least, of Thomas R. Hayes. The gist of the claim against this defendant is that he, purchasing bonds as agent for Main, and with Main's money, received from the sellers, in consideration of the purchase, a bonus of shares of stock, and that he did not account to his principal for these shares. If he did so receive the stock, he was, on elementary principles, chargeable with it as trustee. Civ. Code, §§ 2219, 2229. Whether

enough is alleged to impose on C. E. Hayes an obligation toward Main as involuntary trustee of trust property taken with notice of its character is of no consequence in this connection. Upon a new trial, leave to amend the complaint may, if deemed necessary, be granted. But a cause of action being set forth as against one defendant, neither its insufficiency as against another, nor any defects of form, can be considered on this appeal.

Did the evidence justify the finding that the shares coming to Thomas R. and C. E. Hayes were not received by the former as a bonus on the bond purchase? The plaintiff showed, at the trial, through the testimony of Thomas R. Hayes himself, that said Hayes, on September 29, 1902, purchased for Main 15 bonds of the Standard Portland Cement Company, and paid for the same by two checks for \$10,000 and \$5,000, respectively, each made payable to the order of C. E. Hayes, and signed "Charles Main, by Hayes." These checks were signed by Thomas R. Hayes as Main's agent. On October 4, 1902, there was a similar purchase of 5 bonds, and on January 8, 1903, a third of 5 bonds. These were paid for by checks, one for \$5000, and the other for \$3,056.66, both signed "Charles Main, by Hayes," and payable to the order of the Standard Portland Cement Company. Judge F. W. Henshaw, one of the directors of the cement company, testified that the corporation had authorized an issue of 500 \$1,000 bonds. The issue was "underwritten" by William G. Henshaw and W. J. Dingee; that is, Henshaw and Dingee bought the bonds and guaranteed their sale. With the bonds they received from the cement company 10,000 shares of the stock of the corporation, on the understanding that this stock, or so much thereof as might be needed, was to be given to purchasers of bonds as a bonus to induce the purchase, at the ratio of not more than 20 shares of stock to each \$1,000 bond. Any stock not so used was to be returned to the treasury of the corporation. None was in fact returned.

It appeared that Mr. Dingee was absent at the time of the sale of these bonds to Thomas R. Hayes. Mr. W. G. Henshaw, who had personal knowledge of the transaction, was out of the jurisdiction at the time of the trial, and his testimony had not been taken. All that plaintiff could offer, in addition to what has been stated regarding the general method adopted by the corporation in disposing of its bonds, and the showing that Thomas R. Hayes had purchased bonds for plaintiff, was evidence of the receipt of shares of stock by Thomas R. and C. E. Hayes. In this connection it was made to appear that on September 29, 1902, two certificates for 100 shares each were issued to Thomas R. Hayes, and one for 100 shares to C. E. Hayes; on October 4, 1902, 100 shares to Thomas R., and 100 to C. E. Hayes;

on January 9, 1903, 100 shares to C. E. Hayes. Each of these issues, except the last, occurred upon the very day upon which Thomas R. Hayes had drawn a check in payment for bonds bought by him for Main. The last issue of stock was dated one day after the payment for bonds. The number of shares issued to Thomas R. and C. E. Hayes on September 29, 1902 (i. e., 300), was in the ratio of 20 shares to each bond purchased on that date. So of the shares issued in January, 1903.

The defendants offered no testimony, but submitted the case on the showing made by plaintiff. Here we have an agent or trustee purchasing bonds for his principal. Three separate purchases are made. The bonds are held for sale by parties who have been furnished with shares of stock to be given as a bonus, or part consideration, to persons who may purchase the bonds. On each of the three occasions upon which purchases are made for his principal by the agent, we find an issue of stock, corresponding, at least in two cases, to the amount of the bonus which the sellers were authorized to give, made to the agent, or to his son, who had knowledge of the agency. That, upon a consideration of all these circumstances, a court or jury would have been justified in drawing the inference that the stock had been given to Thomas R. Hayes as a bonus accompanying the purchase of bonds for his principal, can hardly be questioned. And the probability that the fact was as is claimed by plaintiff is immeasurably strengthened by the failure of Thomas R. Hayes, who was present at the trial, to testify in his own behalf. A prima facie case having been made against him, it would have been a simple matter for him to explain the exact nature of the transaction, if there was any possible explanation consistent with a due execution of his trust. "It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary." Code Civ. Proc. § 2061, subd. 7; *Missouri, etc., R. Co. v. Elliott*, 102 Fed. 96, 102, 42 C. A. 188; *Hos-tetter Co. v. Gallagher Stores (C. C.)* 142 Fed. 208; *Neilson v. Betts*, L. R. 5 H. L. 1, 20; *Goodwin v. McGehee*, 15 Ala. 232; *Jeffrey v. United Order, etc.*, 97 Me. 176, 53 Atl. 1102; *Smith v. Whitman*, 6 Allen (Mass.) 562; *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603. This principle applies with, perhaps, greater force where a party charged with conduct which is apparently suspicious or dishonorable has an opportunity to explain it, but fails to do so. 1 *Moore on Facts*, 566; *Bryant v. Fink*, 75 Iowa, 516, 39 N. W. 820;

Whitney v. Rose, 43 Mich. 27, 4 N. W. 557; *Montgomery v. Beecher* (N. J. Ch.) 31 Atl. 451; N. Y., etc., *Ferry Co. v. Moore*, 102 N. Y. 667, 6 N. E. 293; *Nelson v. N. Y.*, 131 N. Y. 4, 29 N. E. 814; *McConkey v. Cockey*, 69 Md. 286, 14 Atl. 405. "Silence under such circumstances," says the Court of Appeals of Maryland in *Keller v. Gill*, 92 Md. 190, 48 Atl. 69, "is little less than a formal confession of guilt, and a court of equity cannot be expected to say that the charges are unfounded or that the evidence is untrue, when there is nothing in the record to refute either, and when the parties charged with the fraud have failed to repel it by their own testimony." It is no doubt true that these are primarily rules to guide the jury or the trial court in passing, in the first instance, on the issues of fact. This court is not, on appeal, to make an original finding on any such issue. The conclusions on controverted matters of fact reached in the court below must stand here, unless we can say, as matter of law, that they are without substantial support in the evidence. But, in reading the evidence with a view to ascertaining its sufficiency, this court, like the trial court, must necessarily be guided by the means furnished by the law for measuring the effect of the production or withholding of certain evidence.

In addition to what we have said, it is to be noted that Thomas R. Hayes was a trustee for Main, and that he is here sought to be charged with the proceeds of the property (money) intrusted to him. The plaintiff asserts that certain shares of stock received by Hayes were a part of such proceeds. Trustees are under an obligation to render to their beneficiaries a full account of all their dealings with the trust fund (3 Pom. Eq. Jur. § 1063; 28 Am. & Eng. Ency. L. [2d Ed.] 1076), and where there has been a negligent failure to keep true accounts, or a refusal to account, all presumptions will be against the trustee upon a settlement (*Lupton v. White*, 15 Ves. 432, 440; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *Landis v. Scott*, 32 Pa. 495). Here there was nothing in the nature of an accounting beyond the bare denial by Thomas R. Hayes, before the commencement of the action and again in his answer, that he had received any bonus. This was not a compliance with his obligation, which was to give to his beneficiary complete and satisfactory information of his dealings with the trust estate. 2 *Beach on Trusts*, § 522; *In re Fish* [1893], 2 Ch. 413, 426; *Ottley v. Gilby*, 8 Beav. 602.

Upon the whole case, we are satisfied that the evidence produced by plaintiff tended so directly to show an improper use, by Thomas R. Hayes, of his fiduciary powers, that, in the absence of any explanation from him, the finding that he had not violated his duty is without substantial support. The only reasonable conclusion that can be drawn from the facts appearing in this record is

that Hayes, charged with the obligation of investing Main's funds, so contrived as to obtain for himself a secret profit which could and should have been obtained for his principal. Although the burden of proof be upon the plaintiff, a court of equity should not, in order to save the defendant from liability, strain the evidence in order to find a possible ground of exculpation, where the accused trustee has not seen fit to suggest one.

These views necessitate the reversal of the order appealed from. Of the alleged errors of law, it will be sufficient, for the purposes of a new trial, to say that, in support of the contention that the sale of bonds to Hayes carried a stock bonus, it would be proper, after a showing that all of the bonds issued were disposed of according to a certain plan or method, to admit testimony regarding the terms on which bonds had been sold to other purchasers. While, ordinarily, evidence that a certain contract was made with A, is not admissible to show that a similar contract was made with B., it has repeatedly been held that such evidence may, in the discretion of the court, be allowed, where the circumstances indicate a strong probability that the course followed in one instance would be followed in others. 1 Wigmore, Ev. § 377, and cases cited; *Moody v. Peirano*, 4 Cal. App. 411, 88 Pac. 380.

The order denying a new trial is reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.

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MADISON et al. v. OCTAVE OIL CO. et al.
(S. F. 4,823.)

(Supreme Court of California. Dec. 22, 1908.)

1. PLEADING (§ 129*)—COMPLAINT—DEFAULT OF ANSWER—EFFECT.

A failure to answer a complaint confesses the truth of all the allegations of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 270; Dec. Dig. § 129.*]

2. JUDGMENT (§ 114*)—WAIVER OF LEGAL RIGHT.

A legal right may be waived.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 114.*]

3. APPEAL AND ERROR (§ 171*)—ERRORS REVIEWABLE—QUESTIONS RAISED FOR THE FIRST TIME ON APPEAL.

A party who has proceeded in the trial court in a manner inconsistent with an intent to assert a right, to which he might be entitled, will not on appeal be permitted to shift his position and claim for the first time a benefit which he has rejected at all prior stages of the proceeding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. § 171.*]

4. JUDGMENT (§ 114*)—DEFAULT—WAIVER.

A complaint sought to restrain defendant from interfering with plaintiff in doing assessment work on a mineral claim, and prayed that his title be quieted. Defendant answered deny-

ing the complaint, and filed a cross-complaint alleging ownership of the premises, subject to the title of the United States, and sought to quiet title against the claim of plaintiff. The default of plaintiff to the cross-complaint was entered. Subsequently he filed an amended complaint, alleging ownership subject to the title of the United States, and prayed that he be declared the owner of the property and be put in possession thereof. Defendant desired time in which to answer, with the understanding that the trial should proceed, until the answer could be prepared, on the theory that the amended complaint should be deemed denied. The trial proceeded on the issues so raised, and no reference was made to the default. During the trial, defendant filed an answer denying many of the allegations of the amended complaint and set up affirmative matter as a defense. *Held*, that defendant waived the right to a default judgment on the cross-complaint, and the court might render judgment for plaintiff on the amended complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 164; Dec. Dig. § 114.*]

5. MINES AND MINERALS (§ 48*)—"MINERAL"—"MINERAL LANDS."

Gypsum is a mineral, and lands containing it are mineral lands, within the federal statutes.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 48.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4513-4516; vol. 8, p. 7722.]

6. MINES AND MINERALS (§ 2*)—MINERAL LANDS—STATUTES—CONSTRUCTION—"LANDS VALUABLE FOR MINERALS."

Under Rev. St. U. S. §§ 2318, 2319 (U. S. Comp. St. 1901, pp. 1423, 1424), reserving from sale lands valuable for minerals, and opening for exploration and purchase all valuable mineral deposits in the lands of the United States, it is not enough to render lands valuable for minerals that there is some trace of minerals, but there must be minerals in such quantities as to justify the expenditure of effort to extract them; but it is not necessary that minerals of sufficient amount and value to allow immediate profitable working be shown to exist in the land, and it is enough if the vein or deposit has a present or prospective commercial value.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Dec. Dig. § 2.*]

7. MINES AND MINERALS (§ 2*)—MINERAL LANDS—EVIDENCE—SUFFICIENCY.

Evidence held to justify a finding that lands were mineral lands within Rev. St. U. S. §§ 2318, 2319 (U. S. Comp. St. 1901, pp. 1423, 1424), authorizing a valid location on the lands as a mineral claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 2; Dec. Dig. § 2.*]

8. APPEAL AND ERROR (§ 1002*)—FINDINGS—EVIDENCE—REVIEW.

A conflict of evidence presents no question for the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

9. MINES AND MINERALS (§ 23*)—LOCATION—FORFEITURE.

Under Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), providing that, on failure to perform the required assessment work by the locator of a mining claim, the claim shall be open to relocation, provided the original locator has not resumed work on the claim after such failure and before relocation, a mere failure to comply with the statutory requirement does not terminate the right of the locator, but the sole effect of the failure is to throw the land open to location by others, and, in the absence of

such other location, the original claimant's right to resume work and to hold his claim remains, and the estate of the original claimant is not divested until there has been a peaceable entry for the purpose of relocation.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 57-59; Dec. Dig. § 23.*]

10. MINES AND MINERALS (§ 23*)—LOCATION—FORFEITURE.

One who entered on a mining claim of another during the year within which the latter might do the required assessment work, and who held possession thereof adversely to the latter, could not object that the latter had not performed the annual labor required by law.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 57-59; Dec. Dig. § 23.*]

In Bank. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by James Madison and another against the Octave Oil Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Everts & Ewing and N. C. Coldwell, for appellants. L. L. Cory, for respondents.

SLOSS, J. The plaintiffs recovered judgment in an action involving the title and the right of possession of a 40-acre tract of land in Fresno county. The defendants appeal from the judgment, on a record including a bill of exceptions.

The original complaint alleged that on January 1, 1903, the plaintiffs made a valid location of the land in controversy as a mineral placer claim; that in February, 1904, other parties, including some of the defendants, attempted to locate the same claim. The plaintiffs, it was alleged, made several attempts to go upon said claim and do the necessary assessment work for the year 1904, but were forcibly ejected by the defendants. The relief sought was an injunction restraining the defendants from interfering with plaintiffs in the performance of the annual assessment work for 1904; and, further, that plaintiffs' title be quieted. The defendants Octave Oil Company and O'Donnell answered, denying many of the material allegations of the complaint. With the answer there was filed, on behalf of the oil company, a cross-complaint, alleging that said corporation was the owner, subject only to the paramount title of the United States, and entitled to the possession of the 40 acres in dispute, and seeking to quiet its title against the adverse claims of the plaintiffs. The default of plaintiffs to this cross-complaint was entered on February 24, 1906.

Subsequently the plaintiffs filed an amended complaint, which, like the cross-complaint above mentioned, was a simple complaint to quiet title and recover possession. It alleged ownership (subject to the title of the United States) and a right of possession in plaintiffs, averred an ouster by defendants on February 1, 1904, and prayed that plaintiffs be declared the owners of the property and be put in possession thereof.

This amended complaint was filed on February 26, 1906, after the case had been called for trial. Plaintiffs having asked leave to file it, counsel for defendants stated that he had no objection, but that, inasmuch as it "changed the cause of action," he desired time to answer, on the understanding that the trial should then go on, and that, until an answer could be prepared, the allegations of the amended complaint should be deemed denied. No reference was made to the default which had been entered. The trial proceeded on the issues so raised. Before it was concluded, the defendants filed an answer, denying many of the allegations of the amended complaint, and setting up affirmative matter as a defense. The court found that all the allegations of the amended complaint were true.

It is now argued by appellant Octave Oil Company that it was entitled to a judgment upon plaintiffs' default to the cross-complaint. That a default to a complaint confesses the truth of all of its allegations is, of course, elementary. *McGregor v. Shaw*, 11 Cal. 47; *Rowe v. Table Mountain Water Co.*, 10 Cal. 441; *Himmelman v. Spanagel*, 39 Cal. 401; *Hutchings v. Ebeler*, 46 Cal. 557. But it is equally elementary that a legal right may be waived. Where a party has proceeded in the lower court in a manner inconsistent with an intent to assert a right to which he might be entitled, he will not, on appeal, be permitted to shift his position, and claim, for the first time, a benefit which he has rejected at all prior stages of the proceeding. The amended complaint and the cross-complaint presented substantially the same issues. The sole question was whether the plaintiffs or the defendants owned the land and were entitled to its possession. A judgment in favor of the oil company on its cross-complaint would have so disposed of this question as to render it impossible to give to plaintiffs any relief on their amended complaint, and to make futile a trial of the issues tendered by that complaint. If the oil company had intended to stand upon the rights conferred upon it by the default, its natural and proper course would have been to demand judgment in its favor, and object to the filing of the amended complaint. It did neither of these things, but voluntarily proceeded to a trial of the very issues which it now claims had already been determined in its favor. This conduct must be treated as a waiver and abandonment of its cross-complaint and of the default.

The land in dispute was a part of the public domain of the United States. For proof of their title, the plaintiffs relied on a location of the same as a placer mining claim, and proved compliance with the statutory requirements. It is contended by appellants that there had been no such discovery of mineral as would justify the location under the laws of the United States. The claim in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

question was located for respondents on January 1, 1903, by Albert Walter Albrecht. He testified that at that time he found upon the land a deposit of gypsum, and that he located the claim for gypsum. Other witnesses testified to the extent of the deposit, one saying that it was 100 feet long, 20 feet in width, and several feet in depth; another that it covered 60 by 200 feet, and that there were from 300 to 500 tons in sight at one place; another that the cropping was 120 or 130 feet long and 2 feet thick. Several witnesses who had had experience in mining for gypsum expressed the belief that the deposit was sufficient in quantity to justify a reasonable man in locating and working the claim for gypsum.

That gypsum is a mineral, and that lands containing it are mineral lands, within the meaning of the statutes of the United States, are propositions that are not disputed by the appellants. 1 Lindley, Mines, § 97. The argument is, however, that the evidence failed to show a valuable mineral deposit within the meaning of the federal laws. Section 2318, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1423), reserves from sale lands valuable for minerals, while section 2319 (U. S. Comp. St. 1901, p. 1424), opens for exploration and purchase all valuable mineral deposits in lands belonging to the United States. Under these statutes it is not enough that there be some trace or indication of mineral in the land. There must be minerals "in such quantity as to justify the expenditure of effort to extract them." *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423. See, also, *Montana Cent. Ry. Co. v. Migeon* (C. C.) 68 Fed. 811; *Davis, Admr. v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *United States v. Iron Silver M. Co.*, 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571. It is not necessary, however, that mineral of sufficient amount and value to allow immediate profitable working be shown to exist in the land. It is enough if the vein or deposit "has a present or prospective commercial value." *Mont. Cent. Ry. Co. v. Migeon*, supra.

Clearly the evidence above recited was ample to justify the trial court in finding that there had been a discovery of a valuable mineral deposit. There was testimony of contrary tendency, but a conflict of evidence presents no question for the appellate court. The appellants contend that the land had in fact been located by respondents on account of the oil which it might contain, and that the showing that it held gypsum was a mere subterfuge. This, however, was a matter to be determined by the trial court, and there was certainly no lack of evidence tending to support the conclusion reached.

The only other point made by appellants is that the court erred in striking out the special defense set up in the answer. The allegations of this part of the pleading were that the Octave Oil Company had, since the 1st day of February, 1904, been in the actual

and exclusive possession of the land in controversy; that plaintiffs' claim of title was by virtue of an alleged location under the laws of the United States, made on January 1, 1903, and that plaintiffs had not performed work or made improvements to the amount of \$100 upon the land during the years 1903 and 1904, nor during the year 1905. The defendants do not, in their pleading, claim under a subsequent, conflicting location. They rely solely on actual possession, taken after the posting and recording of plaintiffs' notice of location. The authorities are clear to the effect that a failure to do the assessment work does not create a forfeiture in favor of one occupying the position of defendants. The statute which requires that "one hundred dollars' worth of labor shall be performed or improvements made" declares that, "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location." Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426). It is not provided that a mere failure to comply with the statutory requirement shall terminate the locator's right; the sole effect of such failure is to throw the land open to location by others, and, in the absence of such other location, the original claimant's right to resume work and to hold his claim remains. See *McCormick v. Baldwin*, 104 Cal. 227, 37 Pac. 903; *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036. "While a claim is subject to relocation for failure to perform the requisite annual labor, no forfeiture is worked, and the estate of the locator is not divested until there has been a peaceable entry for the purpose of relocation. The right of the original claimant is terminated only by the entry of a new one." 2 Lindley, Mines, § 645; *Beals v. Cone*, 27 Colo. 473, 62 Pac. 948, 958, 83 Am. St. Rep. 92; *McCarthy v. Speed*, 11 S. D. 362, 77 N. W. 590. (There may, of course, be an abandonment of a location, but no question of abandonment is here presented.)

But beyond all this, the respondents had all of the year 1904 within which to do the annual work. Act Jan. 22, 1880, c. 9, 21 Stat. 61 (U. S. Comp. St. 1901, p. 1426). It is admitted by the pleadings, in fact, affirmatively alleged in the answer itself, that the defendants took possession of the claim in February, 1904, and have held such possession, adversely to the plaintiffs, ever since. The defendants, even if claiming under an adverse location, could not be heard to object that plaintiffs did not do the annual labor required by law while they (defendants) remained in adverse possession of the claim. *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *Trevaskis v. Peard*, 111 Cal. 599, 44 Pac. 246.

It follows that the facts specially pleaded

stated no defense, and that the court did not err in striking out this part of the answer.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

(154 Cal. 785)

MILLER & LUX v. KERN COUNTY LAND CO. (S. F. 4,818.)

(Supreme Court of California. Dec. 23, 1908.
Rehearing Denied Jan. 18, 1909.)

1. WATERS AND WATER COURSES (§ 247*)—IRRIGATION DITCH—RIGHT OF WAY—COMPLAINT.

Where a complaint for violation of plaintiff's right to the use of an irrigation ditch showed a continuous trespass and invasion of the right to which plaintiff had succeeded, the complaint was not demurrable for failure to allege that plaintiff was the owner of the right of way, the gate, and canal at the time of the alleged violation of its rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 247.*]

2. WATERS AND WATER COURSES (§ 247*)—IRRIGATION DITCH—PAROL LICENSE—COMPLAINT.

Where a complaint for violation of plaintiff's right to maintain an irrigation ditch on defendant's land, after pleading a written agreement conferring on plaintiff's predecessors such right of way, alleged that defendant's agents co-operated in laying out the lines and locating a canal to conduct the water over defendant's land, and that plaintiff's ditch was constructed openly, with defendant's knowledge, and that defendant's officers encouraged the construction, such facts warranted an inference that plaintiff relied on a parol license to maintain the canal, and did not intend to limit its rights to those acquired under the written contract.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 247.*]

3. ESTOPPEL (§ 93*)—ESTOPPEL IN PAIS—PAROL LICENSE.

Where defendant's officers, knowing that plaintiff's assignors intended to lay out an irrigation canal across defendant's land, assented to, aided, and encouraged the performance of the work, on which plaintiff's assignors expended considerable money, defendant was thereafter estopped to deny the granting of a parol license for such canal.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. § 93.*]

4. LICENSES (§ 59*)—IRRIGATION DITCH—PAROL LICENSE—REVOCATION.

Where defendant granted plaintiff's assignors a parol license to construct an irrigation canal over defendant's land, and plaintiff's assignors entered and expended a large sum of money in the construction of the canal, a license to maintain it was irrevocable.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 121; Dec. Dig. § 59.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Miller & Lux, a corporation, against the Kern County Land Company. From a judgment for plaintiff, and from an

order denying defendant's motion for a new trial, it appeals. Affirmed.

Page, McCutchen & Knight, for appellant. Houghton & Houghton and E. F. Treadwell, for respondent.

PER CURIAM. The appeal is from the judgment, and from the order denying defendant's motion for a new trial. The essential allegations of the complaint are that the copartnership of Miller & Lux, James B. Haggin, and others, owned lands, and conflicting claims to land, and water rights, and conflicting claims to water rights, on Kern river; that in adjustment of the litigation which had sprung up because of their hostile interests, a written agreement was entered into; that one of the purposes to be accomplished by the agreement was the supplying water to all the lands of Miller & Lux; that to this end Buena Vista lake was to be made into a reservoir for the storing of water, and this was done; that an easement was granted in the agreement by James B. Haggin for the reasonable use of his lands for the purpose of taking water to the lands of Miller & Lux. In 1892 James B. Haggin conveyed his lands, with all the water rights appurtenant thereto, to the defendant corporation, and, in turn, the plaintiff corporation succeeded to all the rights of Miller & Lux, copartners. The complaint then proceeds, and here we quote in extenso: "That in the month of April, 1894, said Henry Miller, acting as surviving partner aforesaid, being desirous of irrigating said 4,000 acres of land with water from said lake or reservoir, notified defendant of his intention to locate and construct a gate and canal over and upon the north half of said section 30 for said purpose, whereupon, under its direction, the duly authorized agents of defendant, having power to act in the premises, accompanied said Henry Miller and his employes to said reservoir, and co-operated and assisted him in laying out the lines and surveying and locating a canal upon the north half of said section 30 for the purpose of carrying or conducting water from said lake or reservoir to said 4,000 acres of land; that thereafter, in May, 1894, said Henry Miller, as such surviving partner, commenced the work of constructing the gate and canal so located and laid out, and continued said work until August, 1894, when said gate and canal were completed; that said canal is nearly one mile in length, and the cost and expense of constructing the same and the gate thereto is about \$3,000; that defendant knew said work was in progress from the time it was commenced until the completion of said canal and said gate, and stood by and made no objection thereto, but, on the contrary, by its acts and conduct, encouraged said Henry Miller, acting as such surviving partner, to proceed with the same and construct said canal and gate; that after the

completion thereof, and the gate thereto, said canal was used by said Henry Miller, as such surviving partner, to carry and conduct water from said Buena Vista lake or reservoir to said 4,000 acres of land, for the irrigation thereof, and for other purposes, until in the month of February, 1897, defendant illegally, wrongfully, stealthily, and in the nighttime constructed a dam in and across said canal near its junction with said lake or reservoir, and thereafter to the present day, with force and arms, has prevented said Henry Miller and plaintiff from removing said dam and from using said gate and canal." Plaintiff sought a decree entitling it to the use of the gate and canal, and restraining the defendant from interfering with their use, and a further judgment of \$25,000 damages for injuries sustained. After trial, the court's findings were in favor of the allegations of the complaint, saying that it found against the allegation that the agreement between the original parties conveyed, or purported to convey, to plaintiff or its grantor any right of way for a ditch or canal over the land of the defendant. It did find, however, facts in accordance with the allegations of the complaint, from which it concluded that a parol license to construct and maintain the gate and canal had been given by defendant to plaintiff's predecessor.

Upon appeal it is urged that defendant's demurrer to the complaint should have been sustained, because of the complaint's failure to allege that the plaintiff was the owner of the right of way for gate and canal at the time of the alleged violation of its right to the use thereof. Such an allegation, under the circumstances of this case, was not, however, necessary. Appellant's reliance in this regard is upon the class of cases illustrated by *Vanalstine v. Whelan*, 135 Cal. 232, 67 Pac. 125, by which class of cases it is well settled that it is fatal to an action of claim and delivery if the complaint contains no averment of ownership and right of possession at the time of the commencement of the action. But such a rule does not apply to a case of this character, where the complaint shows a continuous trespass and invasion of the right to which the plaintiff has succeeded. *Cooper v. Taylor*, 15 N. J. Law, 455; *Terpening v. Gallup*, 8 Iowa, 74. Plaintiff, it appears, actually acquired its title and all of the rights of Miller & Lux, copartners, in June, 1897, and the continuance of the asserted trespass after that date is both alleged and established.

The second ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action, in that the allegations are insufficient to show the giving of a parol license, or of the reliance upon a parol license by plaintiff in the expenditure

of its money, is not without merit. It is urged, with much force, that the pleader's theory presented by his complaint is that of a right under a written agreement, and that it does violence to the language of the complaint to wrench it from its obvious import to discover therein reliance upon parol license. But we think it may be fairly said that the complaint shows something more than a mere reliance upon the legal right asserted under the agreement. Thus it is averred that defendant's agents accompanied Miller and his employees to the reservoir and co-operated and assisted them in laying out the lines and surveying and locating the canal for the purpose of conducting this water over defendant's land; that Miller constructed the work openly, and not only with the knowledge of the defendant, who stood by and made no objection thereto, but, moreover, encouraged Miller to proceed with the construction. We think that, by fair intendment, it thus appears from the complaint that the assent of the defendant was obtained under circumstances amounting to a parol license, and if, by fair intendment, these facts can be derived from the complaint, it will be held sufficient against general demurrer. *Anderson v. Bank of Lassen*, 140 Cal. 695, 74 Pac. 287.

From another point of view the complaint is equally impregnable against attack upon demurrer. The allegations above quoted, with others which the complaint contains, may be treated, and they are sufficient when so treated, as a pleading of estoppel in pais. The findings in support of these allegations establish that the defendant, knowing the purpose and nature of the work about to be done by plaintiff's grantor, assented to, aided and encouraged him in, the performance of this work, upon which was expended a considerable sum of money. Here are clearly present all the facts necessary to establish such an estoppel. And thus, by this estoppel, defendant is forbidden to deny the granting of the parol license. The evidence is sufficient to support these findings.

The principal contention upon appeal is that this court should recede from the view which it adopted and expressed in *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, and should adopt the contrary view that a parol license, regardless of its nature, is always revocable at the will of the licensor. This question was duly considered in *Stoner v. Zucker*, supra, the conflict in authority was recognized, and the conclusion there expressed deliberately adopted. We perceive no reason for receding from that conclusion.

For these reasons, the judgment and order appealed from are affirmed.

I dissent: BEATTY, C. J.

154 Cal. 775

STATE COMMISSION IN LUNACY v. WELCH, County Treasurer. (S. F. 4785.) (Supreme Court of California. Dec. 23, 1908.)

1. STATUTES (§ 231*)—CONSTRUCTION—ADOPTION OF CONSTRUCTION OF PRIOR STATUTES.

Where a provision of the practice act (St. 1851, p. 53, c. 5, § 19) is enacted into a subsequent Code in precisely the same language, the construction given the prior statute must govern as to the subsequent Code provision.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. § 231.*]

2. VENUE (§ 11*)—CHANGE OF VENUE—STATUTES—PUBLIC OFFICERS.

Pol. Code, § 3866, makes it the duty of a county treasurer to go to S. county and there settle with the state for state moneys collected. Code Civ. Proc. § 393, declares that certain actions must be tried in the county where the cause or some portion thereof arose, and includes in subdivision 2 actions against a public officer for acts done by virtue of his office, and section 395, declares generally that an action must be tried in the county in which defendant resides at the time of the action. A suit was commenced in A. county against a county treasurer, residing in S. B. county to compel an accounting for money received in his official capacity under sections 2192, 2193, Pol. Code, requiring each county to pay \$10 for each person committed to the home of the feeble minded, to the state and account for it under section 3866. Defendant county treasurer moved for change of venue to S. B. county, and plaintiff contended that S. county was the place of trial, and that defendant waived objection to A. county by moving to transfer to S. B. county. *Held*, that the motion should be granted, though the breach of duty occurred in S. county, since subdivision 2, section 393, applies only to affirmative acts of an officer by which in the execution of process or otherwise he interferes with the personal or property rights of third persons, and hence section 395 controls.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 11.*]

In Bank. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the State Commission in Lunacy against John Welch, as Treasurer of San Benito County, for the recovery of moneys collected. From an order denying a motion to change the place of trial, defendant appeals. Reversed.

H. W. Scott and Briggs & Hulna, for appellant. John W. Stetson, for respondent.

PER CURIAM. This is an appeal from an order denying a motion of the defendant for a change of the place of trial.

The action was begun in the superior court of Alameda county. It is a proceeding in mandamus against the defendant, as treasurer of San Benito county, to compel him, as such treasurer, to pay to the state treasurer the sum of \$1,460, alleged to be due the state from the defendant as treasurer of San Benito county, on account of children committed from said county to the California Home for Feeble Minded Children. The defendant resides in San Benito county. He asks for a change of venue to that county on the ground that he resided there when the action was

begun. The general rule, as stated in section 395 of the Code of Civil Procedure, is that an action must be tried in the county in which the defendant resides at the commencement of the action, and, unless this case falls within some of the statutory exceptions to this rule, the motion should have been granted. The plaintiff's claim is that it falls within the class described in section 393 of the Code of Civil Procedure, declaring that certain actions "must be tried in the county where the cause, or some part thereof, arose." Subdivision 2 places within this class all actions "against a public officer * * * for an act done by him in virtue of his office." Section 3866 of the Political Code provides as follows: "The treasurers of all the counties or cities and counties of this state must, between the fifteenth and thirtieth days of December and May of each year, proceed to the state capitol and settle in full with the controller of state, and pay over in cash to the treasurer of state, all funds belonging to the state which have come into their hands, as county treasurers, before the close of business on and including the first Monday of said months." Section 2192 of the Political Code requires each county to pay to the state treasury \$10 per month for each person committed from such county to the home for the feeble minded. By section 2193 of the Political Code the county auditors are required to include in their report to the state controller in the months of May and December the amount due from the county to the state on account of such commitments, and it is made the duty of the county treasurer, "at the time of the settlement with the state in such months," to pay said amount to the state treasurer. This means that the county treasurer must take the money or its equivalent with him to Sacramento and there pay it over to the state treasurer at the capitol. This duty must be performed in Sacramento county, and, if there is a failure of the treasurer while there to pay the money due, that breach of duty takes place in Sacramento. The complaint alleges that the defendant failed, neglected, and refused to pay said money to the state treasurer. It does not aver that he did not proceed to Sacramento, as the law requires, but merely that he failed, neglected, and refused to make the payment.

From this the plaintiff argues that the cause of action arose where the breach of duty must have occurred, namely, in Sacramento county, and that that county is the proper place for the trial of the action. To the suggestion that in any event Alameda county is not the proper place of trial under the statute, plaintiff answers that the cause may be begun and tried in that county or any county, if no proper and valid objection is made, that the mere fact that it should have been begun and tried in Sacramento county is no ground for transferring it to San Benito

county, which is no more the lawful county than Alameda, and that the application is to change the venue to San Benito county and not to Sacramento county. This answer fully meets and disposes of the suggestion, based, as it is, on the assumption that Sacramento is the proper county for trial. This assumption, however, is contrary to the previous decision of this court in regard to the proper construction of the section in question. Under these decisions the clause of section 393 of the Code of Civil Procedure, upon which the plaintiff relies, does not apply to the present case. The old practice act (St. 1851, p. 53, c. 5, § 19) contained a provision in regard to change of venue in precisely the same language as that of subdivision 2, section 393, above quoted. With regard to this provision it was held that it "applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty." *McMillan v. Richards*, 9 Cal. 420, 70 Am. Dec. 655. With this interpretation thus fixed by that decision, the Legislature in 1872 re-enacted the same provision in the Code of Civil Procedure. This implies that the Legislature intended it to have the same meaning in the new enactment as it had received before in the practice act. *Hyatt v. Allen*, 54 Cal. 356. The construction of section 393 of the Code of Civil Procedure was before this court in *Bonestell, etc., Co. v. Curry*, 153 Cal. 418, 95 Pac. 887. That was an action begun in the city and county of San Francisco against Curry, as Secretary of State, and Zellerbach & Sons, to whom Curry had officially awarded a contract for paper to use in the state printer's office. The suit was to enjoin further action in pursuance of the contract. Zellerbach & Sons resided in San Francisco. A motion was made to change the venue to Sacramento county on the ground that the case came within the purview of section 393 and must be tried in that county, notwithstanding the fact that some of the defendants actually resided in San Francisco. The court followed *McMillan v. Richards*, supra, and held that the language of subdivision 2 "contemplates only such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrests, trespass, conversion," etc., and that the acts enjoined were not of that character. From this it follows that, although the neglect and refusal to perform the duty of paying over the money to the state treasurer occurred in Sacramento county, and is a breach of duty which constitutes a cause of action against the defendant, yet it is not an action which, under section 393, must be tried in that county, but one which, under section 395, is triable in the county in which the defendant resided when it was begun. The case does not

come within any exception to this latter rule, and the motion should have been granted.

The order is reversed.

154 Cal. 709

STANSBURY v. POINDEXTER.

(L. A. 1908.)

(Supreme Court of California. Dec. 21, 1908.)

1. MUNICIPAL CORPORATIONS (§ 330*)—STREET IMPROVEMENTS — CONTRACTS — DETERRING BIDDERS.

A contract between a city street superintendent and a contractor for grading and graveling a street, which contained specifications that all loss or damage arising from the nature of the work, from any unforeseen obstruction from the action of the elements, or for any act or omission of the contractor, or any one employed by him not authorized by the agreement, should be sustained by the contractor, was void as tending to increase the cost of the work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 854, 871; Dec. Dig. § 330.*]

2. MUNICIPAL CORPORATIONS (§ 330*)—STREET IMPROVEMENTS — CONTRACTS — VALIDITY — DETERRING BIDDERS.

That the bidders on the work did not increase their bids on account of such restrictions did not obviate the objection, since some persons may have been deterred from bidding on account of the restrictions who would have otherwise presented lower bids than any of those submitted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 854, 871; Dec. Dig. § 330.*]

Department 2. Appeal from Superior Court, Los Angeles County; *Curtis D. Wilbur*, Judge.

Action by Charles Stansbury against R. W. Poindexter. Judgment for defendant, and plaintiff appeals. Affirmed.

Scarborough & Bowen, for appellant. Long & Baker, for respondent.

MELVIN, J. This is an action by a contractor upon his claim for work performed upon Normandie avenue, Los Angeles, adjacent to defendant's property. The contract, assessment, and lien were declared invalid by the superior court, and judgment was given for the defendant. The contract between the street superintendent and appellant provided that Normandie avenue should be graded and graveled "in accordance with the plans and profile on file at the office of the city engineer, and specifications for the construction of graveled streets on file in the office of the city clerk, said specifications being numbered 68," and that curbing should be laid "in accordance with specifications for constructing redwood curbs on file in the office of the city clerk, said specifications being numbered 52." In each of said specifications the following language is used: "All loss or damage arising from the nature of the work to be done under this agreement, or from any unforeseen obstruction or difficulties which may be encountered in the prose-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cution of the same, or from the action of the elements, or from encumbrances on the lines of the work, or for any act or omission on the part of the contractor, or any person or agent employed by him not authorized by this agreement, shall be sustained by the contractor."

Practically the same provision was declared fatal to the validity of the ordinance authorizing certain street work, considered in the case of *Blochman v. Spreckels*, 135 Cal. 664, 67 Pac. 1061, 57 L. R. A. 213, and that case is conclusive of the question presented here. There is no merit in appellant's point that he was denied opportunity of showing, by all who presented bids to the city council for the work, that the specifications quoted had not operated to increase the amount of their bids. This objection leaves out of consideration the fact that some bidders may have been deterred from offering to do the work at all by reason of the unlawful restrictions contained in the proposed contract. Such persons may have concluded very properly that they could not afford to do the work in view of the burdens imposed, and, without such burdens, they might have been prepared to present lower bids than those filed by their more daring competitors.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

154 Cal. 774

GALVIN et al. v. FANNEN et al. (S. F. 4,824.)

(Supreme Court of California. Dec. 22, 1908.)

1. APPEAL AND ERROR (§ 864*)—REVIEW—APPEAL ON JUDGMENT ROLL.

On appeal upon the judgment roll alone, if the findings are within the issues and support the judgment, it will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3459; Dec. Dig. § 864.*]

2. APPEAL AND ERROR (§ 706*)—PROCEEDINGS IN RECORD—BILL OF EXCEPTIONS.

There being nothing in the transcript to support an appeal from an order denying a new trial, and the record containing no bill of exceptions, the order cannot be reviewed and will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2944; Dec. Dig. § 706.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by E. M. Galvin and others against John J. Fannen and others. From a judgment for defendants and an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

E. M. Galvin, Frank McGowan, and Robert Ash, for appellants. Garoutte & Goodwin, Geo. C. Ross, and John J. Barrett, for respondents.

HENSHAW, J. This action was brought by plaintiffs against John Fannen and James Maguire, administrator of the estate of Bridget McDermott, deceased, to quiet title to certain land. Judgment passed for defendants. Plaintiffs appeal from this judgment, and from the order dismissing their motion for a new trial. The appeal from the judgment is upon the judgment roll alone. The findings are within the issues joined by the pleadings, and fully support the judgment. This appeal, therefore, is without merit.

There is nothing in the transcript to support the appeal from the order dismissing the motion for a new trial. It appears from the records of this court that appellants made an effort here by mandate to compel the settlement of a bill of exceptions by the trial court, but their application for mandate was refused. *Galvin v. Superior Court* (Cal.) 94 Pac. 423. So the appeal from the order is also without merit.

The judgment and order appealed from are therefore affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.

154 Cal. 716

UNION TRUST CO. OF SAN FRANCISCO v. STATE. (Sac. 1,570.)

(Supreme Court of California. Dec. 21, 1908. Rehearing Denied Jan. 18, 1909.)

1. PLEADING (§ 8*)—CONCLUSIONS—ALLEGATIONS CONSTITUTING.

Allegations that the amounts due on bonds sued on are properly chargeable against the state, that the money paid for the bonds was advanced to the state at its request upon its written contract to repay, and that the state sold the bonds as a purely commercial transaction, are conclusions, and hence not entitled to weight in considering the sufficiency of the pleading as an allegation of facts importing a liability of the defendant state.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 13; Dec. Dig. § 8.*]

2. PLEADING (§ 214*)—ADMISSION BY DEMURRER.

Allegations of a pleading must be taken as true on demurrer thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525, 526; Dec. Dig. § 214.*]

3. MUNICIPAL CORPORATIONS (§ 372*)—SPECIAL IMPROVEMENTS—UNDISCHARGED COST—CITY'S LIABILITY.

A provision in a contract for a local improvement that the city shall not be liable for the cost precludes recovery against the city if the special assessments for any reason fail to discharge the cost; the city not being liable in any event unless the contract is its contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 906, 907; Dec. Dig. § 372.*]

4. STATES (§ 166*)—LOCAL IMPROVEMENTS—BONDS—STATE'S LIABILITY.

Where there has been a failure to pay special improvement bonds out of a special assessment fund as contemplated by law, the state is not liable thereon unless the issuance of the

bonds constituted a contract to which the state was a party.

[Ed. Note.—For other cases, see States, Cent. Dig. § 158; Dec. Dig. § 166.*]

5. STATES (§ 107*)—LIABILITY ON CONTRACTS.

A state is as liable for breach of its contract with a person as an individual contractor would be, though not suable without its consent.

[Ed. Note.—For other cases, see States, Cent. Dig. § 105; Dec. Dig. § 107.*]

6. STATES (§ 166*)—LOCAL IMPROVEMENTS—FAILURE TO LEVY ASSESSMENTS—LIABILITY OF STATE.

Under Act April 1, 1872 (St. 1871-72, p. 911, c. 726), authorizing a street improvement in San Francisco to be paid for by special assessments and authorizing the issuance of bonds, the failure of the board of public works to levy and collect assessments to discharge the bonds as required by the act was the default of officers in administering governmental functions, for which the state is not liable, in the absence of legislative provision binding it; the injured person's remedy being to compel the board to perform its duty.

[Ed. Note.—For other cases, see States, Cent. Dig. § 158; Dec. Dig. § 166.*]

7. MUNICIPAL CORPORATIONS (§ 745½*)—STREET IMPROVEMENTS—ACTS OF OFFICERS—NATURE.

The functions of officers charged with duties in opening streets, etc., are as truly governmental as those of ordinary executive and judicial officers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1568, 1569; Dec. Dig. § 745½.*]

8. STATUTES (§ 233*)—CONSTRUCTION—GENERAL WORDS.

General words in a statute respecting a state are not to be construed as imposing liability on the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 314; Dec. Dig. § 233.*]

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by the Union Trust Company of San Francisco against the State of California. From a judgment for defendant, plaintiff appeals. Affirmed.

S. W. Holladay and E. B. Holladay, for appellant. U. S. Webb, Atty. Gen., and George A. Sturtevant, Asst. Atty. Gen., for the State.

SLOSS, J. This action was brought to recover from the state of California the sum of \$855,000 claimed to be due as the principal of 855 bonds, and a further sum of \$1,121,010 for accrued interest. The defendant's demurrer to the complaint was sustained, and the case now comes up on plaintiff's appeal from the ensuing judgment in favor of defendant.

The bonds in question are of the class known as "Montgomery Avenue Bonds." They were issued under the terms of an act of the Legislature entitled "An act to open and establish a public street in the city and county of San Francisco to be called Montgomery Avenue, and to take private lands therefor," approved April 1, 1872 (St. 1871-72, p. 911, c. 726). The act provides for the taking and dedication of a strip of land in the city and county of San Francisco for an

open and public street to be known as "Montgomery Avenue." The strip described is one running diagonally through a number of the then existing streets of the city and the intervening blocks. It is provided that the value of the land taken for the avenue and the damages to the improvements thereon or adjacent thereto and injured thereby, and all other expenses incidental to the taking and the opening of the avenue, shall be considered to be the cost of opening the avenue, and shall be assessed upon certain described lands, declared by the act to be benefited by the proposed improvement. Section 5 provides that, whenever the owners of a majority in frontage of the property described as benefited by the opening of the avenue shall petition the mayor for the opening of the avenue a board of public works, as created by the act, to consist of the mayor, the tax collector, and the surveyor of the city and county of San Francisco, shall proceed to organize for the carrying out of the objects of the act. Said board of works, having adopted the requisite surveys, plans, maps, etc., shall proceed to ascertain and determine and set down in a written report the description and actual cash value of the several lots included in the lands taken for said avenue, and the amount of damage thereby occasioned to the property along the said line and within the course of said avenue. The board is also required to determine and separately state in the report a description of the several subdivisions of land included in the district declared to be benefited by the improvements, and to set down opposite the description of each lot the amount in which, according to the judgment of the board, said lot has been or will be benefited by reason of the opening of said avenue. Provision is made for the inspection of such report by parties interested, and the board is authorized to apply to the county court for confirmation of the report. When, by the confirmation of such report, the damages, costs, and expenses of opening said avenue have been fixed, the board is directed to "cause to be prepared and issued bonds in sums of not less than \$1000 each for such an amount as shall be necessary to discharge and pay all damages, costs and expenses as aforesaid. Said bonds shall be known and designated as the 'Montgomery Avenue Bonds'; shall be payable in thirty years from their date unless sooner redeemed as in this act provided, and shall bear interest at six per cent. per annum payable at the office of the treasurer of said city and county." Persons to whom damages are awarded are authorized to take bonds in lieu of damages, and bonds not so taken are to be sold by the mayor, auditor, and treasurer of the city and county to the highest bidders. All money arising from the sale of the bonds is to be paid to the treasurer of the city and county,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

to be kept in a fund known as the "Montgomery Avenue Fund." Section 11 of the act provides for the annual levy, assessment, and collection of a tax upon the benefited lands sufficient to pay interest on the bonds as the same mature. The moneys so collected are to be paid over to the treasurer as a part of the Montgomery avenue fund, and to be paid out by him on the coupons attached to the bonds as they from time to time become due. The act further provides that there shall be levied, assessed, and collected annually, commencing with the year 1880, upon the same lands, a tax of 1 per cent. upon each \$100 valuation, which shall constitute a sinking fund for the redemption of said bonds. These moneys when collected are also to be paid into the Montgomery avenue fund, and are to be used for the redemption of the bonds whenever the treasurer shall have \$10,000 or more in said sinking fund. Section 24 of the act reads as follows: "It is hereby expressly provided that the city and county of San Francisco shall not in any event whatever be liable for the payment of the bonds, nor any part thereof provided to be issued under this act, and any person purchasing said bonds, or otherwise becoming the owner of any bond or bonds, accepts the same upon that express stipulation and understanding."

The complaint before us alleges the performance of all of the acts necessary to authorize the issuance of the bonds in question. It is averred that the actual owners of more than a majority in frontage of the property, described in the act as benefited, did petition the mayor upon June 18, 1872, requesting and demanding the opening of said Montgomery avenue. The board of works thereupon organized and did all of the acts and things required of them by the act. They made their report and presented it to the county court for confirmation, and the county court did on the 11th day of November, 1872, make its order approving and confirming said report. The damages, costs, and expenses arising from or incidental to the opening of said avenue having been fixed, the board of works caused to be regularly prepared, executed, and issued 1,579 Montgomery avenue bonds in the sum of \$1,000,000. Each of said bonds (except as to number) was in the following form:

"State of California.

"Board of Public Works

"(Number 13.)

"City and County of San Francisco

"(Vignette.)

"\$1000. Montgomery Avenue Bond. \$1000.

"In Conformity

with an Act passed by the People of the State of California represented in Senate and Assembly, entitled an Act to open and establish a public street in the City and County of San Francisco, to be called Mont-

gomery Avenue and to take private lands therefor. Approved April 1, 1872.

"The Treasurer of the City and County of San Francisco, State of California, will pay at his office in said city and county to the holder hereof One Thousand Dollars in United States Gold Coin, with interest at the rate of six per cent. per annum, payable semi-annually in like gold coin upon surrender of the corresponding coupons and that the principal sum is redeemable within thirty years from the date of these presents. It being understood and agreed that this Bond may be redeemed by said Treasurer as provided in said above mentioned Act of the legislature of the State of California. In witness whereof, the Mayor, the Tax Collector and City and County Surveyor of said City and County of San Francisco, composing a board of public works have respectively signed these presents and the President of the Board of Public Works has signed the annexed coupons as of the first day of January, 1873.

William Alvord,

"President of the Board of Public Works and Mayor of the City and County of San Francisco.

"Alexander Austin,

"Tax Collector and member of said Board of Public Works.

"Richard H. Stretch,

"City and County Surveyor and member of said Board of Public Works.

"M. A. B."

Annexed to each of the bonds was a series of coupons for semiannual interest, reading (except as to number and dates) as follows:

"(\$30.)

Board of Public Works.

"(Coupon No. 60.)

"The Treasurer of the City and County of San Francisco will pay bearer at his office Thirty Dollars on Bond No. 13. Due 1st January, 1903. Montgomery Ave.

"M. A. B. Bond.

Wm. Alvord.

"President of Board of Public Works."

Some of the bonds were issued and delivered to the owners of lands taken for the avenue in payment for the damages sustained by them. Others were sold to the highest bidders pursuant to the terms of the act, and the proceeds of the sales were applied to the payment of the damages occasioned to the owners of the lands taken or damaged by the opening of the avenue and for other expenses of said opening. The proceeds of the bonds so issued paid and satisfied the entire cost of opening said avenue, and the board of works did open said Montgomery avenue as a public street according to the requirements of the statute. On the 21st day of September, 1874, the said board of public works transferred the avenue so opened to the municipal authorities of

the city and county of San Francisco for use as an open public street, and it has ever since been maintained and kept by said municipal authorities as a street of said city and county. Since the fiscal year 1880-1881, the said city and county has never levied or assessed taxes on the lands described in the act as benefited by the improvement to pay the interest on said bonds, or to create a sinking fund for the redemption of said bonds. There is no money in the Montgomery avenue fund for the purpose of paying either the interest due on said bonds, or as a sinking fund to redeem the principal, and none of said bonds have in fact been redeemed or paid. The plaintiff purchased for value, and is the bona fide holder and owner of, 855 of said Montgomery avenue bonds and 37,367 coupons of \$30 each. The prayer of the complaint is that the plaintiff have judgment against the state of California for the amount due upon said bonds and coupons, and further judgment for accruing interest upon said bonds until judgment.

By the terms of an act passed in 1893 (St. 1893, p. 57, c. 45), the state has permitted the prosecution of suits against it by persons "having claims on contract or for negligence," and the plaintiff, claiming to have a cause of action for the breach of a contract made by the state, relies on this act. The contention of the defendant, adopted by the court below in sustaining the demurrer and entering judgment, was and is that these bonds and the act authorizing their issuance created no contractual liability on the part of the state of California. If any such liability was created, it must be found in the terms of the act and of the instruments issued under its authority. We have, therefore, in summarizing the complaint, omitted various averments of legal conclusions drawn by the plaintiff from the transactions above set forth. For example it is alleged that the amounts due upon the bonds and coupons are justly, lawfully, and properly chargeable against and payable by the state of California to this plaintiff; that "the money paid for said bonds * * * was advanced to said state at its own request upon its written contract that it should be repaid"; that said "state sought and bargained for the money which it received and took in exchange for its said bonds, and it sold its said bonds as a purely commercial transaction." All of these are statements of conclusions, which, if properly drawn, would follow as matter of law from the facts alleged, and are not in themselves entitled to any weight in considering the sufficiency of the pleading as a declaration of facts importing a liability on the part of the defendant.

No payment of interest on these bonds (to say nothing of the principal) has been made for many years before the commencement of this action, and this is, of course, not the first time that litigation has arisen involving the act of 1872 and the obligations issued in

consequence of the act. Before proceeding to an examination of the particular questions here presented, it may be well to briefly refer to former cases dealing with the act for the opening of Montgomery avenue.

Doyle v. Austin, 47 Cal. 353, was an application for a writ of prohibition. The petitioners were the owners of a lot of land within the benefited district, as defined by the act, and they sought to prohibit the tax collector of the city and county from collecting an assessment which had been levied against their land (and other property similarly situated) to meet the coupons which would fall due during the year 1874. The principal contention of the petitioners was that the act provided for a tax and was void because such tax was not levied in accordance with the requirements of the Constitution of 1849, then in force. Judgment of dismissal was affirmed on appeal, this court holding that the act called for the levy of an "assessment," not a tax, and that the constitutional provisions relied on had no application.

Mulligan v. Smith, 59 Cal. 206, was an appeal from an order denying plaintiff's motion for a new trial. The action was ejectment, and plaintiff relied upon a deed from the tax collector, made upon a sale of benefited land for nonpayment of an assessment. The trial court found that the petition of property owners, provided by the act to be filed with the mayor, had not in fact been signed by a majority of the owners in frontage as required by the statute. This finding was held to be sustained by the evidence, and this court concluded, as had the court below, that the filing of a petition signed by the requisite number of owners was a condition precedent, without which the board of works never acquired power to open the avenue or to perform any of the duties imposed upon them. The order denying a new trial was affirmed.

In *Liebman v. City and County of San Francisco* (C. C.) 11 Sawy. 158, 24 Fed. 705, an action was brought in the United States Circuit Court by a bondholder against the city and county to recover the amount of 20 interest coupons. The defendant's motion to exclude all evidence in support of the complaint was granted. Separate opinions were delivered by Mr. Justice Field and Judge Sawyer, both agreeing that the bonds authorized by the act were not obligations upon which the city and county was in any way liable. This conclusion was based upon a reading of the entire statute, and particularly of section 24, above quoted. The view declared by this court in *Mulligan v. Smith*, i. e., that no valid proceedings could be had in the absence of a petition signed by a majority in frontage of the property owners, was expressly approved, and the opinion of Mr. Justice Field was, at least in part, based on the failure of the complaint to allege compliance with this condition.

These decisions in the state and federal courts—the one holding that, under the facts

shown, a binding assessment could not be levied, and the other that in no event could the city be made liable on bonds issued—seem to have terminated all efforts to compel the payment of the bonds and coupons until, after the passage of the act permitting the state to be sued, this action was instituted. If the facts here alleged were in accordance with what was found by the trial court in *Mulligan v. Smith*, it would necessarily follow, from the law as there declared, that the board of works never acquired jurisdiction to issue any bonds, and that no liability was created by their issue. As is clearly shown in the *Liebman Case*, the bonds contain no such recitals of the due performance of conditions precedent as could operate as an estoppel, in favor of bona fide holders, to deny want of power to issue the instruments. But in this complaint it is specifically alleged that the actual owners of more than a majority in frontage of the benefited property did petition the mayor in writing for the opening of Montgomery avenue. On demurrer this allegation must of course be taken as true. So that, while in previous cases the question was as to the rights of parties (whether bondholders or owners of land sought to be assessed), where it appeared that the statutory steps preliminary to the opening of the avenue, the issuance of bonds, and the levy of assessments had not been taken, we have here to decide the status of bonds issued after a full performance of all the acts upon which the right to issue said bonds depended. The bonds not having been paid, it is sought to compel their payment by the state, which, it is claimed, was a party to the contract created by their sale and purchase.

If we correctly understand the position of the appellant, it is not claimed that the state of California directly and in terms promised to pay the amounts evidenced by the bonds and coupons to the holders thereof. Indeed, the provisions of the statute and of the bonds themselves preclude any such contention. The state of California is not named on the face of the bonds as the obligor undertaking the performance of any obligation. The bonds are issued by the board of public works, and are signed by the members of the board. The only direct promise stated in them is that the treasurer of the city and county of San Francisco will pay a stated sum to the holder, and even this promise is not unconditional, but is qualified by the clause "in conformity with an act * * * entitled an act to open and establish a public street * * * to be called Montgomery Avenue. * * *" "Read in connection with what follows," says Mr. Justice Field, in speaking of this clause, "it imports that the treasurer will pay the amount designated in accordance with the act—that is, out of the fund to be provided by it—and that the holder can look to no other source of payment." *Liebman v. San Francisco*, supra. This view comports with the entire

scheme of the act, which contemplates, not the creation of an indebtedness to be paid by funds raised by a general taxation of property in the city or the state, but the creation of a special improvement district and the payment of the cost of the proposed improvement by means of assessments levied exclusively on lands within this district. These lands, which, in the contemplation of the Legislature, would be benefited by the opening of the avenue, were to be made to pay, to the extent of the benefit received, the expense incurred in such opening. It was not anticipated, by the framers of the law, that any other source of payment would or could be resorted to.

The argument of appellant is, however, that the state, by authorizing the issue of bonds, and providing that funds should be raised in a certain manner for their payment, entered into a contract with holders of the bonds that the method prescribed for raising such funds would be followed, and that it is liable for the damage occasioned to the holders by the failure of the proper officers, from whatever cause, to levy and collect the necessary assessments. "We claim," as counsel for appellant state the position in their brief, "that the state, through its agents, borrowed money from us under the form of a sale of negotiable bonds. That by reason of the negligence and fault of the state agents the money to pay the bonds as promised was not provided, and that therefore the state, as principal, is liable to the same extent as any private person would be." It has often been held, although the cases dealing with the subject are not all in accord, that where a city, to pay the cost of a local improvement, issues bonds payable only out of assessments to be levied and collected by the city from property owners, and the right to collect the assessments is lost through the negligence of the city, action may be brought by the bondholders directly against the city for the amount of their loss. The rule has been applied even in cases of contracts or bonds providing specifically that the city should in no event be liable. *Gable v. Altoona*, 200 Pa. 15, 49 Atl. 367; *Dime Dep. & Dis. Bank v. Scranton*, 208 Pa. 383, 57 Atl. 770; *Barber Asphalt P. Co. v. City of Harrisburg*, 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401. See, *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659. So far as this state is concerned, it must be taken to be settled that a provision in the contract that the city shall not be liable will prevent any recovery against such city if the assessments, for any reason, fail to discharge the cost of the work. *McBean v. San Bernardino*, 96 Cal. 183, 31 Pac. 49; *Conlin v. Board of Supervisors*, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17; *Connolly v. City and County of San Francisco (Cal.)* 33 Pac. 1109. What would be the rule in the absence of such express provision is a question which has not

been before this court. "The cases on the subject," says Judge Dillon (Mun. Corp. § 482), "are conflicting," adding his own view as follows: "The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment. For why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessments and proceed in the collection thereof with the requisite diligence?" The query just suggested is decidedly apposite here. If, as is alleged in the complaint, everything had been done which was requisite to vest in the authorities of the city and county the right, and to impose upon them the duty, of levying and collecting assessments in order to discharge the principal and interest on these bonds, it is difficult to see why the bondholders have not enforced compliance with this duty. *Himmelman v. Cofran*, 36 Cal. 411; *Town of Tipton v. Jones*, 77 Ind. 307; *Tone v. Mayor*, 70 N. Y. 157; *German Am. Bank v. Spokane*, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259; *Whalen v. La Crosse*, 16 Wis. 288. Their failure to do so would, if this action can be sustained, result in transferring the burden from the owners of property in the benefited district, where the statute designed it to fall, to the general treasury, supplied by taxes upon all property owners in the state.

But, whatever may be the true rule as to the liability of municipalities for the cost of improvements intended to be paid out of assessments on specific property, it is clear that such liability cannot exist unless the contract under which work was done or money advanced was the contract of the municipality sought to be charged. So here, where there has been a failure to pay the bonds in the manner contemplated, there can be no obligation on the part of the state unless the issuance of the bonds constituted a contract to which the state was a party. It is at this point that the argument of the appellant fails. As has been pointed out, there is nothing on the face of the bonds purporting to make the state an obligor, and the statute makes it clear that the Legislature never contemplated that payment was to be made in any manner other than by assessments on the benefited property. Section 24 was inserted in order to guard against any possible implication that there might be liability on the part of the city, which was to receive the benefit of the improvements when completed. It would seem that this was the only liability considered to be possible. That no similar provision specifically exempting the state was declared, does not appear to us to indicate any more than that the creation of liability on the part of the state was not within the scope of the legislative consideration. Section 24 was intend-

ed to make clear the purpose of limiting the means of payment to the proceeds of assessments, not to impose a liability on the state, or to shift one from the city to the state.

Much importance is attached by appellant to the opinion of Judge Sawyer in *Liebman v. San Francisco*, and particularly to that portion of it in which he says, in construing the statute, that "the state has undertaken to do this work through the instrumentalities chosen by itself." Similarly, in the same case, Mr. Justice Field says that the board of works "is made the agent of the state to carry out a public improvement directed by its statute, and not the agent of the city and county." But, conceding that the board of works and the other officers mentioned in the act became the agents of the state, it by no means follows that the state authorized them to bind it to pay the cost of the work, or to make the state liable for their failure to raise, in the manner provided by the statute, the funds necessary for the payment of the bonds. That the state, when making a contract with an individual, is liable (though not suable without its consent) for a breach of its agreement in like manner as an individual contractor, is not to be disputed. *People v. Stephens*, 71 N. Y. 549; *Carr v. State*, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 624; *Chapman v. State*, 104 Cal. 690, 38 Pac. 457, 43 Am. St. Rep. 158. In the *Chapman Case* the state was held liable for the value of coal which it had received for storage on one of its wharves. Through the negligence of the state's agents and officers the wharf broke and the coal was lost. The decision went on the ground that the state, in undertaking the business of a wharfinger for hire, and making a contract as such, agreed to be bound "to the same extent as a private person engaged in conducting the business of a wharfinger would be under a similar contract." The court recognizes, however, that liability in such cases must rest upon the making of a contract by the state, and that, "in the absence of a statute voluntarily assuming such liability, the state is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government of the state." *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453; *Lewis v. State*, 96 N. Y. 74, 48 Am. Rep. 607; *Clodfelter v. State*, 86 N. C. 51, 41 Am. Rep. 440. No liability for the failure of the proper officers to levy and collect the assessments necessary to discharge the Montgomery avenue bonds can be imposed upon the state, if those officers, while agents of the state, were merely agents charged with governmental functions. In other words, there is no liability if the state, in authorizing the doing of the things contemplated by this statute, was acting in its sovereign capacity. Whether it was so acting is a question depending upon the construction of the act itself. The open-

ing of streets and the condemnation of the necessary lands, together with provision for payment of the costs and expenses, are among the most familiar governmental powers. Officers charged with duties in connection with such undertakings, are exercising on behalf of the state, governmental functions in as true a sense as are the ordinary executive and judicial officers. In passing legislation providing that a street may be opened, the state's position is in no degree analogous to that assumed by it when it offers wharves or warehouses to the public, to be used for hire. All public corporations exercising governmental functions within a limited portion of the state—counties, cities, towns, reclamation districts, irrigation districts—are agencies of the state, just as the board of works created by this act is such agency. Each of the corporations named is given power to order public work to be done and to provide for its payment, yet it has never been supposed that, merely because such authority is conferred by the Legislature, the state makes itself liable for the failure of such corporations to comply with their contracts. The act here in question authorizes the making of contracts; but while power to make them is derived from the state, it is not provided, expressly or by implication, that they shall be made in the name or on behalf of the state. It is not necessary to resort to the well-settled rule that general words in a statute are not to be construed as imposing a liability on the state (*Molineux v. State*, 109 Cal. 378, 42 Pac. 34, 50 Am. St. Rep. 49; *Sav. & L. Soc. v. San Francisco*, 131 Cal. 356, 63 Pac. 665; *S. F. L. & C. Co. v. State*, 141 Cal. 354, 74 Pac. 1047), for we do not find in this statute any language evidencing an intent to make the state a party to the contract created by the issuance and sale of the bonds. That contract was the limited one expressed on the face of the instruments. The failure to perform it was, on the facts here alleged, the default of officers in the administration of governmental functions, and, in the absence of a legislative provision binding the state to respond for such default, the injured parties were bound to seek their remedy by compelling the delinquent officials to perform their duty.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

154 Cal. 730

FRANK v. STATE. (Sac. 1,573.)

(Supreme Court of California. Dec. 21, 1908. Rehearing Denied Jan. 18, 1909.)

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Action by Max Frank against the State of California. From a judgment for defendant, plaintiff appeals. Affirmed.

J. M. Rothchild (S. W. and E. B. Holladay, of counsel), for appellant. U. S. Webb, Atty. Gen., and George R. Sturtevant, Asst. Atty. Gen., for the state.

SLOSS, J. The plaintiff, as holder of 65 Montgomery avenue bonds and 2,975 coupons, sues to recover the amount of said bonds and coupons from the state of California. Judgment was entered in favor of the defendant upon the sustaining of its demurrer to the complaint.

The complaint is in all substantial particulars identical with that in *Union Trust Company of San Francisco v. State of California* (Sacramento, No. 1,570, decided this day) 99 Pac. 183, and for the reasons stated in the opinion in that case it must be held that the complaint fails to state a cause of action.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

154 Cal. 744

PECK v. FOX. (L. A. 2,091.)

(Supreme Court of California. Dec. 21, 1908.)

TAXATION (§ 770*)—TAX DEEDS—VALIDITY—CURATIVE ACTS—OPERATION.

St. 1903, p. 63, c. 59, validating tax deeds made to the state, otherwise invalid for failing to recite the correct date when the right of redemption expires, etc., operates retroactively, and validates a deed previously executed and otherwise invalid for failing to recite the time of the expiration of the right to redeem as required by Pol. Code, § 3771, as amended by St. 1895, p. 327, c. 218, and operates to vest the title to the property in the state as of the date of the deed, and validates the title of an individual obtaining title from the state prior to the act.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1538; Dec. Dig. § 770.*]

In Bank. Appeal from Superior Court, Los Angeles County; G. A. Gibbs, Judge.

Action by John H. Peck against Edwin R. Fox. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. M. Fall, for appellant. E. R. Fox, in pro. per. O. B. Carter, for respondent.

LORIGAN, J. This is an action to quiet title to a lot in San Pedro, Los Angeles county. Plaintiff obtained judgment, and, from an order denying his motion for a new trial, defendant appeals.

Upon the trial it was stipulated that the title of defendant was based upon a sale of the lot made to the state of California on July 3, 1895, for delinquent state and county taxes of the year 1894; on two deeds made by the tax collector of Los Angeles county to the state in pursuance of said sale, one undated, but recorded on July 16, 1900, and the other executed on December 12, 1902, and which was made to correct the first deed to the state under said sale of July 3, 1895; on a deed from the county tax collector on behalf of the state of California to defendant made on March 1, 1902, and a second correction deed to the state by the tax collector of Los Angeles county,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes Cal. Rep. 98-101 P.—17

dated December 31, 1903, but not recorded. It was further stipulated that the title to the property was in plaintiff, unless by virtue of the tax sale, and said deeds to the state, and the deed from the state to him, title was established in the defendant. The various tax deeds referred to in the stipulation were introduced in evidence, and the court declared the deeds to the state to be invalid, and hence the deed to defendant from the state based thereon also void.

The decision of the court was doubtless based upon the failure of the tax collector in the original deed to the state to recite therein, as required by the provisions of section 3771 of the Political Code, as amended March 28, 1895 (St. 1895, p. 327, c. 218), the time when the right of the owner of the land to redeem from the sale had expired, the court holding that for this failure said original deed to the state was void, and hence the state had no title to the property when, on March 1, 1902, it conveyed it to the defendant. When this action was tried in the superior court, the case of *Baird v. Monroe et al.*, 150 Cal. 561, 89 Pac. 352, had not been decided by this court. That action involved the effect to be given to the validating act of February 28, 1903, as to certificates of tax sales and tax deeds executed to the state for property sold and deeded thereto for nonpayment of taxes. St. 1903, p. 63, c. 59. The act in terms confirmed, validated, and legalized all tax sales and tax deeds made to the state which would have been otherwise invalid for failure to recite, among other things, when the right of redemption would expire, or whether it had expired, and it was held that the act operated retroactively. The effect of this construction of the act was, as applied to the present case, to render the original deed to the state by the tax collector, made prior to the sale by the state to the defendant, as valid and legal as if all matters concerning redemption had been stated therein as required by section 3771 of the Political Code as amended. Under this curative act, and its retrospective effect, the deed to the state was validated and legalized as of the date when it was executed by the tax collector, so that, while prior to the curative act, such deeds, for failing to make the required recitals, were void, under the curative act they were rendered legal and valid as of the date of their execution by the tax collector.

It is insisted, however, by respondent, that the fact that the validating act operates retroactively cannot aid in sustaining the deed by the state to the defendant, because that deed was made by the state to him before the validating act went into effect. In other words, he insists that as the deed to defendant by the state was made on March 1, 1902, when it had no title, and before the passage of the validating act, such deed by it was inoperative to vest any title to the lot in defendant, and any subsequent or

additional title which the state acquired by virtue of the validating act could not inure to the benefit of the title of defendant. *Baird v. Monroe et al.* did not involve this point, as in that case it was admitted that one of the defendants had regularly succeeded to the title, if the tax proceeding there involved could be sustained. But the contention of respondent has been in principle decided against him in the subsequent case of *Fox v. Townsend*, 152 Cal. 51, 55, 91 Pac. 1004, 1007. There the point was that certain correction deeds made to the state by the tax collector, after the state had parted with title to the land, could not aid the title of the purchaser from it. In answer to this claim, it was there said: "Nor do we perceive any force in the objections that the correction deeds to the state were made after the state had parted with the title. No reason is discernible why the state, like a private individual, may not obtain a proper correction deed for the betterment of the title to property which it has conveyed, and, if this be done after conveyance, why, as in the case of an individual, it should not serve to perfect the title granted." In principle there can be no difference in the effect of the validating act as far as feeding and perfecting the title of a purchaser from the state before its passage, and a correction deed to the state subsequently made, which it is held has that effect. They both operate to do so.

It was held in *Baird v. Monroe* that, at the expiration of the five years from the date of the sale to the state, the state was entitled to a deed; it was then equitably the owner of the property. If, therefore, the deed from the tax collector, which the law requires shall be made by him to the state, is ineffectual to convey to it the legal title by reason of the admission of certain necessary recitals, its equitable title still exists, and when a validating act has confirmed and legalized the original deed to the state, the title so acquired inures to the benefit of a purchaser from the state taking his conveyance prior to the passage of the act.

In the case of *Schamblin v. Means*, 6 Cal. App. 261, 265, 91 Pac. 1020, 1022, this precise question was involved, and, following the doctrine as laid down in *Fox v. Townsend*, supra, it was said: "The state, at the end of the five-year period of redemption, acquired an equitable title to the property by a deed which was subsequently confirmed and made valid. There was no right or property taken away from the appellant or his predecessor in title, as the absolute right of redemption expired at the end of the five-year period. Taking the view, however, that the curative act operated to make good only the title to the state as of the date of its passage, such additionally acquired title went to feed and validate the title of defendant."

This conclusion renders it unnecessary to

pass upon the validity of the correction deeds to the state made subsequent to the sale of the lot by the state to defendant. The validating act operated to vest title to the property in the state as of the date when the originally defective deed to it was made, and, as the title inured to the benefit of defendant under his conveyance from the state, any consideration of the correction deeds becomes unimportant. The curative act validated the original defective conveyance to the state, vested in it the title to the lot in question as of the date of the original deed by the tax collector to it, and the title so validated inured to the benefit of defendant independent of any correction deeds.

In this view, the conclusion reached by the trial court against the validity of the title of defendant, asserted under the deed by the state to him of March 1, 1902, was erroneous, and the order denying the motion for a new trial is reversed, and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

154 Cal. 735

SHERWOOD et al. v. WALLIN et al.
(S. F. 4829.)

(Supreme Court of California. Dec. 21, 1908.)

1. EVIDENCE (§ 383*) — DOCUMENTARY EVIDENCE—EFFECT.

Under the law of West Virginia, providing that, when a resolution of stockholders increasing the capital stock of a corporation has been certified to the Secretary of State, he shall issue a certificate reciting the resolution, and declaring the action to be authorized by law, which certificate shall be received in all courts as evidence of the change and of authority to effect the same, the certificate of the Secretary was at least prima facie evidence of the giving of the notice required by law as to the meeting of the stockholders for the purpose of increasing the stock.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1664; Dec. Dig. § 383.*]

2. NOTICE (§ 11*)—NOTICE BY PUBLICATION—SUFFICIENCY.

A requirement that a notice be published for a designated number of weeks in some newspaper published in the county is fully satisfied by a publication once each week for the designated number of weeks in a daily newspaper published in the county.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 29; Dec. Dig. § 11.*]

3. NOTICE (§ 11*)—NOTICE BY PUBLICATION—SUFFICIENCY—STATUTORY PROVISIONS—COMPLIANCE.

The law of West Virginia requiring corporations organized thereunder who desire to increase their capital stock to give notice by advertisement published at least two weeks before such action in some newspaper published in the county was satisfied by two publications, once in each week for two successive weeks, in a daily newspaper, the first publication being

more than two weeks prior to the day noticed for the meeting of the stockholders.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 29; Dec. Dig. § 11.*]

4. CORPORATIONS (§ 289*).

The owner of stock standing in his name on the books of the corporation is entitled to have a certificate therefor issued to him, and a certificate legally issued by de facto officers of the corporation entitles him to vote at a corporate meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1242; Dec. Dig. § 289.*]

5. CORPORATIONS (§ 289*)—DE FACTO DIRECTORS—POWERS—ASSESSMENTS ON CAPITAL STOCK.

A de facto board of directors of a corporation may exercise the powers of a de jure board in the matter of levying assessments on the capital stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1242; Dec. Dig. § 289.*]

6. CORPORATIONS (§ 289*)—DE FACTO DIRECTORS—POWERS.

A de facto board of directors of a corporation may legally call a special meeting of stockholders for the purpose of increasing capital stock, where under the by-laws such call may be made at any time by a majority of the board of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1242; Dec. Dig. § 289.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by L. M. Sherwood and another against Frank A. Wallin and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Purcell Rowe (Jordan, Rowe & Brann, of counsel), for appellants. Edwin L. Forster and Robert R. Moody, for respondents.

ANGELLOTTI, J. This is an action instituted by two stockholders of the Golden Key Mining Company, a corporation organized under the laws of the state of West Virginia, and having its principal place of business in the city and county of San Francisco in this state, wherein all of its property is situate and all of its business is done and all of its stockholders reside, against such corporation and numerous stockholders thereof. The object of the action was to obtain relief by way of injunction and otherwise from certain acts of the defendants, other than the corporation, alleged to have been done by said defendants in the furtherance of a conspiracy to deprive plaintiffs of their rights as the owners and holders of a majority of the capital stock of the corporation. Among other acts assailed was one of March 4, 1903, purporting to increase the capital stock of the corporation from 100,000 shares, of the par value of \$1 per share, to 200,000 shares of the same par value per share. The only defendants served with summons or who appeared in the action were the corporation and Messrs. Wallin, Nauman, and A. W. McQueen. The trial court found against

all allegations of conspiracy, and no complaint is made as to these findings. It did find that a certain so-called equalizing issue of capital stock amounting to 10,980 shares, issued under a resolution of May 8, 1900, was invalid, and so decreed by its judgment, and as to this no complaint is made. Otherwise its judgment was in favor of defendants. Plaintiffs have appealed from this judgment, assailing only the conclusion of the trial court as to the validity of the proceedings for the increase of the capital stock from 100,000 to 200,000 shares, which increase the court found to be regular, legal, and valid.

Under the laws of West Virginia in force at the time of the attempted action, any corporation might "by resolution at any general or special meeting of the stockholders, * * * make such reduction or increase in the number of shares of its capital stock, or the par value of each share, as may be decided upon by said stockholders, a majority of the stock * * * being represented by the holders thereof at such meeting in person or by proxy and voting therefor; provided that notice be given by advertisement published at least two weeks before such action in some newspaper of general circulation printed in the county wherein the principal office of such corporation is located, if such office be within this state; and if such office be not within this state, then in some newspaper printed at the capital of this state, of the intention to offer such resolution." The law further provided that, when such a change shall have been made, the president of the corporation shall certify the resolution to the Secretary of State, who shall issue to the corporation a certificate reciting the resolution and declaring the action to be authorized by law, which certificate shall be received in all courts and places as evidence of the change and of the authority to effect the same. The by-laws of the corporation provided that a special meeting of the stockholders might be called at any time "by a majority of the board of directors," and that at all meetings of stockholders a majority of the shares of stock, whether present in person or by proxy, shall constitute a quorum for the transaction of business.

A finding of the trial court which is not assailed establishes the fact to be that defendants Wallin, Nauman, and McQueen, and their associates, have ever since March 12, 1901, constituted the de facto board of directors of such corporation, having possession of all the records and property thereof, and performing all the functions of directors and officers, under an election attempted to be had on March 12, 1901. It is further established by an unassailed finding that in February, 1903, said de facto board issued a call for a meeting of the stockholders to be held on March 4, 1903, for the purpose of so increasing the capital stock. The court found that due notice of this meeting was given

in the manner required by the laws of West Virginia, and that at the meeting of the stockholders held at the time noticed "there was present and acting throughout a quorum of stockholders." It is as to these two matters only that the claim is made that the findings are not supported by the evidence.

The finding of due notice of the meeting, which means no more than that the advertisement required by the statute was given in all respects as required thereby, was undoubtedly correct in view of the evidence. The certificate of the Secretary of State of West Virginia was, under the statute, at least prima facie evidence of the giving of the notice required by the law. The evidence introduced by plaintiffs to destroy the effect of the certificate showed nothing at variance therewith. It appeared therefrom that the notice was published in the Charleston Daily News, a newspaper printed and published daily in the state of West Virginia, in two issues thereof, to wit, on February 10, 1903, and on February 17, 1903, "and no more." It is urged that publication in a daily paper, such as the Charleston Daily News, should have been made daily for 14 days. There is nothing in the statute under consideration specifying the kind of newspaper with respect to frequency of issue, or requiring the notice to be published for the prescribed time as often as the paper is issued during such times. The requirement is simply that the advertisement be published "at least two weeks before such action in some newspaper," etc. It is settled in this state that a requirement that a notice be published for a designated number of weeks in some newspaper published in the county is fully satisfied by a publication once each week, for the designated number of weeks, in a daily newspaper published in the county. *People v. Reclamation District*, 121 Cal. 522, 524, 50 Pac. 1068, 53 Pac. 1085; *Chapman v. Zoberlein*, 152 Cal. 216, 92 Pac. 188, 190. Presumably, the law in this respect is the same in West Virginia. It may be assumed that the language of the statute is such as to require a publication once a week for two weeks before the day noticed for the meeting. As has been seen, the first publication was on February 10, 1903, more than two weeks before the time fixed for the meeting. The two publications, one each week, constituted a publication for two weeks, just as in *Derby v. Modesto*, 104 Cal. 515, 38 Pac. 900, a publication for fourteen consecutive days constituted a required publication of "at least two weeks," and the requisite period of two weeks had fully elapsed prior to the day noticed for the meeting. See, also, *State v. Yellow Jacket, etc., M. Co.*, 5 Nev. 415.

As to the finding that there was a quorum of stockholders present at the meeting of March 4, 1903: In order to constitute a quorum, it was necessary that more than 44,510 shares should be present and represented. The records of the corporation show-

ed that 56,055 shares were represented at the meeting. This did not include any of the equalizing issue of 10,980 shares held by the court to be illegal. In order to make up said 56,055 shares, however, it was necessary to count 17,500 shares represented and voted by Frank A. Wallin, which stood on the books of the corporation in his name. The claim is that this should not have been counted, for the reason, as we understand the contention of learned counsel for plaintiffs, that Wallin had no valid certificate therefor, in that the certificate held by him was not signed by the president and secretary of the corporation, and the by-laws provided, "No certificate of stock shall be valid unless signed by both the president and secretary and sealed with the corporate seal." By the bill of exceptions the following is made to appear: Wallin had acquired this stock from Geo. W. Mann prior to March 12, 1901, on which day the stock stood on the books in the name of Mann. On the last-named day the de facto board of directors organized by the election of Wallin as president and one Cowherd as secretary. Immediately thereafter Wallin surrendered the certificate for 17,500 shares in the name of Mann, and the same was canceled and a new certificate therefor, signed by Wallin as president and Cowherd as secretary, was issued to Wallin, and an entry of the transfer made on the records of the corporation. There was no other act or proceeding in relation to this certificate until the shares were voted at the meeting of March 4, 1903. Up to the time of the meeting of March 12, 1901, plaintiff L. M. Sherwood was the duly elected, qualified, and acting president of the corporation, having been elected in June, 1900, and the by-laws provided that the officers of the corporation should hold their respective offices for one year, and until their successors are chosen and qualified. It is urged that, at the time of the issuance of this certificate, Mr. Sherwood was the de jure president of the corporation, and that the certificate, not being signed by him, is ineffectual for any purpose. So far as the record available on this appeal shows, Wallin was the owner of this stock, and the same stood in his name on the books of the corporation. Under these circumstances he was entitled to have the certificate therefor issued to him. The issuance of such certificate was a mere ministerial act which the officers of the corporation were bound to perform in the exercise of the routine duties of their offices. If we assume that such issuance was essential to Wallin's right to vote the stock at the meeting of March 4, 1903 (see, however, Clark and Marshall on Priv. Corps. §§ 378b, 653a and 653b), we have no doubt that the certificate must be held to have been legally issued by the de facto officers. The claim of plaintiffs that there was no quorum present at the meeting of March 4, 1903, is based wholly on the claim as to these

17,500 shares. From what we have said, it follows that the finding is fully sustained.

The only other point made on this appeal is that the special stockholders' meeting of March 4, 1903, was not legally called, for the reason, shown on the face of the findings, that it was called by those who were found to be only the de facto board of directors. A valid call for the special meeting of the stockholders was essential to the validity of the proceedings for the increase of the capital stock. Under the by-laws, such a call could be made at any time by a majority of the board of directors. Did the de facto board of directors have this power? We can conceive of no good reason why it should be held that they did not. They, under the well-recognized definition of de facto officers of corporations and the other specific facts found by the court, were the persons who for nearly two years had actually held office as directors, with the consent of the corporation, and, under color of an election, had exercised all the functions of such offices, and were in peaceful possession as such directors of all the corporate property. See 3 Clark and Marshall on Priv. Corps. § 662. There is nothing in the findings to indicate that their assumption of the office of directors was not acquiesced in by all of the stockholders, and, under the findings, they must be held to have been possessed of all the power of de facto directors. It is conceded that such a de facto board may legally perform such acts as are within the scope of the corporation's business. In 8 Am. & Eng. Ency. (2d. Ed.) p. 778, we find it stated that as a general rule the acts of de facto officers of a corporation, within the power of the offices they assume to hold, are valid and binding on the corporation. In 10 Cyc. 755, it is declared that, as a general rule, such acts are deemed valid in respect to third persons, the corporation, the shareholders, and the directors themselves. It is settled in this state, in accord with the great weight of authority, that a de facto board of directors of a corporation may exercise the powers of a de jure board in the matter of levying assessments on the capital stock. San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 80, 35 Pac. 349. See, also, 3 Clark and Marshall on Priv. Corps. §§ 499b, 662. The principle which upholds the action of de facto officers of corporations has been held to apply to the calling of a meeting for the election of officers. See 10 Cyc. 325; Smith v. Erb, 4 Gill (Md.) 437; Commonwealth v. Smith, 45 Pa. 59. It is difficult to see why the rule does not apply in the matter of calling a special meeting of the stockholders to consider and act upon any matter pertaining to the corporation, as to which, under the law, the stockholders may act at a special meeting. The calling of such a meeting is the performance of the most ordinary of the duties devolving on corporation directors, and the only effect thereof is to enable the stockholders themselves to determine in the manner pro-

vided by law as to matters affecting the corporation and their interests therein, the board of directors being simply the machinery by which the stockholders may be legally brought together.

It appears to have been held in *Re Wheeler*, 2 Abb. Prac., N. S. (N. Y.) 361, that where the statute required that every director should be a stockholder, and that notice of a stockholders' meeting to effect an increase of the capital stock should be signed by a majority of the directors, and the notice was signed by four out of the seven acting as directors, but one of the three so signing was not a stockholder, the subsequent vote for the increase of stock was illegal. This is the only case cited which is at all against the view we have stated. No point appears to have been made in that case as to the power of this acting director as a director de facto, it appearing to be assumed that, if he was not a director de jure, he was altogether without power as a director at all. This view is opposed to the rule declared in this state in *San Jose Savings Bank v. Sierra, etc., Co.*, 63 Cal. 179, where it was held that a director who had ceased to be a stockholder continued to be a director de facto until ousted in a direct proceeding. See, also, *Balfour-Guthrie Co. v. Woodworth*, 124 Cal. 169, 173, 56 Pac. 891; *Mining Co. v. Anglo-Cal. Bank*, 104 U. S. 192, 26 L. Ed. 707. We are of the opinion that the call for the special meeting must be held, upon the findings, to have been valid, and the meeting held in pursuance thereof to have been a legal meeting.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

154 Cal. 710

GERMAN SAVINGS & LOAN SOCIETY v. McLELLAN. (S. F. 4533.)

(Supreme Court of California. Dec. 21, 1908.)

1. CONTRACTS (§ 10*)—ESSENTIALS—MEETING OF MINDS.

There can be no contract without a meeting of minds and mutuality of agreement.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 21; Dec. Dig. § 10.*]

2. SPECIFIC PERFORMANCE (§ 32*) — REQUISITES—CLEAR UNDERSTANDING.

A contract will not be specifically enforced unless there has been a clear mutual understanding and mutuality of assent to the terms of the contract.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 89; Dec. Dig. § 32.*]

3. VENDOR AND PURCHASER (§ 80*)—CONTRACT TO CONVEY—MUTUALITY OF UNDERSTANDING—EVIDENCE—SUFFICIENCY.

Evidence respecting a contract to convey land held to show want of mutuality of understanding concerning a spring to be reserved.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 135; Dec. Dig. § 80.*]

In Bank. Appeal from Superior Court, Contra Costa County; William S. Wells, Judge.

Action by the German Savings & Loan Society against W. S. McLellan. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Reversed.

Goodfellow & Eells, for appellant. W. S. McLellan, in pro. per.

ANGELLOTTI, J. This is an action commenced March 7, 1899, to quiet plaintiff's title to a tract of land in Contra Costa county, containing some 261.33 acres. Plaintiff is the owner thereof except in so far as its title is affected by an alleged parol contract of sale set up in defendant's cross-complaint, under which it is alleged he entered into and remains in possession, and as to which he seeks specific performance. The issues made by the cross-complaint and plaintiff's answer were tried by the court with an advisory jury, findings of the jury in favor of the defendant were adopted by the court, and a decree of specific performance was given on October 3, 1899, as to the land, "save and except the small pipe spring further from the house shall be retained to plaintiff, with privilege of running the water through pipes over the land, conveyed to tanks prepared to receive such water and to carry such water from said tanks." On October 2, 1905, an order was made denying a motion for a new trial. This is an appeal by plaintiff from the judgment and from the order denying the motion for new trial.

For the purposes of this appeal, it is necessary to consider but one point. The property in question was a part of a tract of land owned by plaintiff, known as the "Hemme Ranch," which had been subdivided into smaller subdivisions for purposes of sale, and a map thereof showing such subdivisions, numbered as lots, had been made. Lots 32, 33, 34, and 35, with an area of 73.70 acres, comprised what is called the "orchard tract," lot 30 adjoining this on the northeast contained 33½ acres of farming land, and lot 28, southwest, west, and northwest of the orchard, contained 254.06 acres of hill and pasture land. There was on the orchard tract and about 100 yards from the house thereon a valuable spring, known as the "large" or "main" spring, which was connected by pipes with tanks owned by plaintiff situated on the Hemme ranch, and the water of this spring, which was the main supply of such tanks, was used by various persons holding under plaintiff, including any occupant of the orchard tract. The testimony indicated that there was also a small undeveloped spring on this tract, some 200 yards or more from the house; but there was some evidence on the part of defendant that there was in fact no real spring there, and the jury in response to the question, "How many

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

springs were there on the property in question near the house?" answered, "One." In the southeasterly corner of lot 28, in accordance with defendant's testimony, about one-fourth of a mile from the house, there was a developed spring, very much smaller than the one in the orchard, but sufficient, defendant testified, "for farming purposes for one or two families." There was some slight testimony which indicates that this spring was also connected by pipes with the tanks. Defendant first examined this property in the early part of October, 1899, being shown it by Mr. Harrison, plaintiff's agent in charge, who was without any authority, so far as appears, to make any definite arrangements. Whatever definite arrangements were made were had with Mr. Tourny, secretary of plaintiff, at plaintiff's bank in San Francisco. After some preliminary meetings Mr. Tourny and defendant apparently reached an understanding on October 20, 1899, that defendant was to purchase, for a consideration as to which there is some dispute and which is not material on the point we are discussing, the orchard tract, lot 30 (the farming land), and the portion of lot 28 lying south of a line then roughly drawn on the map by them across said lot, which would include the spring thereon. It is undisputed that it was understood that plaintiff was to reserve one spring, the tanks, and the right to conduct water to the tanks through the pipes on the land to be sold. The question here is what spring was so intended to be reserved. Defendant then gave to Mr. Tourny his wife's check for \$440.89 on account of the \$2,000 to be paid on delivery of the deed, the remainder of the purchase price to be secured by mortgage. A survey was to be made to obtain the description of the portion of lot 28 to be conveyed, and, pending such survey and preparation of the necessary deed and mortgage, defendant went into possession of the premises on November 13th. He expended thereon something in the neighborhood of \$1,000 in farming operations and in improving the house. When it came to the matter of executing the papers in December, 1899, it was discovered that there was a misunderstanding as to which spring was to be reserved, and negotiations were at once broken off, and this litigation immediately followed. The check given by defendant has never been cashed, and plaintiff offered to return it both in December, 1899, and on the trial. No resolution was ever adopted by plaintiff's board of directors authorizing any sale of any property to defendant until the succeeding February. This February resolution was excluded from evidence on objection of defendant, but Mr. Tourny testified that it correctly stated the terms of the agreement between himself and defendant, which means, of course, that it stated them in accord with his version of those terms, which is entirely at variance with defendant's statement as to the terms.

The jury specifically found that plaintiff, as part of the sale referred to in the cross-complaint, sold to defendant "the large spring nearest the dwelling house," that Tourny in making his memorandum hereinafter described referred to such large spring, that Tourny was not bargaining to give defendant the small spring, and that at the time the check was given the minds of both defendant and Tourny were agreed upon the small spring as the one to be reserved. While the evidence may have been sufficient to support a finding that defendant understood that he was to have the spring nearest to the house, which was the main or large spring, we can find nothing therein warranting a conclusion that Tourny, representing the plaintiff, was negotiating upon any other theory than that the plaintiff was to reserve that spring from the transfer, and that the most that plaintiff was willing to concede in regard to it was that defendant might use water therefrom in common with other persons occupying land purchased from or held under plaintiff.

The evidence establishes very clearly that, when the matter of the springs was first talked of, the representatives of plaintiff desired to retain all the springs, allowing defendant simply to use water therefrom in common with other purchasers and occupants, but that defendant objected to such an arrangement, and that finally it was understood that he should take all but one spring. When the arrangement was finally made between Tourny and defendant, on October 20th, Tourny had not personally seen the property, and his knowledge of the location of the springs was obtained entirely from Harrison over the telephone. Tourny testified that Harrison told him over the telephone about the springs, that there were two, and that the larger one where the main supply of water came from would have to be retained by the bank, but that the defendant might use water therefrom; that he received this information in the presence of defendant, making a memorandum of the terms of the agreement as he did so, and informing defendant as to the message; that he also said to defendant, "I would give you this spring if I could, but Mr. Harrison tells me it is needed here for the ranch; we can't do without it; we must have this water." In this written memorandum of the terms of the agreement then made by Tourny, which was introduced in evidence by defendant, appears the following: "Agt. for spring (small spring near house to go to purchaser other spring to be retained & privilege given to remove tanks to suitable elevation.)" There is really nothing substantial in defendant's testimony, which was the only other evidence as to the arrangement on this matter between Tourny and defendant, that conflicts with this testimony of Tourny as to his understanding in regard to which spring was to be reserved. It is true that on his direct examination defendant testified that Tourny had said to

him, "We will sell you the spring next to the house." But his cross-examination demonstrated that whatever was said by Tourny relative to the spring near or nearest to the house was based upon the assumption, known to defendant, that it was not the largest or main spring, and that it was the desire and intention of plaintiff not to convey the main spring. In his deposition read on such cross-examination, and acknowledged by him to be correct, he said: "He told me that he would sell me the spring nearest the house; that they reserved the spring on the hill for themselves; and he said the spring on the hill was the largest spring, and that they reserved that for themselves. * * * I told him I wanted the largest spring. I thought I was entitled to it, buying the land, and he said, 'No,' that Harrison said that they must keep the largest spring." In no place did he deny that Tourny consistently insisted that the largest spring—the main spring—was to be reserved, and the defendant was to have the small spring. The following is an example of his cross-examination: "Q. Did he tell you also that you were to have the smaller of the two springs, the smallest spring of the two? A. Yes, sir. Q. Now you are claiming the bigger one, ain't you? A. I know nothing about the bigger one. Q. I say the one you are claiming now is the bigger one? A. I believe it is. Q. You are claiming now what he didn't intend to give you? A. I am claiming what he sold me. Q. You are not claiming what he intended to sell you? A. I don't know what he intended to sell me. I know what I believe he intended to sell me." On redirect examination he said: "He didn't say the smaller spring of the two. He said I would have that spring which was the smaller spring; the one nearest the house was the one he was selling me." Whatever may have been defendant's idea as to which of the two springs was the larger, the one in the orchard or the one on lot 28, we can see no warrant in the evidence as to what transpired between the parties for the conclusion that Tourny, acting for the plaintiff, was willing to part with what was in fact the larger spring, whether it was the spring nearest the house or not, or for any assumption on the part of defendant from what Tourny said that he was to have the spring nearer the house, if it was, in fact, the larger spring. He was informed in the plainest and most unequivocal terms that the largest spring must be reserved. The words "small" and "large" as used in describing the springs cannot, under the circumstances, be entirely disregarded. Therefore, assuming that defendant believed that he was bargaining for the spring nearest the house, it is manifest from what was said that Tourny intended to reserve what was in fact the larger spring, and that the

minds of the two did not meet as to the particular spring to be reserved.

There can be no contract unless the minds of the parties have met and mutually agreed. Equity requires as a condition of specific performance a clear mutual understanding and a positive assent on both sides as to the terms of the contract. See 26 Am. & Eng. Ency. of Law, 21; Cortelyou's Appeal, 102 Pa. 576; Coles v. Bowne, 10 Paige (N. Y.) 526; Wristen v. Bowles, 82 Cal. 84, 22 Pac. 1136. The evidence of the oral negotiations between Tourny and defendant does not furnish support for a conclusion that there was any such mutual understanding in the matter of the spring to be reserved, and this was a most material part of their proposed contract.

Our views upon the question thus discussed render it unnecessary to consider any of the many other objections made by plaintiff to the specific performance of this alleged contract.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(154 Cal. 695)

BOLLINGER v. BOLLINGER et al.
(S. F. 4305.)

(Supreme Court of California. Dec. 19, 1908.)

1. PARTIES (§ 76*)—WANT OF CAPACITY TO SUE—OBJECTIONS—WAIVER.

In a suit by executors of a deceased child of a grantor to establish a trust in land conveyed by the grantor, the complaint alleged the conveyance by the grantor in trust for himself for life, and at his death for distribution among his children, the death of the child subsequent to the death of the grantor, the appointment and qualification of the executors, and averred that the letters testamentary had not been suspended or revoked, and that the executors were the duly qualified and acting executors. On the trial, it appeared that prior to the filing of the complaint a decree distributing the estate of the deceased child had been entered, but not discharging the executors. *Held*, that the objection that the executors were not entitled to recover was an objection to their legal capacity to sue, and was waived under Code Civ. Proc. § 434, because not taken advantage of by demurrer or answer.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 76.*]

2. TRIAL (§ 396*)—COMPLAINT—FINDINGS—VARIANCE.

The complaint, in a suit by executors of a deceased child of the grantor to establish a trust in land conveyed by the grantor, alleged the conveyance by the grantor in trust for himself until his death, and then for distribution among his children, and averred the death of the child subsequent to the death of the grantor, and that the child was entitled to one-fifth of the property on the death of the grantor. The court found that on the death of the grantor the child was entitled under the trust to one-fifth of the property remaining in the hands of the grantee as trustee. *Held*, that the variance between the complaint and the findings was immaterial, within Code Civ. Proc. §§ 469, 470, providing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that a variance between the pleading and the proof shall not be deemed material unless it actually misleads the adverse party, and that where the variance is not material the court may direct the fact to be found according to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 935; Dec. Dig. § 396.*]

3. TRUSTS (§ 44*)—PAROL TRUSTS—EVIDENCE—SUFFICIENCY.

To prove a trust by parol under a conveyance absolute in terms, the evidence must be clear, satisfactory, and convincing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 68; Dec. Dig. § 44.*]

4. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS—WEIGHT OF EVIDENCE.

Whether the evidence in a suit to establish a parol trust under a conveyance absolute in terms is clear, satisfactory, and convincing, must be determined by the trial court, and its determination will be accepted by the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

5. TRUSTS (§ 44*)—PAROL TRUSTS—EVIDENCE—SUFFICIENCY.

Evidence held to establish a parol trust in land conveyed by a deed absolute in terms, and the purposes, subject-matter, and beneficiaries thereof.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Dec. Dig. § 44.*]

6. EVIDENCE (§ 230*)—ADMISSIONS—DECLARATIONS OF GRANTOR AFTER EXECUTION OF CONVEYANCE—ADMISSIBILITY.

Declarations of a grantor in a deed purporting to convey the absolute title to the grantee, made after the conveyance, and in the absence of the grantee to the effect that the conveyance was made in trust and that the grantee held the property in trust, are inadmissible to establish the trust.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.*]

7. WITNESSES (§ 404*)—IMPEACHMENT—PROOF OF CONTRADICTIONARY STATEMENTS.

Where a witness called by a party to prove a fact failed to give any evidence in support of the fact and gave no affirmative testimony, the party was not entitled to prove that the witness had made statements establishing the fact, notwithstanding Code Civ. Proc. §§ 2049, 2052, authorizing a party producing a witness to contradict him by other evidence, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1272; Dec. Dig. § 404.*]

8. ACTION (§ 50*)—MISJOINDER OF CAUSES.

A cause of action charging that the grantee in a deed obtained the deed by undue influence and fraud, prosecuted after the death of the grantor for the benefit of his heirs and devisees, and a cause of action charging that the grantee received title to the premises conveyed under an express trust for the benefit of the children of the grantor, prosecuted by the executors of a deceased child of the grantor after the death of the grantor, are improperly joined as against a demurrer.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511, 512; Dec. Dig. § 50.*]

In Bank. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by Mary A. L. Bollinger against George Y. Bollinger and others, in which William Pullan and another, individually and as executors of Mary C. Pullan, deceased, filed a cross-complaint against defendants and

plaintiff. From a judgment for plaintiffs in the cross-complaint, defendant George Y. Bollinger appeals. Reversed and remanded.

The following opinion in the above-entitled cause was handed down by Hall, J., in the District Court of Appeal of the First appellate district, in which Cooper, P. J., and Kerrigan, J., concurred:

"This action was brought by plaintiff, Mary A. L. Bollinger, to have it decreed that certain property conveyed by the late husband of plaintiff, Christian Bollinger (now deceased), to George Y. Bollinger, without consideration, was community property of plaintiff and her late husband, and that George Y. Bollinger holds one-half thereof in trust for plaintiff, etc., etc.

"Plaintiff made not only George Y. Bollinger, who is a son of Christian Bollinger, defendant, but also made the other children of Christian Bollinger, and William Pullan and George Pullan, as executors of the will of Mary C. Pullan, a daughter of Christian Bollinger, who died subsequently to his decease, and the children and certain grandchildren of said Mary C. Pullan, defendants.

"Answers were made to plaintiff's complaint by George Y. Bollinger as well as by others of the defendants, and upon the trial the findings and judgment were against plaintiff, and no appeal has been taken by her or her representatives (she having died after the commencement of the action).

"William Pullan and George Pullan, individually and as executors of the will of Mary C. Pullan, besides answering plaintiff's complaint, filed a cross-complaint against defendant George Y. Bollinger, to which they also made all the other defendants as well as the plaintiff defendants, by which they sought to have it decreed that the same transfers of said property by Christian Bollinger to defendant George Y. Bollinger were obtained through the undue influence and fraud of said George Y. Bollinger, and that ever since said transfers he has held the legal title to the property transferred in trust for Christian Bollinger until his death, and that therefrom he has held and now holds the legal title to one-fifth of said property in trust for cross-complainants, and that he be compelled to transfer one-fifth thereof to said cross-complainants.

"Upon the trial of the issues made by said cross-complaint and the answer thereto of George Y. Bollinger, William and George Pullan, as executors of the will of Mary C. Pullan, recovered judgment to the effect that George Y. Bollinger holds in trust for said executors of the will of Mary C. Pullan one-fifth of certain property therein described, and directing transfer thereof accordingly.

"From this judgment, and the order denying his motion for a new trial, said George Y. Bollinger has appealed.

"(1) Appellant contends that reversible error was committed by the court in overruling his demurrer to respondents' cross-complaint. The cross-complaint contains two counts, and the demurrer is to each count. Appellant discovers in each count four distinct causes of action, to wit, (1) an alleged cause of action for undue influence exercised by George Y. Bollinger over Christian Bollinger; (2) an alleged cause of action for defrauding Christian Bollinger by George Y. Bollinger; (3) an alleged cause of action for defrauding the surviving children and the children of the deceased child of Christian Bollinger by George Y. Bollinger; and (4) an alleged cause of action to enforce a trust in favor of the surviving children and the children of the deceased child of Christian Bollinger.

"It is claimed that the two first alleged causes of action are actions that might have been brought by Christian Bollinger in his lifetime, and on his death passed to his estate, while the last two are actions in favor of his children, and in which his estate has no interest, and for this reason that said actions are improperly joined.

"It is certain that the cross-complaint does contain some allegations pointing to an action in favor of Christian Bollinger's estate; but on the trial of the action the court found against the allegations of the cross-complainant in this regard, and found such facts as support an action to establish and enforce a trust in favor of the children of Christian Bollinger, of whom Mary C. Pullan, respondents' testatrix, was one at the time of his death, and the decree enforces the trust in favor of the respondents as executors of her will only.

"The facts alleged and found bring the case, as to the rights of Mary C. Pullan, upon the death of Christian Bollinger, clearly within the rule laid down in *Brisson v. Brisson*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; *Id.*, 90 Cal. 323, 27 Pac. 186; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171.

"The prayer of the cross-complaint sought only to enforce a trust in one-fifth of the property conveyed, as a right that inured to Mary C. Pullan upon the death of Christian Bollinger and the repudiation of the trust by appellant.

"As before stated, the court found against the allegations of the cross-complaint and in favor of the appellant upon the matters tending to support actions in favor of the estate of Christian Bollinger. Under these circumstances we think it clear that appellant could not have been injured by the ruling of the court upon the demurrer, even though such ruling may have been erroneous. Judgment should not be reversed for errors that do not affect the substantial rights of the parties. Code Civ. Proc. § 475; *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176,

12 Pac. 449; *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729; *Hirshfeld v. Weill*, 121 Cal. 13, 53 Pac. 402.

"(2) Upon the trial it was shown that, prior to the filing of the cross-complaint, the decree of distribution of the estate of Mary C. Pullan, deceased, had been made and entered. By this decree her estate, described as consisting of \$1,688.30, was distributed to her legatees. The decree also contained the words: 'And any other property not now known or discovered, which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows,' etc., etc. The receipts of the distributees, acknowledging in general terms the receipt of the property of the estate in accordance with the decree, were also in evidence. It is not contended, however, that the legatees did receive the property in this action sued for, or that the executors have ever been discharged. It is insisted, however, that the evidence above mentioned showed that respondents, as executors of the estate of Mary C. Pullan, are not entitled to recover.

"This objection, we think, goes to the legal capacity of the respondents to sue, and should have been taken by the answer in order to avail appellants.

"The cause of action alleged and found was one that belonged to Mary C. Pullan at the time of her death, and upon her death passed to her estate. The cross-complaint alleged the death of Mary C. Pullan subsequent to the death of Christian Bollinger, and the due appointment and qualification of respondents as the executors of her will, and the issuance to them of letters testamentary, and 'that said letters have not been suspended, revoked, or discharged, and that cross-complainants are still the duly qualified and acting executors of the estate of Mary C. Pullan, deceased.' These allegations support the right of respondents to maintain this action for the benefit of the estate. They are not denied, and therefore stand admitted, and no affirmative matter is alleged to countervail the effect of said allegations.

"Under these admitted allegations respondents were entitled to sue to enforce any right belonging to the estate of Mary C. Pullan. The objection, not having been taken by demurrer or answer, must be deemed to have been waived. Code Civ. Proc. § 434. The motion for nonsuit on this ground was properly denied.

"In what we have just said, however, we are not to be understood as indicating that the executors may not enforce by suit rights of the estate to property held adversely, after the entry of the decree of distribution but before actual delivery under such decree to the distributees. An examination of the cases cited by appellant to sustain his contention discloses that in each case the executor had actually delivered the property to heir or legatee. Prior to such delivery it would

seem that the executors have the right to possess all the property of the estate as against all the world save the distributees. But in the condition of the pleadings it is not necessary for us to decide the point on this appeal.

"(3) We are asked to reverse the judgment for the reason that the terms and beneficiaries of the trust found are not in accordance with the allegations of the cross-complaint.

"It is substantially alleged in the cross-complaint that appellant agreed with and represented to his father, Christian Bollinger, that, if he would deed and transfer his property to appellant, he would simply hold the legal title to said property, and that upon the death of said Christian Bollinger he would immediately divide all of said property among the children of said Christian Bollinger, or the representatives of any deceased child, share and share alike, to wit, one-fifth of said property to each child, and make and give good and sufficient deeds of conveyance of the real property, and transfers of the personal property, to each of the said children or their representatives, in the proportions aforesaid.

"The transfers and conveyances to appellant were accordingly made, but appellant, after the death of his father, to wit, about January 1, 1901, for the first time denied and repudiated the trust.

"The court found that the appellant solicited and urged his father, Christian Bollinger, to transfer his property to him, and that if he would so transfer said property he, said George Y. Bollinger, would manage the same with ability, integrity, and honesty, and that he would hold the same in trust upon certain terms and for certain purposes, which are specifically set out in the finding, 'and in the event of the death of Christian Bollinger before the death of Mary A. L. Bollinger, all of said property then remaining in his hands, and all its accumulations then remaining in his hands, under said trust should immediately vest in and become the property of said David A. Bollinger, said Emma Bare, said Elizabeth C. Bare, said Mary C. Pullan, and said George Y. Bollinger, an undivided one-fifth to each, and that said George Y. Bollinger would in that event execute to said David A. Bollinger, Emma Bare, Elizabeth C. Bare, Mary C. Pullan, and George Y. Bollinger proper conveyances of said property and its said accumulations, vested as aforesaid an undivided one-fifth to each.'

"The Mary A. L. Bollinger mentioned in the finding was the wife of Christian Bollinger, and the five other persons mentioned therein are the five children of said Christian.

"In point of fact, as appears by the allegations and admissions of the pleadings, Christian Bollinger did die before his wife, Mary A. L. Bollinger. It was only upon the death of Christian Bollinger that Mary C. Pullan would be entitled to any of the property, or

to enforce any trust therein under the allegations of the cross-complaint. It is the trust for her benefit alone that is sought to be enforced in this action, and the terms and trusts upon which the property was held prior to the death of Christian Bollinger are and were immaterial to her or her cause of action.

"Upon the death of Christian Bollinger, under the trust as found Mary C. Pullan was entitled to one-fifth of the property then remaining in the hands of the trustee. Under the trust as alleged she was entitled to one-fifth of the trust property upon the death of Christian Bollinger. The trust found in her favor is within the terms of the trust as alleged. The finding corresponds in substance with the allegations so far as they affect the rights of Mary C. Pullan, or her estate, against appellant. In other words, the variance between the findings and the allegations is as to matters that do not affect the judgment or the rights of the parties. The legal result as to the respective rights of appellant and respondents is the same in either case. We think the variance immaterial, and one that could not have misled appellant to his prejudice, especially in view of the fact that he denied the existence of any trust, and claimed the property as his own. Code Civ. Proc. § 469.

"Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment.' Code Civ. Proc. § 470.

"See, also, *Carter v. Rhodes*, 135 Cal. 46, 66 Pac. 985; *Began v. O'Reilly*, 32 Cal. 11; *Davis v. Baugh*, 59 Cal. 568; *Herman v. Hecht*, 116 Cal. 553, 48 Pac. 611; *Stockton, etc., Works v. Glen Falls Ins. Co.*, 121 Cal. 167, 53 Pac. 565; *Duke v. Huntington*, 130 Cal. 272, 62 Pac. 510; *Foster v. Carr*, 135 Cal. 83, 67 Pac. 43.

"(4) The general objection urged that the evidence in proof of the trust was erroneously admitted is practically disposed of by what we have said upon the preceding point. Some of the evidence tended to prove terms of the trust not alleged, but none thus proved are inconsistent with the trust alleged and found in favor of the children upon the death of Christian Bollinger. Much of the testimony went to general admissions made by George Y. Bollinger, after the death of his father, to the effect that he held the property 'in trust,' and 'in trust for the children,' and the like. All of this was corroborative of the direct evidence given in the deposition of David A. Bollinger tending to prove a trust in favor of Mary C. Pullan as one of the children of Christian Bollinger, which was enforceable by her executors on her death.

"(5) It is next urged that the evidence is insufficient to establish any trust, and appellant invokes the rule that, to prove a trust by parol under conveyances absolute in terms,

the evidence must be clear, satisfactory, and convincing. The rule invoked is amply supported by authority, and is founded in sound reason. But its proper application, where there is substantial evidence to support the existence of a trust, must be left largely to the trial court. As was said in *Harris v. Harris*, 136 Cal. 379, 69 Pac. 23: 'Whether the evidence in any particular case is of this character' (clear, satisfactory, and convincing) 'must be determined by the trial court, and its determination thereon will be accepted by this court as conclusive.' See, also, *Sherman v. Sandel*, 106 Cal. 373, 39 Pac. 797.

"In the case at bar Christian Bollinger was at the date of the transfer 79 years of age, and so illiterate that he could neither read nor write—not even sign his own name. He had five children, of whom appellant, then 37 years of age, was one. He had on three prior occasions made equal divisions of property among his five children, to the aggregate amount of \$57,750. By his will, dated March 12, 1890, he had devised to his wife one-half of a block of land, including his dwelling, situate in the town of Santa Clara, and all the rest of his property in equal shares to his five children. H. M. Leonard, then his business agent, and appellant were appointed executors to serve without bonds. By a codicil dated July 26, 1893, the appointment of Leonard as executor was revoked, and appellant was appointed sole executor, to serve without bonds. This will was never revoked. By the transfers now in question, made in March, 1895, Christian Bollinger conveyed to appellant, without consideration, property of the face value of upwards of \$45,000, and stripped himself of all he owned save his residence in the town of Santa Clara.

"The facts above set forth conclusively appear from the record.

"There is evidence that prior to the transfer in question appellant had in important transactions acted as his father's agent. He had demanded and obtained for his father, from Leonard, who had theretofore been the agent of his father, the sum of \$5,000, and kept it for several days, and then paid it over to his father. He had also loaned \$8,000 for his father, secured by a mortgage of the Quivey ranch. In this transaction the borrower dealt only with appellant, as agent of Christian Bollinger.

"There is evidence that on the day all the transfers save one were made appellant met his father, Christian Bollinger, and informed him that his wife (who was not the mother of his children) intended to sue him for a divorce, and represented to him that, if he would deed to appellant his property, appellant would hold it for him (Christian Bollinger), and, on Christian Bollinger's death, deed it to Christian Bollinger's children, one-fifth to each, and if Mrs. Bollinger (Christian Bollinger's wife) should die before him to deed it back to him (Christian Bollinger). The above is clearly the effect of the testi-

mony of David Bollinger, although not stated in his exact words. The witness further testified that Christian Bollinger replied 'Very well,' and on the same day went to an attorney's office with appellant, and made all the transfers in question, save one, which was of land, and made about three weeks later.

"While appellant in his answer alleges that he 'has always denied and repudiated any trust whatever concerning any property conveyed or transferred to him by the said Christian Bollinger,' and 'that he now claims title to such of the said property as was conveyed and transferred to him by said Christian Bollinger from the several dates of conveyance and transfer,' he testified that he accounted to his father for large sums collected on the notes transferred, and always gave him money whenever requested so to do. There is evidence of admissions and statements of appellant, made after the death of Christian Bollinger, that he held the property conveyed in trust for his brother and sisters.

"The evidence was sufficient to establish a trust, and the purposes, subject-matter, and beneficiaries thereof.

"(6) We now come to the consideration of some rulings made by the court during the trial which were erroneous, and of such a character as to necessitate a new trial. As before stated, the deeds and transfers claimed by respondents to have been made in trust are upon their face absolute. Over the repeated objections and exceptions of appellant, respondents were allowed to prove statements of Christian Bollinger, made after the execution of such deeds and transfers, and not in the presence of appellant, to the effect that such transfers were made in trust, and that appellant held the property in trust. As very clearly appears from a dialogue that took place between the court and counsel for respondents, these declarations of Christian Bollinger, the grantor, were offered and received as evidence tending to show a trust. In answer to a query from counsel for appellant concerning the scope of the evidence of the declarations of Christian Bollinger, the court said:

"I am satisfied * * * you can offer them for the purpose of showing a trust. Counsel for Respondents: Yes, sir. The Court: That is all you offer them for? Counsel for Respondents: That is what I offer them for, and that is what they are in here for. The Court: And I shall so receive them."

"It is well settled that declarations of a grantor, made after the execution of his conveyance, cannot be received to disparage his deed. *Fischer v. Bergson*, 49 Cal. 294; *Walden v. Purvis*, 73 Cal. 518, 15 Pac. 91; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Ord v. Ord*, 99 Cal. 523, 34 Pac. 83; *Hyde v. Buckner*, 108 Cal. 522, 41 Pac. 416; *Smith v. Mason*, 122 Cal. 426, 55 Pac. 143.

"In the case at bar the deeds and convey-

ances were on their face absolute, and purported to convey an absolute title to appellant. It was his contention that they did convey such title. Respondents, on the other hand, maintained that the conveyances were in trust, and did not convey absolute title. This was the primary issue in the case. The declarations of Christian Bollinger were admitted by the court as evidence to disparage his own deed, and this action of the court, under the authorities above cited, necessitates a retrial of this action.

"The court also erred in permitting respondents to prove that David E. Bare, a witness called by respondents, had made statements to the effect that George Y. Bollinger (appellant) had admitted that he held the property in trust, and also other statements as to declarations made by Christian Bollinger. The manifest purpose of calling the witness was to prove that he had heard appellant admit that he held the property in trust, and also to prove declarations of Christian Bollinger tending to show confidence in his son, the appellant; but the witness denied that he had heard appellant say anything about the property transferred to him, or that he had heard the declarations attributed to Christian Bollinger. In other words, the witness gave no affirmative testimony, but simply failed to give expected testimony that would have supported respondents' contention, if it had been given.

"The court, over the objection and exception of appellant, permitted respondents to prove that the witness had made statements to two different witnesses to the effect that he had heard appellant say that he was holding the property in trust for his brother and sisters, and also that he told of the declarations and acts of Christian Bollinger tending to show confidence in his son, the appellant.

"That these rulings were erroneous has been established by a long and consistent line of authorities in this state. *People v. Jacobs*, 49 Cal. 384; *People v. De Witt*, 68 Cal. 584, 10 Pac. 212; *People v. Wallace*, 89 Cal. 158, 26 Pac. 650; *People v. Mitchell*, 94 Cal. 550, 29 Pac. 1106; *Estate of Kennedy*, 104 Cal. 429, 38 Pac. 93; *Hyde v. Buckner*, 108 Cal. 522, 41 Pac. 416; *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *People v. Crespi*, 115 Cal. 50, 46 Pac. 863; *People v. Godwin*, 123 Cal. 374, 55 Pac. 1059; *People v. Creeks*, 141 Cal. 529, 75 Pac. 101.

"The contention of respondents that the evidence was admissible under section 2049 of the Code of Civil Procedure is answered by the language used in *People v. Creeks*, supra: "That such testimony is not authorized by the provisions of sections 2049 and 2052 of the Code of Civil Procedure was squarely held in *People v. De Witt*, 68 Cal. 584, 10 Pac. 212. The decisions of this court uniformly hold such testimony objectionable."

"In *People v. Creeks*, supra, and in *Estate*

of *Kennedy*, supra, a new trial was ordered solely because of such a ruling as is here complained of.

"For the reasons above noted, the judgment and order must be reversed, and it is so ordered."

Charles W. Slack and V. A. Scheller, for appellant. Nicholas Bowden, for respondent Mary A. L. Bollinger. E. E. Cothran, for other respondent.

HENSHAW, J. A rehearing of the cause was ordered by this court for the further consideration of the question discussed in subdivision 1 of the opinion above quoted, and, in particular, of the following matter:

"It is claimed that the two first alleged causes of action are actions that might have been brought by Christian Bollinger in his lifetime, and on his death passed to his estate, while the last two are actions in favor of his children, and in which his estate has no interest; and for this reason that said actions are improperly joined. It is certain that the cross-complaint does contain some allegations pointing to an action in favor of Christian Bollinger's estate; but on the trial of the action the court found against the allegations of the cross-complainant in this regard, and found such facts as support an action to establish and enforce a trust in favor of the children of Christian Bollinger, of whom Mary C. Pullan, respondents' testatrix, was one at the time of his death, and the decree enforces the trust in favor of the respondents as executors of her will only.

"The prayer of the cross-complaint sought only to enforce a trust in one-fifth of the property conveyed, as a right that inured to Mary C. Pullan upon the death of Christian Bollinger and the repudiation of the trust by appellant.

"As before stated, the court found against the allegations of the cross-complaint and in favor of the appellant upon the matters tending to support actions in favor of the estate of Christian Bollinger. Under these circumstances we think it clear that appellant could not have been injured by the ruling of the court upon the demurrer, even though such ruling may have been erroneous. Judgment should not be reversed for errors that do not affect the substantial rights of the parties. Code Civ. Proc. § 475; *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; *Angell v. Hopkins*, 79 Cal. 181, 21 Pac. 729; *Hirshfeld v. Weill*, 121 Cal. 13, 53 Pac. 402."

It is insisted by appellant that, at least, two causes of action, which by no possibility may be joined in the same complaint, were in this complaint improperly joined; that a demurrer was directed to this defect in the pleading, and that it should have been sustained. The first of these causes of action charges that George Y. Bollinger obtained the property from his father by the

exercise of undue influence and fraud upon him. This cause of action, the father being dead, is a cause of action to the prosecution of which the deceased's personal representatives succeed, and the recovery would be on behalf of the estate, its heirs and devisees. The second distinct cause of action charges that George Y. Bollinger received title to the property under an express trust for the benefit (with others) of Mary C. Pullan. This cause of action charges, not upon the ground of fraud or undue influence, but upon the express trust deliberately entered into and subsequently repudiated by the trustee. A favorable judgment under this cause of action would not be for the benefit of the estate of Christian Bollinger, deceased, but for the benefit of the cestuis que trust. That this position of appellant is sound may not be gainsaid. Indeed, it is conceded in the opinion of the learned judge of the Court of Appeal. He concludes the error to be without injury because the court actually found against the cause of action sounding in fraud, and in favor of the cause of action to declare the trust, and, this being so, he concludes that the error of the trial court was without injury to appellant. Such would, indeed, be the case, and the view of the Court of Appeal upon the matter would be perfectly sound, if the ultimate outcome of the litigation had been an affirmance instead of a reversal. But, for the reasons expressed in the opinion (with which reasons we are in full accord), the judgment and order appealed from were reversed and the cause remanded for a new trial. It may not be foretold what new evidence may be presented upon the new trial, and it may not be said that no injury will be worked to appellant if, upon this new trial, he is called upon to defend against two causes of action thus admittedly improperly joined. It follows, therefore, that the demurrer should have been sustained.

In all other respects the opinion and conclusion of the Court of Appeal is hereby adopted and affirmed. As to the demurrer, it is ordered that the cause be reversed, with directions to the trial court to sustain the demurrer, with leave to the pleader to amend and elect upon which cause of action he will stand.

The judgment and order are reversed and the cause remanded, for proceedings in conformity with the foregoing.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; ANGELLOTTI, J.

154 Cal. 743

PEOPLE v. FALLON. (Cr. 1503, 1504.) (Supreme Court of California. Dec. 21, 1908.)

1. CRIMINAL LAW (§ 207*)—JURISDICTION.

Police judges in the city and county of San Francisco have power to sit as magistrates;

Pen. Code, § 808, including, in its enumeration of those who are magistrates, police magistrates in cities.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 413, 414, 418, 440, 472-475; Dec. Dig. § 207.*]

2. STATUTES (§ 104*)—SPECIAL LEGISLATION.

The act commonly designated as the "Burnt Record Act" (Laws Ex. Sess. 1906, p. 73, c. 55), authorizing the restoration of lost or destroyed records, is not special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 116; Dec. Dig. § 104.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

The People against Thomas P. Fallon. Defendant appeals from orders, and petitions for stay. Orders affirmed; petition denied.

See, also, 149 Cal. 287, 86 Pac. 689.

John L. Guilfoyle, Jr., and Frank V. Cornish, for appellant. U. S. Webb, Atty. Gen., Wm. H. Langdon, Dist. Atty., and John O'Gara, Asst. Dist. Atty., for the People.

PER CURIAM. These are two appeals taken from orders in the above-entitled cause, the first from an order fixing the date of execution, the second from an order restoring the destroyed records in the case. Without deciding the preliminary objections to the hearing of these appeals, as that the order fixing the date of execution is not appealable under section 1227 of the Penal Code, and that the point presented may not be heard upon this appeal because not taken advantage of by motion to set aside the information, we come directly to a consideration of these appeals upon the merits.

Upon the first appeal it is contended that police judges in the city and county of San Francisco have not the power to sit as magistrates—a power conferred upon them by section 808 of the Penal Code. This proposition is too obviously without merit to require discussion.

The single proposition presented upon the second appeal, that the act authorizing the restoration of lost or destroyed records, commonly designated the "Burnt Record Act" (Laws Ex. Sess. 1906, p. 73, c. 55), is special legislation, is also without merit.

For which reasons the orders appealed from are affirmed.

The petition for stay of proceedings is denied, and the remittitur is ordered to issue forthwith.

154 Cal. 731

MITCHELL v. CALIFORNIA & O. S. S. CO. (S. F. 5,003.)

(Supreme Court of California. Dec. 21, 1908.)

1. APPEAL AND ERROR (§ 373*)—REQUISITES FOR TRANSFER OF CAUSE—STATUTORY PROVISIONS—BOND—NECESSITY.

St. 1907, p. 753, c. 410, § 941a, provides that an appeal may be taken to the Supreme Court and District Court of Appeal by filing with the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court in which the judgment or order was entered a notice of appeal therefrom, no service of the notice nor bond for costs on appeal being required. The act did not repeal the former method requiring service of notice of appeal and filing of a bond for costs, and did not provide for an election of one of the methods. *Held*, that the act established a new and alternative method, and it is sufficient if an appeal is perfected under either method; and hence, though a party did not file a sufficient undertaking for costs, as required by the old method, but filed his notice of appeal which was sufficient under the new method, the appellate court obtained jurisdiction, though the party intended to pursue the old method.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 373.*]

2. STATUTES (§ 243*)—CONSTRUCTION—REMEDIES AND PROCEDURE—STATUTES AIDING APPEALS.

Statutes making provisions in aid of appeals are to be liberally construed and applied.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 324; Dec. Dig. § 243.*]

3. APPEAL AND ERROR (§ 12*)—FORM OF REMEDY—ELECTION OF REMEDY.

The rule that, where there is more than one remedy for a review, a party must elect the one under which he will proceed and is bound by his election, was not applicable, since an appeal was the only remedy given, though two methods for asserting it were provided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 39-46; Dec. Dig. § 12.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by James Mitchell against the California & Oregon Steamship Company. From orders granting plaintiff's motion to vacate an order extending defendant's time for serving its statement on motion for a new trial, and denying defendant's motion to be relieved under Code Civ. Proc. § 473, from plaintiff's objection to the settlement of the statement, defendant appeals. On motion to dismiss. Denied.

W. F. Williamson, for appellant. Costello & Costello, for respondent.

LORIGAN, J. This is a motion to dismiss an appeal by defendant from what is claimed to be two orders of court, one granting the motion of plaintiff to vacate and set aside an order made by the court extending the time of defendant to serve its statement on motion for a new trial, and the other denying the motion of defendant to be relieved, under section 473, Code Civ. Proc., from the objection of plaintiff to the settlement of the proposed statement on motion for a new trial, on the ground that it had not been served within time. Both these orders were embraced within a single minute order of the court.

On the assumption that the appeal is taken from two separate and distinct orders, respondent moves to dismiss it, because but one undertaking on appeal for costs was filed, and this did not distinctly refer to either appeal. Centerville, etc., Co. v. Bachold, 109 Cal. 113, 41 Pac. 813; Matter of Heydenfeldt, 119

Cal. 347, 51 Pac. 543; Wadleigh v. Phelps, 147 Cal. 141, 81 Pac. 418.

Appellant insists that what is asserted to be two orders is really but a single order; that the only proceeding before the court in which the minute order appealed from was made was the application of appellant for relief, under which he conceded the invalidity of the order extending time which the respondent had moved to set aside for want of jurisdiction in the court to make it; admitted that the objection on that ground was good, confessed default with reference to service of his statement, and asked to be relieved from it; and that the denial of this relief was the real and only effect of the minute order. We do not deem it necessary to consider the argument of the respective counsel as to the real effect of what are apparently two orders, because, in the light of existing legislation providing different methods in which appeals may be taken, if the steps which were taken on the appeal here are sufficient under either method, that is all that is required to give this court jurisdiction of it.

The notice of appeal from the order complained of was filed on December 11, 1907. The order was made and entered on December 7, 1907. The Legislature in 1907 passed an act (St. 1907, p. 753, c. 410) which was in effect when the appeal herein was taken, establishing a new and alternative method of appeal. This act did not repeal the old and prevailing method requiring service and filing of the notice of appeal and the filing of a bond for costs on appeal in order to have a perfected appeal, vesting in this court jurisdiction to entertain it. While the Legislature accomplished by this new and alternative method a radical change and a wholesome reform in the method which it permitted might be adopted in taking future appeals, it did not abolish the old method, for, doubtless, the prudential reason, among others, that some questions might arise as to the constitutionality of the act permitting the new method of appeal. But the act did supply a more simplified method. It established a new and alternative method whereby appeals might be taken to the Supreme Court and District Court of Appeal, by providing, in section 941a of the act, that an appeal might be taken to such courts by simply filing with the court in which the judgment, order, or decree were entered a notice of appeal therefrom. The effect of such filing is declared by the act to be that "it shall, without further action on the part of the appellant, transfer the cause for decision and determination to the higher court." No service of the notice of appeal is required. In fact, it is expressly dispensed with. Neither is there any provision requiring the giving of a bond for costs on appeal. This act was recently declared by this court, on a motion

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to dismiss an appeal taken under it, and where the constitutionality of the act was involved, to be constitutional. *Estate of George S. McPhee, deceased—Corrigan v. McPhee* (Cal.)—97 Pac. 878. And it was likewise there held that the act did not require the giving of a bond for costs on appeal, and it was unnecessary to give any. So that, under the act, this court acquires jurisdiction of an appeal by the filing of the notice of the appeal alone.

The act, as we say, provided, without destroying the old method, a reform in the method of appeal, and all statutes making provisions in aid of appeals are to be liberally construed and applied. The Legislature left to a litigant desiring to appeal the right to adopt either method he saw fit, and, if an appeal that is taken can be sustained by an appellate court under either method providing for it, it should be done. The appeal of the appellant here can be so sustained, and there is no reason why it should not be. Conceding that the appellant undertook to perfect his appeal under the old method, if he has not perfected it because that method, as a jurisdictional prerequisite to our entertaining it, required the filing of an undertaking for costs on appeal, that should not conclude him from asserting that, tested by the requirements of the new and alternative method, he has perfected it. There is nothing in the act which requires the appellant to make an election as to the method which he shall adopt in taking his appeal, or which concludes him from insisting that he has perfected an appeal under the new method, even if he has unsuccessfully attempted to make a good service of notice, or filed an insufficient cost bond according to the requirements of the old. That this appeal was perfected under the new method there can be no question. Appellant filed his notice, and that was all that was required to perfect it.

The position of the respondent on this motion is based entirely on his claim that, as two methods of appeal were open to appellant, he was driven to an election as to which one he would adopt and proceed under. There is nothing in this position. The simple question is, has the appellant perfected an appeal under either method? If he has, that is the end of the inquiry. If he has perfected an appeal tested by the new method, it is unimportant whether he unsuccessfully attempted to file a sufficient cost bond in addition to serving his notice, neither of which the new method requires. It was entirely voluntary on his part whether, as matter of precaution, he should do so or not, and his appeal is not imperiled because in an attempt at cautiousness he has erred in some matter of procedure which he might have omitted and his appeal still be good. If the appeal would otherwise be good by simply filing the notice of appeal, any unsuc-

cessful attempt to take steps required in the old method, and not required by the new, will be deemed unimportant and of no legal significance as affecting the appeal.

Respondent, upon his claim that appellant was driven to an election of one of two methods of appeal which the law provided he might adopt, insists that the rule to be applied is that, where the party has more than one remedy for a review in a particular case, he must elect the one under which he will proceed, and is bound by his election. Without conceding the inflexibility of the rule as asserted by respondent, it is sufficient to say that there is no question here of two or more remedies provided for a review. There is but one remedy—an appeal—for which the Legislature has provided two methods under which it may be asserted. The methods are not mutually exclusive, and the old method includes the only thing which is essential in the new towards perfecting an appeal, namely, the filing of the notice. When a motion to dismiss an appeal is made on the ground that the court has not obtained jurisdiction, it only looks to ascertain that fact. If an appeal may be perfected in two methods, it only ascertains if it has been perfected under either. Here, under one method, it is provided that an appeal is perfected by simply filing a notice of appeal. When, upon examining the transcript, it is found that it shows a notice of appeal properly filed, which is sufficient ipso facto under the new and alternative method to perfect the appeal, the court will look no further, but will treat a failure to serve the notice or give a cost bond, or an error in attempting to do so, which might have been fatal to the appeal under the old method, as matter of no legal consequence.

It appearing that the appellant perfected its appeal by the filing of a proper notice of appeal under the new and alternative method, the motion to dismiss is denied.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

154 Cal. 748

QUIST v. HILL et al. (S. F. 4,821.)

(Supreme Court of California. Dec. 22, 1908.
Rehearing Denied Jan. 18, 1909.)

1. APPEAL AND ERROR (§ 414*)—PROCEEDINGS FOR TRANSFER—NOTICE OF APPEAL—PERSONS ENTITLED.

Where plaintiffs sued their employer, a contractor, and the owner of the property on which they worked, and secured a personal judgment against the contractor, from which no appeal was taken, and a lien on the property for their wages, the judgment providing that the proceeds of the sale of the lien property should be applied to the payment of the personal judgment against the contractor, on appeal by the owner it was unnecessary, under Code Civ. Proc. § 940, providing that an appeal is taken by filing notice of appeal with the court and serving a similar notice on the adverse party,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to serve notice of the appeal upon the contractor, since a reversal would not injuriously affect him, though the judgment was made a lien on the property for payment of the personal judgment against him, as he was primarily liable, and the owners would have an action over against him if they paid his debt.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. § 414.*]

2. NEW TRIAL (§ 2*)—GROUNDS—FINDINGS CONTRARY TO LAW.

Under Code Civ. Proc. § 656, defining a new trial as a re-examination of an issue of fact in the same court, where the case was tried on an agreed statement of facts which the parties stipulated was to be considered as the court's findings in the case, a motion for new trial would not lie on the ground that the decision was contrary to law, as that point could only be raised on appeal.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4788-4790.]

3. NEW TRIAL (§ 2*)—GROUNDS—DEFECTS IN FINDING—STIPULATED FINDING.

Under Code Civ. Proc. § 656, defining a "new trial" as a re-examination of an issue of fact in the same court where the case was tried on an agreed statement of facts which the parties stipulated were to be considered the court's findings, a new trial for the purpose of re-examining a question of fact could not be had on any ground.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 2.*]

4. APPEAL AND ERROR (§ 783*)—DISMISSAL—AGREED FINDINGS.

Though a motion for new trial was properly denied where the case was tried on agreed facts, which the parties stipulated should be considered as the findings of the court, on appeal from the order denying the motion, the proper course is to affirm the order, and not to dismiss the appeal therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3125; Dec. Dig. § 783.*]

5. LIENS (§ 8*)—ARTISAN'S LIEN—EFFECT OF STATUTE.

Civ. Code, § 3052, giving any person who makes, alters, etc., any article of personal property at the request of the owner or legal possessor a lien thereon for his work and labor, and authorizing him to retain possession until payment of its charges and to sell it upon notice if the charges are not paid within two months, though extending the right to a lien to all persons named, and providing for its enforcement by sale, which did not exist at common law, is otherwise merely declaratory of the common law, and the lien can only be asserted in the same cases that it could at common law, and the right thereto must be interpreted by common-law principles.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 2; Dec. Dig. § 8.*]

6. LIENS (§ 1*)—ARTISAN'S LIEN—RIGHT—COMMON LAW.

At common law, the right to a lien for work done on an article could only be asserted by one having exclusive possession of the article, and who had done the work thereon under contract with the owner, or one authorized by him to contract for the work, privity of contract being essential, and a mere employé or servant of the person contracting with the owner did not have such possession as would entitle him to a lien.

[Ed. Note.—For other cases, see Liens, Dec. Dig. § 1.*]

7. LIENS (§ 1*)—PERSONS ENTITLED—LABORERS—ARTISAN'S LIEN—"LEGAL POSSESSOR."

Civ. Code, § 3052, gives to any person who makes, alters, etc., any article of personal property at the request of the owner or legal possessor a lien thereon for his charges, and gives him the right to possession until payment, or, if the charges are not paid within two months, the right to sell it to satisfy his charges. Defendants engaged another to peel tanbark from trees on their land and deliver it at a certain place, and the latter hired plaintiffs to do the work, but abandoned the contract after doing part of the work, leaving plaintiffs partly unpaid. No contractual relations existed between defendants and plaintiffs. *Held*, that plaintiffs were not entitled to a lien for their wages on bark peeled by them remaining on defendants' land, either at common law or under the statute, they not having the required possession of the property and not having contracted with defendants, nor was the contractor the "legal possessor" of the property within the statute so as to give them a lien under their contract with him, the legal possessor contemplated by the statute being one with original authority to contract for the work, such as a pledgee.

[Ed. Note.—For other cases, see Liens, Dec. Dig. § 1.*]

8. LIENS (§ 16*)—RIGHT—LOSS—BREACH OF CONTRACT.

One agreeing to peel bark from trees and deliver it at a certain place, payment to be made upon delivery and acceptance, by abandoning the work before a part of the bark was delivered, waived his right to a lien thereon for doing the work.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 8-16; Dec. Dig. § 16.*]

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Charles Quist against H. Hill and A. E. Hill and others, in which part of defendants filed a cross-complaint for a personal judgment against one of defendants and to establish a lien for work on property of the defendants named. From a judgment for plaintiff and for the cross-complainants, establishing the lien claimed, and from an order denying a new trial the Hills appealed. Reversed and remanded.

McNab & Hirsch, for appellants. Thomas, Pemberton & Thomas and Robert Duncan, for respondent.

LORIGAN, J. This action was brought by plaintiff against A. W. Sandman and the Hills and others to obtain a personal judgment against Sandman and to enforce a lien upon some 235 cords of tanbark, the property of the Hills. All the other defendants except Sandman and the Hills filed cross-complaints asking a personal judgment against Sandman and also asserting liens against the tanbark similar to those asserted by the plaintiff. The claims asserted by the plaintiff and cross-complainants were for labor in cutting and drawing the tanbark from the trees on the premises of the Hills, under their employment for that purpose by Sandman, who had entered into a contract with the Hills to do the peeling and delivery of the bark. Sandman made default. The Hills appeared and

resisted the assertion of a lien on their property. The cause was submitted on an agreed statement of facts, and the court gave the plaintiff and the cross-complainants personal judgment against the defendant Sandman, and a further judgment establishing their asserted liens against the bark, and directing its sale by the sheriff to satisfy their lien claims. The defendants Hill appeal from the judgment and from an order denying their motion for a new trial. Sandman was not served with notice of this appeal.

It is insisted by the respondents that both these appeals should be dismissed, and have moved to that effect. They insist that the appeal from the judgment should be dismissed because the defendant Sandman, who had the contract with the Hills to cut and deliver the bark, and who employed the respondents to do the work thereof, and against whom they obtained a personal judgment, should have been served with the notice of appeal from the judgment. Their claim is that he was an adverse party whose interest would be injuriously affected by a reversal of the judgment establishing and enforcing the lien, and hence, under section 940 of the Code of Civil Procedure, should have been served with the notice of appeal. We do not think this point has any force. Though the judgment against Sandman was a personal judgment for the full amount of the several claims of respondents, he has not appealed from it. That judgment fixed a primary liability on his part to respondents. It is true that by another part of the judgment liens are established against the property of the appellants Hill in favor of respondents, but the judgment establishing them is separate and distinct from the personal judgment against Sandman, and a matter in which the latter has no interest and which does not affect him, unless it can be said that that portion of the judgment providing that the proceeds of the sale of appellants' property, on which the lien is fixed, shall be paid on the personal judgment obtained against him, is a legal advantage of which he will be deprived if the judgment establishing the lien is reversed. It is the claim of respondent that Sandman has this legal advantage and benefit. It is insisted by them that as Sandman is interested in having the judgment sustained, so as to have the proceeds of the sale of the property of the appellants Hill, upon which the lien of respondents was fixed, applied towards the satisfaction of the personal judgment against himself, he is therefore a party who would be injured by a reversal of the judgment, and hence should have been served with notice of appeal. We do not, however, think that Sandman comes within the class of aggrieved parties upon whom it is necessary to serve such notice. While it would appear on the face of the judgment, superficially considered, that he would be injuriously affected by a reversal of it, yet when his legal rights under the judgment as

an entirety are considered it is obvious that it can have no such effect.

As we have seen, Sandman was personally responsible to the respondents for whatever claims they had for their services in cutting the bark. Any right which they could assert against the property of the appellants Hill, if such right existed at all, was conferred by law and consisted of a right to subject the property of the Hills to a lien for their services. The primary obligation to respondents, however, was upon Sandman, and respondents obtained a personal judgment against him for the full amount of their claim. Any lien which the law gave to respondents upon the property of appellants Hill was for the benefit of respondents, and not for the advantage of Sandman. In legal effect this judgment, in as far as it enforced the lien against the property of the Hills and directed a sale and the application of the proceeds toward the satisfaction of the judgment obtained against Sandman was of no benefit to the latter so as to make the reversal of the judgment injurious to him. Sandman had no legal right to have the property of the appellants Hill subjected to the payment of his indebtedness to the respondents. The primary personal obligation was on him to pay the respondents for their labor. The law, if it gave them a lien at all, created it for the benefit of the respondents because he had failed to perform his obligation to them. If the judgment here involved were reversed, it could only be reversed so far as it established a lien on the property of the appellants. The personal judgment against Sandman, not being appealed from, would remain after reversal as it had stood before, subject to enforcement at any time on execution at the instance of respondents. Reversing that judgment in so far as it established a lien, which is the only question involved on this appeal, could not affect the personal judgment against Sandman. Nor could such reversal injuriously affect Sandman because thereby Sandman would be deprived of a lien against appellants' property. It would in law be no injury to him, because, had the judgment as far as it established the lien been affirmed, and the property to which the lien attached been sold under the judgment, the Hills would have their action over against Sandman to recover from him the amount which their property had had to contribute to the payment of his personal judgment and primary liability to the respondents. All that the reversal would amount to as far as Sandman is concerned would be that the Hills, as against him, would not be forced to take such action, nor Sandman be subjected to it. Under such circumstances, and where it is apparent that no legal benefit could accrue to Sandman under the judgment establishing the lien, it cannot be said that the reversal of the judgment as a lien would injuriously affect him, and hence he was not a party upon whom notice of appeal should be served.

See, on this proposition generally, *Mannix v. Tryon*, 152 Cal. 38, 91 Pac. 983. The notice to dismiss the appeal from the judgment is denied.

Respondents likewise move to dismiss the appeal from the order denying the motion of appellants for a new trial. Their point is that as the case was submitted to the trial court for disposition on an agreed statement of facts, which facts it was also stipulated by the parties were to be considered as the findings of the court in the case, a motion for a new trial would not lie. We are satisfied that the point that under such circumstances a party cannot demand a new trial is correct. The statement of facts in the case at bar constituted by stipulation the findings of the court. It is not, and under the stipulation as to facts could not be, claimed that the findings are not sustained by the evidence, because the findings consist of the agreed facts themselves. "A new trial is a re-examination of an issue of fact in the same court after trial and decision. * * *" Code Civ. Proc. § 656. It is quite obvious that where it is stipulated between parties as to what the facts in the controversy are, and that those facts shall constitute the findings, there is no room for demanding a new trial. It would be idle to grant a new trial and re-examine a question of fact when there has not only been no controversy over any issue of fact, but where the facts are expressly agreed upon. Neither under the circumstances could the appellants be heard to demand a new trial, as they did, on the ground that the decision of the court was against law. That point could only be availed of on appeal. In *re Doyle*, 73 Cal. 565, 570, 15 Pac. 125; *Swift v. Occidental Mining Co.*, 141 Cal. 161, 74 Pac. 700. The trial court correctly denied the motion for a new trial, but the proper course here is not to dismiss the appeal therefrom, but to affirm the order of the lower court denying the motion for a new trial, which we do. *Quist v. Hill* (Cal.) 95 Pac. 658.

Having disposed of these preliminary motions, we now proceed to a consideration of the appeal on its merits. From the facts as they were stipulated upon the trial and which constitute the findings of the court, it appears that the defendants Hill, as owners of a tract of timber land in Mendocino county, entered into a written agreement with the defendant A. W. Sandman, by which the latter was to peel, from the trees on said land, all the tanbark which would go a certain measurement, and deliver it at a landing known as Munroe landing, in said county. The Hills agreed to pay Sandman \$9.50 per cord for peeling and delivering said bark at the landing; settlement to be made when each 50 cords thereof were delivered and accepted by the Munroe Lumber Company. Sandman entered upon the performance of his contract and employed the plaintiff and the cross-complainants as laborers to peel the bark for him.

He delivered 119½ cords at the landing, for which he was fully paid by the Hills, and then abandoned his contract. At the time Sandman abandoned the contract he left on the premises of the Hills where the peeling was being done the quantity of tanbark which plaintiff and the cross-complainants as employees of Sandman had peeled and for which he had not paid them, and of which, since it has been peeled, they had been in possession on the land of the Hills. The Hills had not employed the plaintiff or cross-complainants and had no notice of any claim of lien by them until this action to foreclose them was brought, although they knew, in a general way, that plaintiff and cross-complainants were peeling said bark for Sandman. Upon these facts agreed to as findings, and upon additional admissions by the parties as to the amounts due from Sandman to plaintiff and the cross-complainants for their labor in peeling the bark, the court awarded a personal judgment in their favor against Sandman, and also decreed a lien in their favor upon the bark remaining in their possession, and directed its enforcement by sale. The only point on this appeal on the merits is as to whether the respondents were entitled to any lien against the tanbark in question and which it is conceded was the property of the appellants Hill.

Respondents base their claim to a lien upon section 3052 of the Civil Code, which provides that a person "who makes, alters or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien upon the same for his reasonable charges for the work done and materials furnished, and may retain the possession of the same until the charges are paid. If not paid within two months after the work is done the person may proceed to sell the property at public auction upon giving ten days' public notice of the sale," etc. As far as the first part of the section which we have quoted is concerned, it simply declares the common-law rule as to the right of a mechanic or artisan performing labor on an article of personal property to a lien thereon dependent on possession for payment for his service. While at common law the right to a lien extended to a large class of persons, it was the intention of the Legislature by the Code provision to extend its application so that any person who had altered or repaired any article of personal property at the request of the owner or legal possessor thereof should have the benefit of a lien. It was intended also by the Code provision to provide for a method of enforcing the lien which did not exist at common law because at common law no lien on a chattel for work done or materials furnished gave a right to a sale of the chattel for the enforcement of the lien. *Boisot on Mechanics' Liens*, § 784. But while the Code has extended the right to a lien in general to all persons performing the prescribed labor concerning an article of per-

sonal property at the request of the owner or legal possessor thereof, it is in other respects but declaratory of the common-law rule, and the right to a lien must be governed by the same rules which prevailed at common law. It can only be asserted under the same circumstances and conditions as it could be asserted at common law, and the right to do so must be interpreted in accordance with common-law principles.

Now as to the common-law rule: It will be observed that there was no contract between the Hills and the respondents for the peeling of the bark against which the latter assert their lien. They were not the employes of the Hills. The Hills had made their contract directly with Sandman for the work, and Sandman had employed the respondents to do the labor for him. They were the employes of Sandman and could only look to him for payment of their wages upon his personal contract therefor. Under these circumstances, the respondents would have no lien upon the property of the Hills at common law, and, as the Code section is but declaratory of that law, could have no lien under it. At common law the right to a lien existed only in favor of the person who had done the work directly under a contract with the owner of the article of personal property upon which it had been expended, or where it had been done by agreement with some one authorized by the owner to contract with the person to do the work. Privity of contract between the owner of the chattel and the mechanic was an essential prerequisite to support the claim of lien. It did not lie in favor of an employé or servant of the person who had contracted with the owner to do it. The only security which the employé performing service on a chattel had was the personal responsibility of his employer on the contract of hiring. In speaking of the right to such a lien at common law, it is tersely said in Jones on Liens (because the principle is not open to question) that "the lien belongs strictly to the person who has contracted with the owner to do the work. A servant or journeyman or subcontractor of such person has no lien." Jones on Liens, vol. 1, p. 737. The rule is stated to the same effect in Boisot on Mechanics' Liens, §§ 768, 772, and in Story on Bailments, § 440. It is also declared to be the rule at common law by the decisions. Hollingsworth v. Dow, 19 Pick. (Mass.) 228; Quillian v. Central R. R., etc., Co., 52 Ga. 374; Jacobs v. Knapp, 50 N. H. 71; Globe Works v. Wright, 106 Mass. 207; Wright v. Terry, 23 Fla. 160, 2 South. 6; Landry v. Blanchard, 16 La. Ann. 173. A right to a lien could only be asserted at common law where the mechanic or artisan had the exclusive possession of the thing with reference to which he had performed labor and against which he asserted his lien. It cannot be said that an employé ever has that possession. It can only be in the person with whom the owner directly contracts. Whatever posses-

sion an employé of such contractor may have is but the possession of his employer. While it is true that in the instant case the respondents as bark peelers under their employment by Sandman had some possession of the bark, it was simply such a possession as any employé would have of the property with respect to which his employer had agreed to perform services. It was no different than the possession which the employes of a machinist would have of a machine which their employer had agreed to construct or repair, or which any other employes working for their employer would have of the property concerning which the employer had contracted with the owner to do work. It would be simply a possession incident to the performance of their duties upon the thing under the direction of their employer and for him, and their possession would be but the possession of their employer.

The Hills were not indebted to the respondents in any way, nor had they even placed them in possession of their property. As to the respondents, their contract was with Sandman, and he was responsible to them for the payment of their wages. He alone was given possession by the Hills of the property upon which the bark was peeled and upon which respondents assert a lien; but, whatever sort of possession the respondents had or obtained of the peeled bark, it was at all times subordinate to that of Sandman. Their possession of it was simply that of employes and was not that exclusive and unconditional possession which is necessary in order to constitute the basis of a lien. Of course, the respondents are not asserting a right to hold the tanbark for the benefit of any lien which Sandman might have upon it because the latter under his contract could have no lien. He had waived it under his agreement, which provided that he was only to be paid for the bark after it was delivered and accepted by the Munroe Lumber Company. His agreement to deliver the bark before payment conclusively negatives any right in him to retain possession of it until payment. The respondents assert an independent right in themselves as against the Hills to a lien upon the property of the latter with whom they never had any contract and possession of whose property was never in them, but in Sandman. This it is clear under the authorities they are not entitled to do. At common law they could assert no lien and no greater right is given them under the Code provision in that respect than they could have asserted at common law.

We are cited by respondents to no authority which sanctions the right of an employé at common law to assert a lien against the property of one who has contracted with his employer to perform work or furnish materials in the making or repairing of a chattel. They rely here in support of such asserted right upon the case of Douglass v. McFarland (decided by this court) 92 Cal. 656,

28 Pac. 637, and on *Holderman v. Manier*, 104 Ind. 118, 3 N. E. 811; *Haughton v. Bush*, 101 Mich. 267, 59 N. W. 621; *Palmer v. Tucker*, 45 Me. 316; *Phillips v. Freyer*, 80 Mich. 254, 45 N. W. 81. But none of these cases support the right of an employé of a contractor to a lien against the property of the owner. The case of *Douglass v. McFarland*, the only one we need particularly refer to, involved the right of the plaintiff there to retain the possession of certain redwood railroad ties and shakes which he had manufactured on the land of one Harney under a contract with the latter to do so. He asserted a lien upon the property and sought to retain possession until the amount due him for manufacturing the ties and shakes should be paid. It was held under the same section upon which respondent relies (Civ. Code, § 3052) that plaintiff had a lien on the property and a right to retain the possession of it until his lien was discharged; but it will be observed that the assertion of the lien in the case cited was by the contractor himself, and not by an employé. There is nothing in the case militating against the general rule that an employé of a contractor has no lien. It is simply in harmony with the rule that the contractor alone has the lien. The cases cited by respondent from other jurisdictions were also cases where the lien was sustained but on behalf of the parties directly contracting with the owner for the labor upon the article made or repaired. None of them were actions brought by an employé of the contractor against the owner.

Respondents insist, however, that under the terms of the section their employment by Sandman was sufficient to give them a lien on the property of the Hills because Sandman was the "legal possessor of the property" and in possession of the tanbark when the services upon it were performed. But Sandman's possession of the land under the contract with the Hills to peel the tanbark from the trees thereon did not constitute him a "legal possessor of the property" so as to bind the property of the Hills. What is meant by the term "legal possessor of the property" in the section is one who has the right by virtue of his possession to originally contract with reference to the manufacture, alteration, or repair thereof, such as, for example, a lessee or pledgee of the property; some one having a possession coupled with a right of property so that he can contract with reference to it respecting any of the matters enumerated in the section. Sandman was not such a legal possessor. His possession was only a qualified one—simply for the purpose of peeling and delivering the bark. He was not a "legal possessor of the property" in any sense under the Code section so as to confer upon re-

spondents under their employment by him of a right to assert a lien against it.

The judgment is reversed and the cause remanded.

We concur: HENSHAW, J.; MELVIN, J.

9 Cal. App. 283

O'BRIEN v. BIG CASINO GOLD MINING CO. (Civ. 479.)

(Court of Appeal, Third District, California.
Nov. 7, 1908.)

1. APPEAL AND ERROR (§ 173*)—REVIEW—CONTENTIONS NOT CONSIDERED BELOW.

Where a defense was not urged at trial and no evidence was offered to support it, it will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1079; Dec. Dig. § 173.*]

2. CORPORATIONS (§ 667*)—FOREIGN CORPORATIONS—RIGHT TO DEFEND—DESIGNATING AGENT FOR SERVICE OF PROCESS.

Under Civ. Code, § 405, requiring foreign corporations to file with the Secretary of State the name of some person within the state upon whom service may be made, and section 406, prohibiting corporations not complying with the statute from maintaining or defending any action if the proof in an action against a foreign corporation did not show that it had complied with the statute, it could not plead the statute of limitations as a defense.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2590; Dec. Dig. § 667.*]

3. CORPORATIONS (§ 631*)—FOREIGN CORPORATIONS—RIGHTS.

As a general rule, it is only by comity that foreign corporations can exist and transact business in states other than that in which they were incorporated.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2490; Dec. Dig. § 631.*]

4. LIMITATION OF ACTIONS (§ 88*)—ABSENCE WHEN ACTION ACCRUES—CORPORATIONS.

Foreign corporations come within the provisions of statutes which prevent the running of limitations in favor of absent debtors while they are without the jurisdiction of the state.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 463; Dec. Dig. § 88.*]

5. APPEAL AND ERROR (§ 237*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—OPENING UP CASE.

Though counsel of defendant foreign corporation did not know at the time of trial that the corporation had designated some one within the state on whom process could be served, as required by statute, but did discover that fact before decision, and the defect having been pointed out by plaintiff's brief submitted after oral argument, defendant cannot complain of the refusal of the court to open the case after decision to supply such evidence, where it did not move to open the case at the first opportunity.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 237.*]

6. TRIAL (§ 71*)—RECEPTION OF EVIDENCE—DISCRETION OF TRIAL COURT—OPENING UP CASE.

Though counsel for defendant foreign corporation did not know that the corporation had designated a person on whom process could be served, as required by statute, and did not learn of it until the evidence was in, the only defense being the statute of limitations, and the requirement of the statute as to such designation being

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

absolute, it was within the trial court's discretion to refuse to open up the case after decision to permit defendant to show that it had filed the statutory designation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 167; Dec. Dig. § 71.*]

7. NEW TRIAL (§ 91*)—DISCRETION OF TRIAL COURT—NEWLY DISCOVERED EVIDENCE.

For the same reason, the trial court did not abuse its discretion in denying a new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 184-187; Dec. Dig. § 91.*]

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by Richard O'Brien against the Big Casino Gold Mining Company. From a judgment for plaintiff, and an order denying a new trial, defendant appealed. Affirmed.

F. W. Street and H. M. Street, for appellant. E. W. Holland, for respondent.

HART, J. The plaintiff brought this action to recover the sum of \$500, alleged to be due him from the defendant, on an account stated, for services performed in the capacity of superintendent of the mining operations of the corporation. The answer, after denying the alleged indebtedness, sets up as a special defense the bar of the statute of limitations (section 339, Code Civ. Proc.), and also the further defense that, by reason of the alleged carelessness and negligence of the plaintiff as superintendent of defendant's properties, the latter suffered the loss, through robbery, of the product of a pocket of gold found in defendant's mine, of the alleged value of more than \$3,000, and that defendant had therefore sustained damages in the sum of \$3,000 because of such alleged carelessness and culpable negligence of plaintiff. The last mentioned defense was not pressed at the trial, no evidence having been offered in its support, and therefore further consideration of the same may be dismissed. The cause was tried by the court, a jury having been waived by both parties, and judgment awarded the plaintiff for the sum sued for. This appeal is from the judgment and order denying the defendant a new trial.

The principal point urged by the appellant on this appeal is that the respondent's right of action was at the time of the filing of his complaint barred by the provisions of section 339 of the Code of Civil Procedure, prescribing a limitation of two years within which an action may be commenced upon a contract, obligation, or liability not founded upon an instrument of writing, etc. No serious effort, which could properly be interposed under the issues tendered by the pleadings, seems to have been made to dispute the validity and correctness of plaintiff's claim. The contention of the plaintiff in response to the special plea in bar is twofold, to wit: First, that the defendant ren-

dered to the plaintiff an account stated in writing before the same or the original account from which the account stated originated was barred by the statute; secondly, that the defendant, being a foreign corporation doing business in this state, failed to show at the trial that it had filed with the Secretary of State a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served (section 405, Civ. Code), and that, therefore, the defendant cannot invoke the benefit of the laws of this state limiting the time for the commencement of civil actions (section 406, Civ. Code). We think the second point made by the respondent is a conclusive answer to appellant's contention that the finding of the court against the defendant's plea of the statute of limitations is unwarranted and unsustained by the record.

The complaint alleges that the defendant "was and now is a corporation duly organized and existing under the laws of the State of Washington, and transacting and carrying on business in the county of Tuolumne, state of California." The answer expressly admits said allegation to be true. Under the terms of section 405 of the Civil Code it was, as already indicated, the duty of the defendant, as a foreign corporation, to file with the Secretary of State a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served, and that failure to do as thus required deprives it, under the provisions of section 406 of said Code, of the right to invoke or claim any benefit under the statute of limitations of this state. Therefore, the defendant having failed to produce any proof addressed to that point, the court below was not only justified in finding, but required to find against it on the plea of the statute. *Pierce v. Southern Pacific Co.*, 120 Cal. 156 et seq., 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350. In that case, referring to the provisions of sections 405 and 406 of the Civil Code, the Supreme Court says: "It being admitted that defendant was a corporation organized under the laws of another state, compliance with the foregoing statute became a necessary fact to be proven as a predicate to its right to avail itself of the benefit of the statute of limitations. [Italics ours.] This it failed to do, and hence the court did not err in its finding against its defense of the statute of limitations. * * * The statute, then, is not a limitation upon the right of foreign corporations to avail themselves of our statute of limitations, but it confers that right, subject only to the condition prescribed." It may be stated as a general rule that foreign corporations may, by comity only, transact business in states other than the one by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

virtue of the laws of which they exist. They are, therefore, citizens, so to speak, of the state by whose laws they are created, and, except by comity, have no legal existence elsewhere, and consequently they in principle come within the provisions of those statutes which make a saving as to absent debtors in favor of whom, so long as they remain without the jurisdiction of the state, the law of limitations does not run. Wood on Limitations, § 250. The consequence of this rule is, as before declared, that foreign corporations, when attempting to claim the benefit of our statute of limitations, are required, as a necessary prerequisite to the exercise of that right, to not only meet the demands of the law by virtue of which alone they may avail themselves of the privilege of transacting business in this state, but must prove the fact at the trial. Omission to make such proof is, as seen, fatal to their right to claim the benefit of the statute. The court's finding against the defendant on its special plea in bar was therefore sustained by the total failure of proof on this point.

On the motion for a new trial, and as one of the grounds therefor, appellant's attorney presented an affidavit, made by himself, alleging that he was not aware at the time of the trial that the designation required by section 405 of the Civil Code had been filed with the Secretary of State until after the court below had rendered its decision in this action, and that "defendant and deponent, its counsel, was taken by surprise in the said point so raised by counsel for plaintiff in his brief (the cause having been, after oral argument before the trial court, submitted on briefs), and at said time, the taking of evidence in said cause having closed, the surprise was one which ordinary prudence could not have guarded against." Accompanying said affidavit, and made a part thereof, is a copy of the designation required by our statute, certified as a true copy by the Secretary of State. The appellant, after being apprised of the necessity of proof upon the point under consideration, which information was received before the court handed down its decision, made no move to have the case opened for the purpose of showing the fact of the filing of the necessary designation; the court having tried the case without a jury. This it should have done, although we do not think the refusal of the court to open up the case for that purpose would involve an abuse of discretion in a case where, as here, the only defense sought to be established is purely technical and not addressed to the merits, and consequently not in furtherance of justice, and the evidence claimed to be "newly discovered" is made by the law indispensably necessary to the establishment of such defense. For the same reason the court's order denying de-

fendant a new trial represents the exercise of a discretion with which we may not properly interfere.

We have deemed it unnecessary to review the evidence upon the merits of the case, because, as before observed, no question is raised by appellant of its sufficiency to sustain the finding of the court that the defendant is indebted to the plaintiff in the sum for which judgment was given.

For the foregoing reasons, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURRELL, J.

9 Cal. App. 288

BURRELL v. COLLINS. (Civ. 427.)

(Court of Appeal, Third District, California.
Nov. 7, 1908.)

1. APPEAL AND ERROR (§ 843*)—REVIEW—QUESTIONS CONSIDERED—QUESTIONS NOT NECESSARY.

Where plaintiff claimed that property sold under execution belonged to him, and sued to recover its value on that ground, as well as because of irregularities in the sale, any irregularity in the sale is immaterial and need not be considered on appeal, as, if plaintiff owned it, he could recover for its conversion, and, if not, the irregularity did not concern him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. § 843.*]

2. TRIAL (§ 62*)—RECEPTION OF EVIDENCE—SCOPE OF EVIDENCE IN REBUTTAL—OWNERSHIP OF PROPERTY

In an action against the sheriff for conversion of cattle sold under execution against B., where plaintiff simply claimed the cattle as his own, but defendant justified on the ground that they belonged to B., and introduced evidence of B.'s ownership, it was error to exclude a question asked by plaintiff of B. whether the cattle sold belonged to him on the ground that it was not proper evidence in rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 149; Dec. Dig. § 62.*]

3. TRIAL (§ 62*)—RECEPTION OF EVIDENCE—SCOPE OF EVIDENCE IN REBUTTAL.

Where a question to a witness was proper to elicit evidence in rebuttal of defendant's evidence that the answer might have been favorable to defendant, or, if unfavorable, the court might have been justified in disregarding it, would not justify excluding the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 149; Dec. Dig. § 62.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by M. W. Burrell against J. D. Collins. From a judgment for defendant, and an order denying a motion for new trial, plaintiff appealed. Judgment and order reversed.

R. W. Miller, for appellant. Everts & Ewing, for respondent.

BURNETT, J. The action was brought to recover the value of a certain number of cattle alleged to have been the property of plaintiff and converted by defendant. The

cattle were taken by defendant as sheriff of Fresno county under a writ of attachment issued out of the superior court of said county in the case of W. R. Smith et al. v. E. J. Burrell, and they were afterwards sold as the property of said E. J. Burrell under a writ of execution against the defendant in said cause.

Two issues are presented by the pleadings, to wit, the ownership of the property and the conversion of the same by defendant. The latter contends that the cattle belonged to E. J. Burrell and were legally sold under said writ of execution, while plaintiff insists, not only that he is the owner of the property, but also that the record shows an irregularity in the sale, as no proof was made of the judgment upon which the execution was issued. But it is clear that the only controversy of importance here is as to the ownership of the property, because, if it belonged to plaintiff, the admitted taking by defendant was a conversion, and, if plaintiff was not the owner, it is no concern of his whether the property was regularly or irregularly taken. There is sufficient evidence disclosed by the record to justify the finding that the property belonged to said E. J. Burrell, but we cannot avoid the conclusion that the trial court committed prejudicial error in its ruling in relation to certain offered evidence directed to the issue of ownership. The said E. J. Burrell was called by plaintiff as a witness in rebuttal, and, after stating that he was the party defendant in the suit of Smith v. Burrell and that certain cattle were sold under an execution issued against him, he was asked this question: "Were the cattle levied upon by the execution and sold at the sheriff's sale in the suit of Smith et al. v. Burrell your cattle?" The court sustained an objection that "it was irrelevant, incompetent, and immaterial and not rebuttal testimony." In this we think the court erred. Plaintiff in his case in chief did not anticipate the defense, but offered evidence in support of the allegations of his complaint and rested. Defendant sought to justify his action upon the ground that the property belonged to E. J. Burrell and introduced evidence to that effect. This was new matter brought out by the defendant, and, while the effect of it was to disprove the ownership of plaintiff, it was directed to a specific affirmative fact which in rebuttal the plaintiff had a right to controvert, not simply to fortify his own allegation, but to overcome the showing made by defendant. E. J. Burrell was not called as a witness by defendant, but the whole defense rested upon the showing made that he was the owner and no one was in as good a position to testify concerning this as himself. It may be that the answer would have been favorable to defendant, or, if unfavorable, that the court would have been entirely justified in

disregarding it, but such considerations cannot excuse the ruling. Plaintiff had a right to have the question answered and the answer considered the same as though the issue had been tried by a jury.

We find no other prejudicial error, but, for the reason stated, the judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

154 Cal. 778

SHATTUCK & DESMOND WAREHOUSE
CO. v. GILLELEN. (L. A. 2,228.)

(Supreme Court of California. Dec. 23, 1908.)

1. CORPORATIONS (§ 244*) — LIABILITY OF
STOCKHOLDERS — STATUTES — CONSTRUCTION.
— "STOCKHOLDER."

Under Civ. Code, § 322, defining the term "stockholder" as applying not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, etc., a pledgee of corporate stock, who allows himself to appear on the books of the corporation as the owner of the stock, is a "stockholder," within the section, and within Const. art. 12, § 3, making stockholders individually liable for corporate debts; but a pledgee of stock, who directs the secretary of the corporation to issue to him a new certificate in his name as pledgee, is not a stockholder because the secretary, without the knowledge of the pledgee, entered his name on the corporate books as a stockholder and issued stock in his name as such.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 974, 975; Dec. Dig. § 244.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6667, 6668; vol. 8, p. 780±.]

2. CORPORATIONS (§ 244*)—STOCKHOLDERS.

Where the indorsement on corporate stock pledged to secure a loan purports to transfer the stock absolutely to the pledgee who delivers the same to the secretary of the corporation, with instructions to issue to him a new certificate in his name as pledgee, the secretary is not warranted in issuing a certificate to the pledgee in his name as absolute owner and making entry on the books of the corporation as though such pledgee is the absolute owner.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 974, 975; Dec. Dig. § 244.*]

3. EVIDENCE (§ 424*) — PAROL EVIDENCE —
VARYING TERMS OF INSTRUMENT—ADMISSIBILITY.

The rule forbidding parol evidence to vary or alter the terms of a written contract, as established by Code Civ. Proc. § 1856, applies only as between the parties to a contract, their representatives or successors in interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1967; Dec. Dig. § 424.*]

4. PLEDGES (§ 16*)—PAROL EVIDENCE—VARYING
TERMS OF INSTRUMENT—ADMISSIBILITY.

The parties to an apparent absolute transfer of property, real or personal, may always show by parol that the transfer was made solely by way of security, and that the transaction was a mortgage or pledge, and hence, where the indorsement on corporate stock pledged to secure a loan purported to transfer the same absolutely to the pledgee, the pledgee, in an action by a creditor of the corporation to enforce stock liability, could show by parol that he was a mere pledgee of the stock, and that the issue of a new certificate to him as owner and the entry

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

of his name as owner on the corporate books was in violation of his instructions and without his knowledge.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 25; Dec. Dig. § 16;* Evidence, Cent. Dig. § 2136.]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Shattuck & Desmond Warehouse Company against Warren Gillelen. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

Oscar A. Trippet, for appellant. Borden & Carhart, for respondent.

ANGELOTTI, J. This is an appeal by plaintiff from a judgment for defendant and an order denying a motion for a new trial. The action is one brought upon a note given on April 15, 1902, to one E. S. Shattuck by the Ivanpah Smelting Company (a corporation), and transferred to plaintiff, to recover from the defendant his proportionate liability as a stockholder of said Ivanpah Smelting Company; it being alleged that when the indebtedness to evidence which said note was given was created, and at the time of the giving of said note, defendant was the owner, and appeared on the books of said corporation as the owner, of 908 shares of the 954 shares of the corporate stock subscribed for.

The principal portion of the indebtedness evidenced by the note grew out of a contract entered into between Shattuck and the Ivanpah Smelting Company on February 1, 1902, under which Shattuck was to furnish the company men, wagons, and horses for at least six months at \$75 per day. Between that date and April 15, 1902, there had become due under this contract and for certain merchandise and services furnished and rendered outside thereof, less credits amounting to \$429.43, the sum of \$3,041.16, and on April 15, 1902, the contract was abrogated by the parties, with the understanding that Shattuck should be allowed \$4,450 in addition to what was due, as liquidated damages for the failure of the company to complete its contract. These two amounts, the \$3,041.16 due, and the \$4,450 allowance for damages, make up the amount of the note, \$7,491.16. There is some question whether this compromise as to damages and the giving of the note therefor was in fact authorized by the corporation, but we may assume for the purposes of this decision that it was.

The trial court found that defendant was not a stockholder of the Ivanpah Smelting Company at any time prior to February 11, 1904, when he acquired title to said 908 shares by purchase at a judicial sale in proceedings to foreclose a pledge. It further found the probative facts upon which it based its conclusion that he was not a stockholder

within the meaning of our constitutional and statutory provisions relative to the liability of stockholders of corporations for the debts thereof. There is no material difference between the facts so found, and the facts stated in the opinion of this court in *Welch v. Gillelen*, 147 Cal. 571, 82 Pac. 248, a similar action by a creditor of the Ivanpah Smelting Company against this defendant, on account of his alleged ownership of these shares of stock. Briefly stated, these facts are as follows: Defendant never, in fact, owned any portion of this stock prior to his purchase thereof in the year 1904. From some time in the year 1901 to the time of such purchase he held it purely by way of pledge, to secure the payment of money advanced by him to the owners for the purchase thereof by them. One Blaisdell and one Sisson were the owners; the certificates therefor being issued to Blaisdell. At the time that the stock was so pledged to him, the certificates therefor were indorsed and delivered by Blaisdell to defendant; the indorsement not showing that the transaction was only a pledge. Defendant retained these certificates until February 27, 1902, when, Blaisdell having died, defendant, on Sisson's request, for the purpose of having the record show the real transaction between defendant and the owners, deposited the pledged certificates with the secretary of the company with the direction to said secretary to issue to him a new certificate in his name as pledgee, which implied, of course, a direction that the secretary should also make a proper entry on the books of the corporation of the fact that he held the stock as pledgee, as the court found. The secretary, in violation of these instructions, and without any authority in that behalf, and without the knowledge of defendant, issued a new certificate for this stock to the defendant, which on its face showed him to be the owner thereof, and made an entry in the record books of the company which likewise showed him to be the owner, instead of a mere pledgee. This certificate was receipted for by an employé of defendant and taken to defendant, who at once discovered the error therein. He immediately went to the secretary, and demanded that his previous instructions be complied with. The secretary never refused to rectify the matter, but put the defendant off on the plea that the matter could not be rectified in the absence of the vice president of the company, and that the matter would be attended to as soon as the signature of the vice president could be obtained. Defendant frequently thereafter renewed his said demands on the secretary, receiving like responses, until on May 15, 1902, in compliance with a written demand made by defendant's attorneys, the matter was remedied by a cancellation of the certificate, the issuance of a new certificate to defendant as pledgee, and the making of an entry on the books of the

company showing defendant to be the holder of this stock as a pledgee only. While retaining the erroneous certificate during all this time, defendant never acquiesced therein, and never did any act asserting a stockholder's right in the corporation. Previous to April 15, 1902, Shattuck had no information tending to lead him to believe that defendant appeared on the books of the corporation as the owner of this stock, but discovered that fact on the last-named day before accepting the note. There was absolutely nothing to indicate that defendant had any reason to suspect that Shattuck had such knowledge, or relied thereon at all in any of his transactions with the corporation. Upon these facts the trial court concluded that defendant was not liable as a stockholder for the payment of said note or any part thereof, and that, as to plaintiff and its assignor, he was not guilty of such laches or of such conduct as would estop him in this action to deny his true relation to the stock held by him.

As we have said, there is no material difference between the facts of this case and those of *Welch v. Gillelen*, supra. The real effort of learned counsel for appellant appears to us to be to induce a modification of the views expressed by the court in that case as to the law applicable to these facts. An examination of the authorities relied on by counsel in this behalf discloses to us no satisfactory reason for any such modification. The rule invoked by him, which is thoroughly established by the decisions of this court, that, under section 322 of our Civil Code, a pledgee, who allows himself to appear upon the books of a corporation as the owner of the pledged stock, is to be deemed to be the owner thereof for all the purposes of section 3, art. 12, of the Constitution, and section 322, Civ. Code (see *Hurlburt v. Arthur*, 140 Cal. 103, 73 Pac. 734, 98 Am. St. Rep. 17; *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158) is fully recognized by that decision. The provision of section 322, Civ. Code, in this regard, as construed in *Hurlburt v. Arthur*, supra, is that the term "stockholder" as used therein applies "to such persons as appear by the books of the corporation to be such," and that stock held as collateral security, etc., does not make the holder a stockholder except when he appears by the books to be such. This rule, we say, is fully recognized in *Welch v. Gillelen*, supra; but it is further held, in accord with what appears to us to be the only rational construction of the section, that the language "such persons as appear by the books," etc., must be limited to persons who knowingly or voluntarily permit their names to appear as stockholders. Upon this point we quote from the opinion: "The general construction of the section in question contended for by appellant, if it were sustained, would necessarily preclude one from showing that while upon the face of the corporate books he appeared to be a stockholder, yet in

fact he was not; that he had never owned or subscribed for any stock or authorized the issuance of any to him by the corporation. A construction which would lead to this result cannot seriously be considered. The relation of a stockholder to a corporation is one of contract, either express or implied. It only exists when a party has either expressly consented to become a stockholder, or his conduct is such that in law his consent will be implied. He cannot be made a stockholder and liable to the creditors of a corporation without his consent, simply because an officer of the corporation has without authority, or in direct violation of his instructions, entered his name upon the books of the corporation as a stockholder and caused stock to be issued in his name as such. Nor does entry of his name in the books as a stockholder preclude him from showing that in fact he was not a stockholder, and that the issuance of stock in his name was unauthorized." The decisions relied on by the appellant in that case were shown to be cases where the party asserting that he was not a stockholder had either knowingly and voluntarily assumed that position upon the books of the corporation, or, if he had not originally done so, had by his subsequent conduct estopped himself from denying the relationship.

What is said in *Welch v. Gillelen*, supra, on the question of laches in failing to have made a change of the entries in the books of the corporation after discovery of the error committed by the secretary in issuing the certificate, is equally applicable here. The sum of this was that under the circumstances defendant proceeded with all reasonable diligence to have the matter rectified, until it was so rectified on May 15, 1902.

Learned counsel for appellant appears to maintain that, in view of the indorsement on the back of the pledged certificates, signed by Blaisdell, purporting to transfer them absolutely to defendant, the secretary of the corporation was bound to treat the transaction as a transfer of the ownership of the stock, and issue a certificate and make an entry on the books as though it were such a transfer, and that defendant by the delivery to the secretary of such certificate so indorsed directed the doing of just what the secretary did. We are unable to assent to this. The indorsements did not necessarily mean that defendant was taking the title other than as a mere pledgee. See *Hall v. Cayot*, 141 Cal. 13, 17, 74 Pac. 299. Taking them as showing on their face an absolute transfer of the stock by Blaisdell to defendant, the rule forbidding parol evidence to vary or alter the terms of a written contract (section 1856, Code Civ. Proc.) has no application: (1) Because that rule applies only as between the parties to a contract, their representatives or successors in interest (*Dunn v. Price*, 112 Cal. 46, 44 Pac. 354); and (2) because it is always open even to the parties

to what purports to be an absolute transfer of property, real or personal, to show by parol that the transfer was made solely by way of security, and that the transaction was in fact a mortgage or pledge. The secretary of the corporation was not warranted in assuming, in the face of the positive instructions of defendant, that the transaction between Blaisdell and defendant was anything more than a pledge, he had no right in view of those directions to issue a new certificate to defendant as owner and to make it appear on the books of the corporation that he was such owner, and defendant was fully warranted in assuming that his instructions would be followed and that no such certificate would be issued and no such entry made.

We find nothing in the record that will warrant us in holding that the trial court erred in concluding that defendant was not estopped by his conduct to show his true relation to this stock. There was nothing in Shattuck's acts or in any circumstance of which defendant had knowledge tending to indicate to defendant that Shattuck was dealing with the corporation under the belief that he (defendant) was a stockholder, and he never said or did anything calculated to mislead Shattuck in that regard.

There is no other matter discussed in the briefs that requires notice.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

154 Cal. 798

TAYLOR v. McCOWEN. (S. F. 4,235.)

(Supreme Court of California. Dec. 24, 1908.

Rehearing Denied Jan. 21, 1909.)

1. EVIDENCE (§ 459*)—PAROL EVIDENCE—AMBIGUITY—EXPLANATION.

A distribution decree following the terms of a will distributed certain land to A. for life, on condition that she should continue to reside thereon for life, and if she removed permanently therefrom, the lands should become the absolute property of "Albion M. Taylor of Lowell, Mass." *Held*, that evidence that no person named Albion M. Taylor had ever lived in Lowell, Mass., but that testatrix had a nephew residing there named Albion C. Taylor whom she had visited, and who was the person intended, was not objectionable as a collateral attack on the decree, but was admissible to remove an ambiguity therein by showing that there was a person on whom it could operate on the termination of the estate of the first taker.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2114; Dec. Dig. § 459.*]

2. WILLS (§ 488*)—LATENT AMBIGUITY.

A latent ambiguity may arise in a will, either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer the name or description, or when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or if in existence is not the one intended, or the thing does not belong to testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1024; Dec. Dig. § 488.*]

3. WILLS (§ 463*)—AMBIGUITY—MISDESCRIPTION—CORRECTION.

Where an ambiguity in a will consists of a misdescription, and such misdescription can be stricken, and enough remain to identify the person or thing, the court will deal with it in that way, or if it is an obvious mistake, will read it as if corrected.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 982; Dec. Dig. § 463.*]

4. WILLS (§ 488*)—LATENT AMBIGUITY—EVIDENCE.

Where there is a latent ambiguity in a will, evidence is admissible to show the condition of testator's family, estate, and surroundings at the time of making the will, in order to explain the same.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1033-1036; Dec. Dig. § 488.*]

5. LIMITATION OF ACTIONS (§ 37*)—MISTAKE.

Where an action was brought to enforce a right under a distribution decree, and to explain a latent ambiguity therein, and not to change or alter the decree for mistake, it was not within Code Civ. Proc. § 338, subd. 4, barring proceedings for relief because of mistake after three years from the time the cause of action accrues.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 37.*]

6. WILLS (§ 624*)—CONSTRUCTION—CONDITIONAL LIMITATION.

Civ. Code, § 778, declares that a remainder may be limited on a contingency, the happening of which will abridge or determine the precedent estate, and such remainder shall be deemed a conditional limitation. Section 773 provides that a fee may be limited on a contingency which must happen, if at all, within the period prescribed in the title. *Held* that, where testator bequeathed land to A. for life, and on her death to her heirs, but that, if A. should not reside on the land for her natural life, the land should become the absolute property of T., A.'s estate was not based on a condition subsequent, but was subject to a conditional limitation, so that on her removal from the land in her lifetime, the property vested in T. at once, without entry or suit to establish title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1446; Dec. Dig. § 624.*]

7. WILLS (§ 601*)—DISTRIBUTION DECREE—CONSTRUCTION.

Where a decree, carrying into effect the provisions of a will, distributed certain land to A. for life, remainder to her heirs on condition that she should reside on the land for life, and should she remove permanently therefrom in her lifetime, then the lands should become the property of T., the condition was not void as repugnant to A.'s estate in fee previously created therein.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350; Dec. Dig. § 601.*]

8. EVIDENCE (§ 601*)—IDENTITY—SUFFICIENCY—DISTRIBUTION DECREE—AMBIGUITY.

In an action to determine adverse claims to a tract of land, evidence *held* to support a finding that the decree of distribution providing that the property should become the absolute property of Albion M. Taylor of Lowell, Mass., intended to designate Albion C. Taylor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2458; Dec. Dig. § 601.*]

9. ADVERSE POSSESSION (§ 113*)—EVIDENCE—ASSESSMENT ROLLS.

In an action to determine adverse claims to a tract of land, assessment rolls on which the property was entered were properly admitted to

show that the common source had acquired title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 113.*]

10. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—EVIDENCE.

Where both parties claimed under a common source, defendant was not prejudiced by evidence showing that the common source acquired title by adverse possession.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

11. EVIDENCE (§ 291*)—DECLARATIONS—RELATIONSHIP.

Evidence that testatrix, under whom both parties claimed title, declared that she had a nephew named Albion C. Taylor, who resided in Lowell, Mass., was admissible, under Code Civ. Proc. § 1870, subd. 4, providing that the act or declaration of a deceased person in respect to the relationship of any person related by blood or marriage to her is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1150; Dec. Dig. § 291.*]

12. WILLS (§ 489*)—EVIDENCE TO AID CONSTRUCTION—IDENTITY OF PERSONS.

Evidence as to the existence and identity of the person named in a distribution decree, and in a will, entitled to an estate subject to a conditional limitation, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1041; Dec. Dig. § 489.*]

In Bank. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by John Taylor, as administrator of the estate of Albion C. Taylor, deceased, against Hale McCowen. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

McNab & Hirsch and T. B. Pond, for appellant. T. L. Carothers, for respondent.

SHAW, J. This is an action to determine adverse claims to a tract of land. Judgment was given in favor of the plaintiff, and an order was made denying the defendant's motion for a new trial. Thereupon the defendant appealed from the judgment, and also from the order.

Both parties claim under one Adaline S. Budd, who died on January 10, 1892, seised of the property in question. Upon the distribution of her estate in pursuance of the terms of her will the lands in question were distributed "to Charlotte Budd Armstrong for the term of her natural life, and upon her death to become the property of her heirs at law. Upon the condition that the said Charlotte Budd Armstrong shall continue to reside upon said lands for the period of her natural life, and should the said Charlotte Budd Armstrong remove permanently from said lands during the period of her lifetime, then and in that case, the said lands shall become the absolute property of Albion M. Taylor, of Lowell, Mass." This decree was made on June 7, 1893. The will contained, in addition to the conditions mentioned in the decree, the provision that the said Charlotte Budd Armstrong should take up her residence upon said tract of land within one year from the date

of the death of the deceased, Mrs. Budd, and that, if she failed to take up her residence on the land within said year, or if she should remove from said land during her natural life, then the property should "become the property absolutely of my nephew Albion M. Taylor, of Lowell, Massachusetts." Within a year after the death of Mrs. Budd Charlotte Budd Armstrong took up her residence upon said land, and continued to reside thereon until April 28, 1899, when she permanently removed from said land, and sold and conveyed her interest in the same to the defendant, Hale McCowen. On August 7, 1903, a deed was executed by a person under the name of Albion M. Taylor, which, upon its face, states that he was formerly of Lowell, Mass., and a nephew of Adaline S. Budd, deceased, and the same Albion M. Taylor referred to in the last will of said Adaline S. Budd, whereby the said Taylor by quitclaim conveyed the said property to the defendant. The court found that the said Adaline S. Budd devised the property in question, upon the happening of the condition aforesaid to "Albion C. Taylor of Lowell, Massachusetts, a nephew of said Adaline S. Budd, he being named and designated in said will as Albion M. Taylor"; that Mrs. Budd had no nephew of the name of Albion M. Taylor, and never had, and that the insertion of his name in the will was a mistake in giving the name to the scrivener who drew the will, and that Albion C. Taylor was a nephew of Mrs. Budd, and that at the time she made her will he resided in Lowell, Mass., and afterward died in that city. With respect to the decree of distribution, the court found that it also declared that the property, upon the happening of the condition therein mentioned, should become "the absolute property of said Albion C. Taylor, of Lowell, Mass., who was therein designated through mistake, as above found, as Albion M. Taylor."

1. The first contention of the defendant is that the evidence and findings relating to the alleged mistake in naming Albion C. Taylor as Albion M. Taylor in the will, and especially in the decree of distribution, was an unlawful and unauthorized collateral attack upon the final judgment of the superior court in making the distribution. Many authorities are cited upon the proposition that a judgment of a court cannot be changed or modified by parol evidence showing a mistake in its terms. This proposition need not be controverted. It may be conceded that, if the judgment appealed from had the effect of grafting, upon the decree of distribution, terms which it did not contain, and contrary to its intent and effect, it would be erroneous. Such, however, is not the effect of the judgment, nor was this the object of the plaintiff in this case. The case presents the familiar instance of a latent ambiguity. The decree of distribution, which is the final statement

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the rights of the parties under the will, declares that, in the event there set forth, the land should become the property of Albion M. Taylor, of Lowell, Mass. It is alleged that no person named Albion M. Taylor had ever lived in Lowell, Mass.; that the decree was founded upon a will which declared that the Albion M. Taylor there intended was the nephew of the testatrix, and that he lived in Lowell, Mass., at the time of the execution of the will. It appears, therefore, if there were no explanation, that there was no person in existence to take under the decree; that is, that there was a latent ambiguity whereby the decree appeared to be inoperative. In further explanation it is shown that the testatrix had a nephew, whose name was Albion C. Taylor, and who resided in Lowell, Mass., and that she had no nephew named Albion M. Taylor. This does not in any respect change the terms of the decree of distribution, but simply points out the person intended to be described therein, and removes the ambiguity in the decree by showing that there is a person upon whom it can operate. The true rule is stated by the Supreme Court of the United States in *Patch v. White*, 117 U. S. 210, 217, 6 Sup. Ct. 617, 29 L. Ed. 860, as follows: "It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer the name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. * * * Where it consists of a misdescription, * * * if the misdescription can be struck out and enough remain in the will to identify the person or thing, the court will deal with it in that way, or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will." A decree of distribution is no more immune against explanation of a latent ambiguity than is a will, and the same rule which the court, in the case cited, applied to an ambiguous will is applicable, under like circumstances, to an ambiguous decree or judgment. This may easily be illustrated by the case of a judgment for money against, we will say, John Smith. An execution being issued against the defendant, the sheriff seizes the property of a man named John Smith in satisfaction of the judgment, said John Smith being an entire stranger to the proceeding,

and not the person served with process in the action. No one would for a moment contend that in such a case the man whose property was seized could not go to court, and by parol and extrinsic evidence show that, although his name was John Smith, he was not the particular John Smith named in the judgment. Such a proceeding would not be an attack upon the judgment, nor would it in any respect change or modify it. It would merely point out the person to whom the judgment was directed.

2. Defendant further contends that the cause is barred by the provisions of subdivision 4, § 338, Code Civ. Proc. This subdivision provides that an action for relief on the ground of mistake must be begun within three years after the cause of action accrues. This contention is founded upon the same misconception of the nature of the case as that upon which the last-mentioned point was based. This is not an action to obtain relief on the ground of mistake in the decree of distribution, but is an action to enforce rights under that decree. The effect of the proceeding is not to change or alter that decree, but to enforce it according to its true intent and meaning. Subdivision 4, § 338, has no application.

3. The next objection is that the suit involves the adjudication of a forfeiture of the estate of Charlotte Budd Armstrong in an action in equity. This, it is claimed, cannot be done; the proposition asserted being that "it is a universal rule in equity never to enforce either a penalty or a forfeiture." Numerous authorities are cited to this effect. It is claimed that the plaintiff was required to establish the fact that Charlotte Budd Armstrong by removing from the land had forfeited her estate, that it is necessary for him to begin an action for that express purpose, or to terminate her estate by an entry, and that until he has done so he cannot go into equity and quiet the title of his intestate to the said land which, according to defendant's contention, could only vest in his intestate by reason of the forfeiture. This objection assumes that the estate of Mrs. Armstrong was an estate upon condition subsequent, which can only be divested by an entry for condition broken, or by a judgment at law. The estate which by the terms of the decree was vested in Mrs. Armstrong was not an estate upon condition, but a conditional limitation. The happening of the condition does not, in contemplation of law, in a case such as that before us, operate to forfeit the estate given to the first taker, but merely to determine it; that is, to bring it to an end. Section 778, Civ. Code, is as follows: "A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation." Section 773 declares that "a fee may be limited upon a contingency, which, if it should occur, must happen

within the period prescribed in this title." The latter clause describes precisely the estate herein created in the intestate of the plaintiff.

The distinction between conditional limitations, contingent remainders, and estates upon condition subsequent, and the different consequences as to the taking effect of the subsequent estate, is clearly set forth in Washburn on Real Property (6th Ed.) vol. 2, § 1640, as follows: "If an estate is limited to A. until B. return from Rome, and after B. return to C., the limitation is a contingent remainder, and good as such. But if the estate had been limited to A., which would be for life if no words of inheritance were annexed, provided that if B. return from Rome, the estate should go to C., the limitation, though expressly the same in effect as the first, would be, not a remainder, but a conditional limitation. In the one case if C.'s estate comes into effect at all, it is after the prior estate had terminated by the natural expiration of the time for which it was limited, whereas in the other C.'s estate, if it took effect, came in and displaced the prior estate before its natural termination, and took its place as a substitute therefor. Then, again, though the estate of A. is a conditional one, liable to be defeated by the happening of a contingent event, it is not a case of condition at the common law, where to determine an estate for a breach of it required an entry by the grantor or his heirs, who thereby regained the estate originally parted with; but it is a case where the estate is wholly parted with by the grantor, no interest being left in him, and passes at once, upon the happening of the event, to him to whom it is limited. That contingent event, when it happens, is the limitation of the first estate granted; and the estate, instead of going back to the original grantor, goes over, eo instanti, and without any act but that of the law, to the party named in the very gift itself of the estate as the one to take it in that event." See, also, to the same effect 1 Wash. R. P. (6th Ed.) § 165; 2 Wash. R. P. (6th Ed.) § 970; 4 Kent, Com. 127; *Miller v. Levi*, 44 N. Y. 494; *Stearns v. Godfrey*, 16 Me. 160; *Coppage v. Alexander's Heirs*, 41 Ky. (2 B. Mon.) 313, 38 Am. Dec. 153; *Jewell v. Pierce*, 120 Cal. 83, 52 Pac. 132. The latter case is practically the same as the case at bar, and although the point here made was not raised, the suit to quiet title was treated by the court as a proper method of establishing a title in the owner of the subsequent estate. In the present case, therefore, no proceeding for a forfeiture, or by way of re-entry for condition broken, was required as a condition precedent to a suit in equity to establish title. The estate of Mrs. Armstrong terminated, eo instanti, upon her removal from the land, and that of the plaintiff's intestate immediately vested as a legal estate in possession.

4. There is no merit in the point that the condition annexed to Mrs. Armstrong's estate in the decree of distribution is void because it is repugnant to her estate in fee therein previously created. Even if the ruling applying to grants by an individual is also applicable to a decree, the entire provision must be considered in order to ascertain the intention and effect, and, so considered, the conditions expressed in the decree constitute a limitation, and not a repugnant provision. *Pavkovich v. Southern Pacific Co.*, 150 Cal. 46, 87 Pac. 1097, and cases there cited.

5. It is earnestly contended that the evidence is insufficient to support the finding that the decree of distribution provided that the property in question should become "the absolute property of Albion C. Taylor, of Lowell, Mass., who was therein designated through mistake, as above found, as Albion M. Taylor." We think this contention is also untenable. The evidence showed that Albion C. Taylor died in 1901; that he was then upwards of 60 years of age, and had resided in Lowell practically all of his life; that he had a brother named Albion R. Taylor, who was older than he, and who died when quite young, many years prior to the making of the will in question; that the testatrix, Mrs. Budd, had visited the family long after the death of Albion R. Taylor, and was fully aware of the fact that he was dead, and that she had no nephew in Lowell, Mass., or elsewhere, of the name of Albion R. Taylor, and no nephew named Albion Taylor, except said nephew Albion C. Taylor, and his son of the same name. It also appeared that no person of the name of Albion M. Taylor ever resided in Lowell, Mass. This evidence was clearly sufficient to show that the person intended by the decree was the same person as that intended by the will, and that this person was no other than Albion C. Taylor, the plaintiff's intestate. The decree identified the person intended by giving the first name as Albion, the last name as Taylor, and the middle initial as "M.," and by the fact that he lived in Lowell, Mass. The extrinsic evidence showed that the decree could not have intended Albion M. Taylor, since no such person existed. This created a latent ambiguity; and, in order to show the person who was really intended, it was proper to prove the additional facts that the testatrix had a nephew named Albion C. Taylor, and that he resided in Lowell, Mass., at the time the will was made and at the time of the decree of distribution, and from this the court properly inferred that the Albion C. Taylor who was her nephew, and who resided in Lowell, Mass., was the person referred to in the decree.

6. Several errors of law are assigned by the appellant, none of which we think is well taken. The assessment rolls were properly introduced in evidence for the purpose of showing that Adaline S. Budd had ac-

quired title to the property by adverse possession. This appears to be the only purpose for which the rolls were admitted and it will not be presumed that the court considered them for any improper purpose. Furthermore as both parties claim under the will of Adaline S. Budd, the evidence could have caused no prejudice to the appellant, even if it had been technically inadmissible. The declarations of Mrs. Budd to Mary McCowen to the effect that she had a nephew named Albion C. Taylor, who resided in Lowell, Mass., was properly admitted under section 1870, Code Civ. Proc. subd. 4, which provides that on a trial there may be proved "the act or declaration, verbal or written, of a deceased person in respect to the relationship * * * of any person related by blood or marriage to such deceased person." The other specifications relate to the evidence introduced for the purpose of showing the facts in regard to the existence and identity of the person named Taylor, mentioned in the decree and in the will in question. There can be no question but that this evidence was admissible for that purpose under the authorities heretofore cited.

The judgment and order are affirmed.

We concur: BEATTY, C. J.; SLOSS, J.
HENSHAW, J.; LORIGAN, J.

154 Cal. 789

CHASE v. SUPERIOR COURT et al.
(S. F. 5,052.)

(Supreme Court of California. Dec. 24, 1908.)

1. VENUE (§ 78*)—CHANGE—ORDER.

Under the express provisions of Code Civ. Proc. § 939, an appeal from an order changing the place of trial of a cause must be taken within 60 days after the entry or filing of the order. *Held*, that since, for the purposes of appeal, the entry of an order changing the venue of a cause is a final disposition of the cause on the part of the court making such order, it must be considered as final in that court for all other purposes, including the divestiture of the court's jurisdiction.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 136; Dec. Dig. § 78.*]

2. VENUE (§ 78*)—ORDER OF CHANGE—EFFECT ON JURISDICTION.

Code Civ. Proc. § 399, provides that, when an order is made changing the venue of a cause, the clerk of court must transmit the pleadings and papers therein to the clerk of the court to which it is transferred, and the court to which such action is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein. Section 837, relating to change of venue in justices' courts, provides that, "from the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court." *Held* that, on making an unconditional order changing the place of trial, the court making the same loses jurisdiction and has no power afterward to vacate such order for failure of the party

obtaining the order to pay the fees of the clerk of the court to which the cause was transferred.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 136; Dec. Dig. § 78.*]

3. COSTS (§ 155*)—CHANGING PLACE FOR TRIAL—LIABILITY.

Code Civ. Proc. § 399, provides that the costs and fees on a change of venue and of filing papers anew must be paid by the party at whose instance the change was made. *Held* that though the action was brought in the wrong county, and the party applying therefor is entitled to a change of venue, he is liable for the costs of transfer, including the entry fees of the court to which the change is made.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 577; Dec. Dig. § 155.*]

4. VENUE (§ 80*)—COSTS OF TRANSFER—JURISDICTION OF COURT TO ENFORCE.

Under Code Civ. Proc. § 399, providing that, on the transfer of a cause to another court for trial, the court to which the transfer is made "has and exercises over the same the like jurisdiction as if it had been originally commenced therein," the liability of the person applying for the transfer for costs and fees in filing the papers anew must be enforced in such court.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 80.*]

In Bank. Original application by J. A. Chase for a writ of prohibition against the Superior Court of the City and County of San Francisco and John Hunt, Judge. Writ allowed.

A. H. Jarman, for petitioner. Nagle & Nagle, for respondents.

SLOSS, J. This application for a writ of prohibition was originally presented to the District Court of Appeal for the First Appellate District. After judgment in that court, ordering a writ to issue as prayed by the petitioner, the proceeding, upon motion of the respondents, was ordered transferred to this court for hearing and determination.

In the District Court of Appeal the following opinion, prepared by COOPER, P. J., was filed:

"The verified petition for a writ of prohibition shows that in July, 1906, F. A. Bliss brought an action in the superior court of the city and county of San Francisco against the petitioner as defendant. In the following September, upon the demand of petitioner, the said superior court duly made an order, changing the place of trial of said action from the city and county of San Francisco to Santa Clara county; that being the county in which the defendant in said action resided at the time of the commencement thereof. The petitioner paid the fees of the clerk of the superior court of San Francisco and the charges for transferring said pleadings and records in said case to the county of Santa Clara, but neglected to pay the fees of the clerk of Santa Clara county demanded for filing the said papers in said cause with said clerk after they had been so transferred. In October, 1907, the attorney for the

plaintiff in said action filed an affidavit in the superior court of San Francisco, setting forth the fact that more than one year had elapsed since the said superior court made the order transferring the said case, and that this petitioner had during all of said time neglected and refused to pay the costs and fees required by law to be paid to the clerk of Santa Clara county, which affidavit was accompanied by the certificate of the county clerk of Santa Clara county to the effect that his legal fees for filing said papers had not been paid. Upon this showing an order to show cause was issued out of the superior court of San Francisco, and served upon petitioner's attorneys. The said superior court, in January, 1908, after notice and hearing, made an order vacating and setting aside the order made in September, 1906, changing the place of trial on the ground that this petitioner had, for more than one year, neglected and refused to pay the fees for filing said papers in Santa Clara county, and at the same time directed that said records and papers be recalled and restored to the superior court of San Francisco, and further made an order denying the said motion of petitioner for a change of the place of trial. The defendant interposed a demurrer to the petition upon the ground that the facts therein stated do not show that the petitioner is entitled to the relief prayed for. On the argument of the case it was agreed that the facts stated in the petition are substantially correct, and that the whole matter might be determined upon the record as it now stands.

"It is claimed that by the unconditional order of transfer the superior court of San Francisco lost jurisdiction, and hence it had no power afterwards to vacate the order changing the place of trial, or to entertain any further jurisdiction in the case. It is provided in the Code of Civil Procedure (section 399) as follows: 'When an order is made transferring an action or proceeding for trial the clerk of the court or justice of the peace must transmit the pleadings and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.' The question in the case is as to when the action was transferred, or, in other words, was the transfer in fact completed by the order made by the court? The Code provides that the court to which the action is transferred 'has and exercises over the same the like jurisdiction as if it had been originally commenced therein.' We are of the opinion that the action was transferred to Santa Clara county when the order was finally made and entered in the superior court of the city and county of San Fran-

cisco. There must be a moment of time when the court transferring the case loses jurisdiction, and the court to which it is transferred acquires jurisdiction. When the court to which the action is transferred acquires jurisdiction, the court which made the order transferring it has no power to make any further order in the premises. The Code (Code Civ. Proc. § 395) expressly provides that the kind of an action brought against petitioner 'must be brought in the county in which the defendants or some of them reside at the commencement of the action.' Such action may, however, be tried in any county unless the defendant, at the time he appears, files an affidavit of merits and demands in writing that it be tried in the proper county. Section 396. The Code makes no provision as to inserting a condition in the order, nor does it provide that the order becomes void for a failure to pay the costs. It makes it the duty of the party at whose instance the order was made to pay the costs of filing the papers anew, but that is the extent of the provision. It may be a hardship upon the party who was sued in the wrong county to compel him to go to such county, file his notice, affidavit, and demand in writing in order to get the case transferred to the county of his residence, where it should have been commenced in the first place, and then, in addition to this, to pay the clerk's fees for filing the papers anew in the county to which it is transferred. It is really making the defendant who has been sued in the wrong county pay the clerk's fees of plaintiff for filing the papers anew in the proper county, but such is the statute. It is not our business in this proceeding to suggest the method of enforcing it, but it is sufficient to say that the statute does not provide that the order may be vacated and set aside by the court which made it if such costs are not paid. The order changing the place of trial having been made and entered in the clerk's office of the superior court of San Francisco, and the custody of the papers and records having passed from the clerk of the city and county of San Francisco to the clerk of Santa Clara county, the superior court of San Francisco had no further duty to perform, and no authority to compel the payment of costs in Santa Clara county. The superior court of Santa Clara county was the court in which to enforce the payment of costs by petitioner.

"In *Hatch v. Galvin*, 50 Cal. 441, the action was brought against defendant to recover damages for having, as justice of the peace, rendered judgment and issued execution in an action in which he had no jurisdiction, because he, as such justice, had duly made an order changing the place of trial to the court of one Squire, a justice of the peace for the same township. It was held that the action would lie, and that, by the order changing the place of trial, the justice's court by which the order was made

lost jurisdiction. In the opinion it is said: 'The order thus entered vested jurisdiction in the court of the said Abner C. Squire, and necessarily put an end to the jurisdiction of the defendant over the case. Section 837 of the Code of Civil Procedure is as follows: "From the time the order changing the place of trial is made the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court." The granting of the order therefore left the court held by the defendant with no other jurisdiction over the cause than it would have had if the action had been originally commenced in the court to which it was thereby transferred; that is to say, with absolutely no jurisdiction to try or determine it.'

"In *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093, it was claimed that the county in which an order, changing the place of trial, was made, retained jurisdiction because the papers and records of the case were sent to the county to which the case had been transferred, instead of sending copies, as required by the Penal Code. The court there said: 'We are of the opinion, under the language of our statute, that the superior court of Santa Clara county acquired jurisdiction of the cause by reason of the making and entry of the order of removal. The statute provides that an order must be made transferring the action, and when such an order is legally made the court making it has no jurisdiction to proceed further in the cause so long, at least, as that order remains unrevoked. The certified copies to be forwarded to the court to which the action has been transferred are the evidence of the order of transfer, and of the proceedings in the court from which the transfer has been made.'

"In *Brown v. Gilmore's Executors*, 8 Md. 322, it is said: 'The order for removal transfers the jurisdiction, and from that moment the case in legal contemplation is in the court to which it is removed, whether the papers have actually been transmitted from one court to the other or not.'

"In *State ex rel. Gibson v. Lay*, 128 Mo. 609, 29 S. W. 999, it is said: 'There can be no serious question but that as soon as the order granting the change of venue was entered of record the circuit court of Vernan county no longer had jurisdiction of the cause, and that, by such order, the jurisdiction was conferred upon the circuit court of Henry county, and that it was from that time on pending in that county.'

"In *Fisk v. Albany R. Co.*, 41 How. Prac. (N. Y.) 365, it is said: 'Where an order is made changing the place of trial in a cause to another county, the change is effected at once. The transfer of the papers is a subsequent clerical duty.'

"The recent case of *Cunningham v. Current R. Company*, 165 Mo. 270, 65 S. W. 556, is directly in point here. There the statute required the party, at whose instance a change

of venue is granted, to deposit with the clerk the sum of \$10. Upon motion an order was made changing the venue from the county in which the action was brought to Texas county. The defendant, who had asked for and procured the order, failed to deposit the \$10 as the statute provided that he must do, and the clerk did not make out and transmit the record. The trial court, at its next term, set aside the order for the reason that the defendant had failed to deposit the \$10 as required by the statute, and proceeded to try the case, giving judgment for the plaintiff. The judgment was reversed by the Supreme Court and held void for the reason that the court, after making the order granting the change of venue, had no further jurisdiction. The opinion is by Chief Justice Burgess, and it is there said: 'While the statute required that the defendant, when it made application for the change of venue, deposit with its application with the clerk of the court \$10, which it failed to do, the court did not for that reason lose jurisdiction over the case; and its order granting the change of venue to Texas county was not absolutely void but irregular, and could not, of course, be set aside at a subsequent term of the court after the order was made, for the obvious reason that it had lost jurisdiction of the cause by reason of the order changing the venue.' The court there quoted from *State v. Taylor*, 132 Mo. 286, 33 S. W. 1145, where the same statute was construed, in which case the court said: 'The deposit of \$10 by the defendant with its application for a change of venue was not a condition precedent to the entertainment of the application, nor to the power of the court to grant it. Therefore its failure to do so did not render the order void, and as it had no power to set the order aside at a subsequent term, it was without authority to try the case the venue of which had been transferred to another court. Our conclusion is that the court was without authority to try the case.' See further to the same effect: *State v. Taylor*, 132 Mo. 286, 33 S. W. 1145; *Farr v. Fuller*, 12 Iowa, 83; *Fatt v. Fatt*, 78 Wis. 633, 48 N. W. 52; *Mills v. National Fire Ins. Co.*, 92 Wis. 90, 65 N. W. 730; *State v. Hopper*, 71 Mo. 425; *Goodhue v. People*, 94 Ill. 37; *Ryburn v. Pryor*, 10 Ark. 417.

"The case of *Armstrong v. Superior Court*, 63 Cal. 412, is not in conflict with what has been said. It was there held that an order granting a motion for a change of venue, upon the condition of payment of certain costs which had accrued in the county in which the order was made, was in effect denying the motion unless the costs be first paid. The court expressly said: 'It is not necessary to decide whether the superior court would have power to set aside a final order changing the place of trial.'

"It is ordered that the demurrer to the petition be overruled, and that the alterna-

tive writ heretofore granted be made absolute."

Further consideration of the question involved has led us to the conviction that the views expressed in the foregoing opinion are correct. A few words may, however, be added to what is there said. An order changing the place of trial is appealable, and the appeal therefrom must be taken within 60 days after the entry or filing of the order. Code Civ. Proc. § 939. For purposes of appeal therefore such order, when entered or filed, is a final and absolute disposition, on the part of the court making it, of the motion for change of venue, and it must be regarded as final (in that court) for all purposes, unless there be attached to it some condition which is to be complied with before the transfer shall become effective. A condition of this character may be expressed in the order itself, as was the case in *Armstrong v. Superior Court*, 63 Cal. 412, or it may be implied from the terms of the statute authorizing the change. Some of the justices of this court, in directing that this proceeding be heard here, were of the opinion that the provision of section 399, requiring the moving party to pay certain costs, might be construed as importing into the order a condition making the transfer contingent upon such payment within a reasonable time. A more careful examination of the statute has, however, satisfied us that to so hold would be equivalent to writing a new provision into the statute, instead of interpreting what is written in it. The Code provides that, "when an order is made transferring an action or proceeding," the pleadings and papers must be transmitted to the clerk or justice of the court to which it is transferred, and the costs and fees of filing in the new court paid. Throughout the statutory provisions we find the two words "transfer" and "transmit"; the former referring to the order of the court, which removes the case from the jurisdiction of one court to that of the other, and the latter to the ministerial duty of the clerk in physically forwarding the papers. The court in which the action was commenced has ended its duty, i. e., that of transferring the cause, before any obligation to pay costs or fees arises, and we can find in the statute nothing which makes the effectiveness of the order conditional upon compliance by the moving party with the obligation imposed upon him by section 399. The sections of the Code dealing with transfers from justices' courts (Code Civ. Proc. § 833 et seq.) likewise contain provisions requiring the transmission of the papers and the payment of costs by the moving party. The ruling of this court in *Hatch v. Galvin*, 50 Cal. 441, that the entry of the order ends the jurisdiction of the justice making it, seems to apply equally to a transfer from one superior court to another. It is true that section 837 provides that, "from the time the order changing the place of trial is made, the court to

which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court," while section 399, which, on its face, refers to both superior and justices' courts, merely provides that the court "to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein." But, if, as above suggested, the "transfer" is effected by the order, rather than by the transmission and filing of the papers, there is no substantial difference in this respect between the sections. Furthermore, since both sections 399 and 837 purport to deal with transfers from justices' courts, they should, if possible, be given a construction which will make them harmonize.

The respondents quote statements of two text-writers to the effect that the failure to pay the required costs renders all prior proceedings of no effect, and enables the court in which the action was commenced to resume jurisdiction. An examination of the cases cited in support of this declaration shows, however, that in each case, with perhaps one exception, the statute under consideration provides, either expressly or by strong implication, that a failure to pay the costs within a given or reasonable time shall have the effect of vacating the order of transfer.

It may be added that the view here adopted does not, as respondents suggest, leave it within the power of the moving party to permanently prevent a trial of the action by his failure to comply with the statutory duty imposed upon him. If the jurisdiction is by the order of transfer vested in the superior court of the county to which the action is transferred, that court has ample power to deal with a failure to comply with the statutory requirements, although the papers have not actually been filed there.

For these reasons it is ordered that a peremptory writ of prohibition issue as prayed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

BEATTY, C. J. I concur in the judgment, not without some doubt, as to the construction given to the statute, but the more readily because it directs attention to an inconvenience or hardship which deserves consideration by the Legislature. It seems to me a most unjust law which requires the defendant in a case like this to pay the costs of removing a cause to the proper county for trial. The necessity for the proceeding arises from the fault of the plaintiff, and he should not only prepay all the costs incident to the removal, but he should not be allowed to recover those particular items of cost upon recovering judgment on the merits. When the action has been commenced in the proper county, and the venue is changed on motion of either party on account of local prejudice, disquali-

fication of the judge, or for the convenience of witnesses, the moving party is justly chargeable in the first instance with the costs involved in the change; but this rule should not be applied to the defendant who merely insists upon a clear right of which the plaintiff has sought to deprive him. The statute needs amendment.

155 Cal. 30

GAS & ELECTRIC CO. v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,060.)

(Supreme Court of California. Dec. 28, 1908.)

1. APPEAL AND ERROR (§ 436*)—TAKING DEPOSITIONS PENDING APPEAL.

Under Code Civ. Proc. § 946, providing that, notwithstanding an appeal and a stay of proceedings, the superior court may proceed on any other matter embraced in the action and not affected by the appeal, and section 1049, providing that an action is pending from its commencement until final determination on appeal, and sections 2020 and 2021, providing that the deposition of a witness out of the state may be taken at any time after the service of the summons or the appearance of defendant, etc., the superior court has jurisdiction pending an appeal to order a commission to take the deposition of a nonresident witness for use on a new trial on the reversal of the judgment on it appearing that such witness is the only witness on a material point, and is under sentence of death in a sister state, though such sentence is subsequently commuted to life imprisonment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2191; Dec. Dig. § 436.*]

2. APPEAL AND ERROR (§ 436*)—TAKING DEPOSITIONS PENDING APPEAL—APPLICATION.

On an application for a commission to take the deposition of a nonresident witness pending an appeal, for use on a new trial on a reversal of the judgment, the issue is not whether the testimony of such witness will be material to the issues already tried, but whether it will be material on a new trial and under such an amendment to the pleading as the circumstances of the case will warrant the court in allowing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2191; Dec. Dig. § 436.*]

3. MANDAMUS (§ 40*)—JUDICIAL PROCEEDINGS—DEPOSITIONS.

Since it does not rest in the discretion of the trial court to refuse a commission to take the deposition of a nonresident witness in the cases defined by the Code, mandamus lies to compel the court to issue a commission in a proper case before judgment.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 85; Dec. Dig. § 40.*]

4. MANDAMUS (§ 4*)—ADEQUACY OF REMEDY BY APPEAL.

Where the trial court improperly refuses to issue a commission to take the deposition of a nonresident witness pending an appeal for use on a new trial in the event of a reversal, mandamus will lie to compel the issuance of a commission; an appeal from the order denying the application being an inadequate remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 9; Dec. Dig. § 4.*]

In Bank. Application for mandamus by the Gas & Electric Company against the Superior Court of the City and County of San Francisco and Thomas F. Graham, as

judge thereof, to compel the issuance of a commission to take the testimony of a nonresident. Peremptory writ issued.

Page, McCutchen & Knight, for petitioner. Samuel M. Shortridge, for respondents.

BEATTY, C. J. This is a proceeding by mandamus to compel the issuance of a commission to take the testimony of one Harry Orchard alias Barry—a prisoner confined in the penitentiary of Idaho—in order that his deposition may be used upon a new trial of an action in which the petitioner is defendant. The cause has been submitted upon the demurrer and answer filed by the judge of the superior court in response to our alternative writ.

The material facts to be considered are that on and prior to the 17th of November, 1904, the petitioner was supplying gas to a building in San Francisco which on that day was partially destroyed by a sudden explosion. Walter H. Linforth, the owner of the building, commenced an action against the petitioner for damages, alleging that the explosion had been caused by the ignition of gas which had escaped from the pipes of the corporation by reason of its negligence in failing to inspect them and keep them in proper repair. Afterwards the cause, being at issue, was tried by a jury and a verdict rendered in favor of Linforth for \$10,800, upon which judgment was entered on October 4, 1905. On December 4, 1905, petitioner appealed from that judgment, and its appeal is still pending in this court. All the records in the case were destroyed in the great fire of April, 1906, but they were subsequently restored, and in March, 1907, petitioner's motion for a new trial was denied. Its appeal from that order also is still pending in this court. The motion for a new trial was based partly upon the ground of newly discovered evidence, which, as set forth in the affidavits, embraced, among other things, a statement that said Harry Orchard would testify, in effect, that he had blown up Linforth's house with a dynamite bomb in an attempt to assassinate one Bradley, who, on the 17th of November, 1904, was an occupant of the premises. At that time Orchard was, as he still is, confined in the penitentiary at Boise, Idaho. In March, 1908, he was sentenced to be executed for murder on May 15th, but he was afterwards reprieved and his sentence finally commuted to life imprisonment. On April 24, 1908, and prior to such commutation, a proceeding was commenced in the superior court, before the Honorable Thomas F. Graham, to obtain Orchard's deposition for use upon a new trial of Linforth's suit, if it should be remanded for a new trial by this court. On the objection of Linforth, the superior court refused to issue a commission

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to take the deposition upon the ground that neither the court, nor judge had any jurisdiction to grant the application. On May 2d another application was made to the same court to perpetuate the testimony of Orchard, under section 2083 et seq. of the Code of Civil Procedure, which application was also denied, whereupon the present proceeding was commenced.

Various objections are urged on behalf of Mr. Linforth and the respondent to the award of a peremptory writ. So far as those objections relate to the proceedings under section 2083 et seq. of the Code of Civil Procedure to perpetuate testimony, they require no consideration, since the petitioner is not seeking any review of the order denying that application. The fact that it was made and denied seems to have been stated in the petition for no other purpose than to show that all the remedies available to the petitioner in the superior court had been fruitlessly invoked before this proceeding was instituted here, which, as above stated, looks only to the issuance of a commission to take the testimony of the witness in a pending action, pursuant to section 2020 et seq. of the Code of Civil Procedure. To the granting of this relief it is objected, in the first place, that the order of the superior court denying petitioner's motion for a commission was an order made after final judgment in the action of *Linforth v. Gas Company*, and as such is reviewable on appeal (Code Civ. Proc. § 963), and, since appeal is a plain, speedy, and adequate remedy, that mandamus will not lie (Code Civ. Proc. § 1086). This position assumes that the superior court had jurisdiction to make the order sought (if the law warrants such an order) and that its ruling upon the motion was reviewable for error. It is stated, however, that the order was denied upon the ground of want of jurisdiction, and, if that view is correct, an appeal would have been fruitless. The only possible remedy for the petitioner would have been an original proceeding in this court where the cause was pending on appeal. It is necessary, we think, to determine this question of jurisdiction in the first place; and we have no doubt that if, upon a proper construction of section 2020 et seq. of the Code of Civil Procedure they apply to a case like this, in which the issues of fact have been decided, and their retrial is contingent upon a reversal by this court of the judgment of the superior court, the jurisdiction to order a commission resides in that court. It is expressly provided (Code Civ. Proc. § 946) that notwithstanding the perfection of an appeal to this court, and the stay of all proceedings upon the judgment or order appealed from, and matters embraced therein, the superior court may nevertheless "proceed upon any other matter embraced in the action and not affected by the order appealed from." It seems very plain that, if the same statute

which contains this provision has also provided that one or both parties to a pending appeal may take depositions with a view to the new trial which may be awarded, the right to do so is not a matter affected by the judgment or order appealed from, and that it rests with the Superior Court to order the commission if it may be ordered at all.

What, then, is the proper construction of sections 2020 and 2021 of the Code of Civil Procedure which prescribe the time for taking depositions? They say in plain terms that the deposition of a witness out of the state, in all cases and of a witness in the state in certain enumerated cases, may be taken in an action at any time after the service of the summons or the appearance of the defendant. This language is very sweeping and comprehensive, and clearly includes, if taken literally, all the time that an action is pending, that is to say, all the time from service of summons or the appearance of the defendant until "its final determination upon appeal or until the time for appeal has passed unless the judgment is sooner satisfied (Code Civ. Proc. § 1049)." But it is contended that this language of the Code must be limited by construction to the time before verdict or findings upon the issues of fact; for, it is said, after verdict or findings there is no issue of fact to be tried, and therefore no occasion for the taking of depositions. It may be answered to this objection that in case of an action it is not requisite that an issue of fact should have arisen in order to authorize the taking of depositions. As soon as the summons has been served, either party may commence the taking of depositions relevant to any possible issue that may arise upon a denial of the allegations of the complaint or upon the allegation of new matter in the answer, and there is perhaps some significance in the distinction made by the statute in this particular between actions and special proceedings. Clearly, therefore, the existence of an actual, as distinguished from a potential, issue of fact, is not, by the terms of the statute, made a conclusive test of the right to take depositions *de bene esse*. On the contrary, it is, as we have seen, broad enough in its express terms to include this very case, and, if it is to be construed in a narrower sense, the reasons for that construction must be sought in the policy which prompted its enactment. The Code provisions in respect to this matter, like other Code provisions, were designed to simplify procedure—to promote the ends of justice by enabling litigants to protect their substantial rights by simpler, speedier, and more efficacious means. Among the most important rights of a litigant is that of securing the evidence by which the justice of his claim or defense may be established, and when there is but a single witness upon a material point, or the witnesses are old and infirm, or without the

jurisdiction, the necessity of taking their depositions is apparent. It was therefore an important part of what has been called the auxiliary jurisdiction of courts of equity to provide for the perpetuation of testimony in view of anticipated litigation, as well as for the taking of depositions *de bene esse* in causes actually at issue. The proceeding in such cases was by bill, and involved the long and tedious procedure of a suit in equity. Relief also was cautiously administered, and the chancellors in later times hesitated to award a commission in a case for which an exact precedent could not be found, although it clearly appeared to fall within the principal upon which the jurisdiction was originally founded. Anonymous, 19, Vesey, Jr., 319-334 (Eng. Reprint, 536), and 1 Pomeroy's Equity (3d Ed.) § 210 et seq.

This was the situation when our Codes came to be enacted, and it very clearly appears that it was the intention of the Legislature, not only to provide a simple statutory proceeding by which litigants, actual or expectant, could secure all the relief formerly afforded by courts of equity, but even ampler relief, and upon easier terms. Prof. Pomeroy states in the sections above cited that the same liberal extension of the remedy has been made by act of Parliament in England. This disposition to amplify the remedy is plainly apparent in the provisions of our Code, both with respect to the proceeding to perpetuate testimony and the right to take depositions *de bene esse*, and, in view of this tendency of legislation, it seems clear to us that in any case which falls at once within the principle upon which the jurisdiction in equity was founded, and the letter of the statute, the right to take a deposition must be upheld. The equitable principle referred to is manifest in the instances in which the proceeding to perpetuate testimony was allowed, viz., when there was but a single witness to a fact material in expected litigation, or when a witness was past 70, or dangerously ill. The proceeding was allowed; that is to say, when there was danger that the evidence might be lost by the death of the witness, and that notwithstanding there was no pending issue of fact. When a cause was actually at issue, commissions were allowed for the examination of witnesses who were without the jurisdiction, because that was the only means by which their testimony could be secured. When in this case application was made to the superior court for a commission to take the deposition of Orchard, it showed the existence of two facts, either of which would have constituted on equitable principles a sufficient ground for perpetuating his testimony for use in expected litigation. He was, in the first place, the only witness upon a material point, and he was to be executed within a short time—a stronger case, as it seems to us, than age or illness. There was also some reason to expect that the case of

Linforth v. Gas Co. might be retried. On principle there does not seem to be any valid distinction between a case on appeal from an order denying a new trial, and a case in which an action may never be commenced. The difference is one of degree, and not of kind. In either case, the issue may or may not come to be tried, and under our statute it is plain that the proceeding to perpetuate testimony would lie in cases involving even a remoter possibility that the testimony would ever be required than there is in the average of appealed cases that there will be a reversal. The reason, therefore, for taking Orchard's deposition in this case, was not less cogent than in ordinary cases in equity, and the rule of our statute is more liberal than the rule in equity. The pertinency of this discussion of the rules governing the procedure for the perpetuation of testimony appears from the fact that one at least of the grounds upon which testimony was allowed to be taken in perpetuum is made by our statute a ground for taking the deposition of a witness *de bene esse*, viz.: "When the witness is the only one who can establish facts or a fact material to the issue." Code Civ. Proc. § 2021, subd. 6. Orchard was the only witness by whom the petitioner could hope to prove that Linforth's house was damaged by an explosion of dynamite and not by an explosion of gas, and, moreover, it appeared that he was soon to die. His testimony was therefore as clearly within the reason as within the letter of the law, which, as we have seen, allows the testimony of such a witness, whether within or without the state, to "be taken in an action at any time after the service of the summons or the appearance of the defendant."

The only substantial argument against this construction of statute is that it enables a contentious litigant to subject the successful party to an action to great and unnecessary expense in the taking of depositions pending a frivolous appeal. This objection, however, does not seem to have been deemed by the Legislature sufficiently grave to prevent the enactment of a statute which easily admits of the same abuses, even when restricted in its application to pending issues, and to controversies which may never reach an issue. There seems also to be less reason to apprehend the inconveniences suggested when it is remembered that the party taking depositions in a case like this must pay the costs of the proceeding without hope of recovering them back except in the event of a reversal of the judgment or order, and not then unless the final judgment is in his favor. Moreover, the respondent may, in case of an appeal manifestly frivolous, ignore the whole proceeding to take new depositions, or, if he deems it unsafe to omit the employment of counsel to attend and cross-examine, he may invoke the power of this court to impose an adequate penalty, on affirmance of the judgment, to recompense him for the unnecessary

expense to which he has been subjected in consequence of a frivolous appeal. In view of these considerations, it is not to be feared that a liberal construction of the Code provisions in question will result in serious abuses.

We have been cited by counsel to only two cases in which the precise point here involved has been decided, and they are in apparent conflict. In *McColl v. Sun Mutual Ins. Co.*, 44 Howard's Pr. 465, the Court of Appeals of New York decided (Grover J., dissenting, and Rapallo, J., not voting), that under the statute of that state the Supreme Court had no authority to issue a commission to take the deposition of a foreign witness in a case pending on appeal. The decision went altogether upon provisions of their statute which do not appear in ours, and upon the presumption that there would be no new trial. It was conceded that it might be in furtherance of justice to extend the statute so as to embrace such cases, but the court said it was to be considered that it would subject the prevailing party to additional expense. In *Long v. Straus*, 124 Ind. 84, 24 N. E. 664, the Supreme Court of Indiana said: "It is also argued that, as the cause was pending in this court at the time the deposition was taken, it should have been suppressed. There is no strength in this position. The appellees had a right to take depositions to preserve testimony at any time, and the fact that the case was pending on appeal did not deprive them of this right. They were not bound to take the risk of losing the testimony, but had there been no opportunity for using it they would have been compelled to pay the costs of securing it." The statute under which this decision was made is not cited, and we are ignorant of its terms, but it can scarcely have been more liberal than our own. And however this may be—whether the terms of the Indiana statute were plain and mandatory or of doubtful construction—one thing is certain, that the policy of the law is very clearly vindicated in a few words. In the cases to which the law applies each party must take some risk. The party desiring the testimony must take the deposition or run the risk of losing it. The opposing party, if the depositions are taken, must incur the expense of employing counsel to cross-examine, or take the risk of ignoring the proceeding. If the condition of the cause is such that the respondent is not willing to take the risk of an ex parte deposition, the appellant should not be compelled to take the risk of losing the testimony altogether. And, if the position of the parties is reversed and it is the respondent who desires the testimony, the argument in his favor is still stronger.

Our conclusion is that the right of the petitioner to take the deposition of Orchard is plain, unless it be a valid objection, as contended by respondent, that the answer of the petitioner in the damage suit raises no issue

as to the cause of the explosion by which Linforth's house was damaged. The answer, it is said, makes no denial that the explosion was caused by the ignition of escaping gas. It is true that the answer fails to make a direct issue upon this point, but it does make a very plain issue upon the alleged negligence of the corporation in allowing gas to escape from its pipes. This question of negligence is certainly material. The mere fact of the explosion, otherwise unexplained, would perhaps justify the inference of escaping gas—an essential step in the proof of negligence, and Orchard's testimony, if believed, would refute the theory of a gas explosion.

But, aside from this, the real question is not whether Orchard's testimony would be material to the issues which were tried, but whether it will be material on a new trial, and under such an amendment to the answer as the circumstances of the case would warrant the court in allowing. As to the question of remedy, we think the petitioner is entitled to the writ of mandamus. That would be the only remedy for the refusal of a commission in a proper case before judgment, and there can be no doubt that it would lie, because it does not rest in the discretion of the trial court or judge to refuse a commission in the cases defined by the Code. Conceding that, in cases such as this, the order denying the application for a commission is appealable, that does not seem to be a sufficient reason for holding that remedy exclusive. It would be entirely inadequate in most cases, as it would have been in this, but for the fact that Orchard's sentence has been commuted. And, moreover, the order remanding the cause if it had been reviewed upon appeal would be in substance a peremptory mandate.

It is ordered that a peremptory writ issue as prayed.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

155 Cal. 15

CLUTE et al. v. SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,038.)

(Supreme Court of California. Dec. 28, 1908.)

1. APPEAL AND ERROR (§ 488*)—SUPERSEDEAS—EFFECT AS STAY OF INJUNCTION.

While an injunction which merely preserves the status quo is not suspended by an appeal, a mandatory injunction compelling affirmative action by defendant cannot be enforced pending a duly perfected appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2278; Dec. Dig. § 488.*]

2. INJUNCTION (§ 5*)—NATURE—MANDATORY INJUNCTION.

Where defendant was in possession of a hotel, claiming to hold as manager for the corporate owner and denying plaintiff's right to represent the corporation, an injunction in a suit

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by plaintiff restraining defendant from representing himself as manager of the corporation, and from interfering with, or attempting to direct or control, the employes of the corporation, in effect compelled defendant to surrender his exclusive possession and was mandatory, and that the corporate owner, and not defendant, its alleged agent, had possession in law, was immaterial in determining whether the injunction was mandatory.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 4; Dec. Dig. § 5.*]

3. INJUNCTION (§ 5*) — NATURE — MANDATORY INJUNCTION.

If an injunction compels one affirmatively to surrender a possession which, under the facts alleged by him, he is entitled to hold, it is mandatory.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 4; Dec. Dig. § 5.*]

4. INJUNCTION (§ 220*)—VIOLATION AND PUNISHMENT—WRIT VIOLATED—PENDENCY OF STAY.

Where a mandatory injunction was in effect an order requiring defendant to deliver possession of a hotel and its contents, so that an undertaking was necessary to stay execution pending appeal, as provided for by Code Civ. Proc. §§ 943, 945, requiring such undertakings where the order appealed from directs the delivery of possession of personalty and realty, and defendant requested the trial court to fix the amount of the undertaking, he should have been given an opportunity to do so, before contempt proceedings were taken against him for violating the injunction pending appeal.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 442; Dec. Dig. § 220.*]

In Bank. Application for writ of review by E. R. Clute and others against the Superior Court in and for the City and County of San Francisco and another to stay proceedings under an injunction pending an appeal therefrom. Judgment for petitioners, ordering proceedings stayed upon the filing of an undertaking.

Jas. Alva Watt and Thos. H. Breeze, for petitioners. A. L. Weil, for respondents.

SLOSS, J. The petitioners, having been by the superior court adjudged guilty of contempt, and ordered committed to the county jail for a term of 48 hours, applied to this court for a writ of review. The alleged contempt consisted in the violation of a temporary injunction, the execution of which had, as was claimed by petitioners, been stayed by an appeal. This court, being of the opinion that supersedeas, rather than certiorari, was the writ applicable to the case, issued an order to show cause why such writ of supersedeas should not issue, in the meantime staying all proceedings on the order appealed from. The action in which the injunction had issued was commenced in the name of Pacific Grand Hotel & Investment Company, a corporation conducting the Pacific Grand Hotel at San Francisco, against E. R. Clute, one of the petitioners herein. The complaint alleges that Clute was on January 3, 1908, elected treasurer and appointed manager of plaintiff; that on April 3, 1908, he was, by a vote of

the board of directors, at a meeting duly held, removed from the office of treasurer and the position of manager. It is alleged that, notwithstanding his removal, Clute still claims to be treasurer and manager, and withholds from the corporation its books, property, and money, and threatens to continue to do so. The prayer of the complaint is that defendant be required to account for funds received or disbursed by him on account of the corporation; that he be required to surrender all corporate books, records, and property to the secretary of the corporation; and that he be enjoined from holding himself out as manager or treasurer or from interfering with the guests or employes of the corporation. Following an order to show cause why an injunction should not issue, the court made an order directing that, upon plaintiff filing an undertaking in the sum of \$2,000, a writ of injunction issue restraining the defendant Clute from collecting any moneys of the corporation or disbursing the same except on the written order of the president and secretary, also restraining him from representing himself as manager and treasurer of the corporation and "from interfering with, or directing, or attempting to direct or control the employes of said corporation." A writ of injunction, in accordance with the order, was issued and filed. Upon a showing to the court by affidavit that Clute and his co-petitioners, who were acting under him, had prevented one Hickman, an employe of the corporation, from entering the office of the hotel or taking possession of the keys of the various rooms, or of the books, an order to show cause why said petitioners should not be punished for contempt was issued. The hearing resulted in the commitment above referred to. In the contempt proceedings, it was made to appear to the court, and it is not here disputed, that prior to the alleged violation of the injunction Clute had duly taken an appeal to this court from the order directing the injunction to issue. On that appeal he had filed a \$300 undertaking, in due form.

Upon the question whether that injunction was mandatory or purely prohibitory, the present application depends; for it is thoroughly settled that, while an injunction which merely has the effect of preserving the subject of the litigation in statu quo is not suspended by an appeal (*Merced Min. Co. v. Fremont*, 7 Cal. 130; *Heinlen v. Cross*, 63 Cal. 44; *Swift v. Shepard*, 64 Cal. 423, 1 Pac. 493; *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333; *Rogers v. Superior Court*, 126 Cal. 183, 58 Pac. 452), a mandatory injunction—i. e., one which compels affirmative action by the defendant—cannot be enforced pending a duly perfected appeal (*Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58; *Mark v. Superior Court*, 129 Cal. 1, 61 Pac. 436; *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563). If an injunction, though couched in terms of prohibition, is mandatory in effect, a proceeding by the court issuing it to punish a violation as a contempt is in the nature of process for the enforcement of the affirmative feature of the writ. It may be likened to an execution, and, if the enforcement of the injunction has been stayed by an appeal, a writ of supersedeas may properly be issued by the appellate court to arrest further action by the court below. *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856, and *Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 33 Pac. 123, relied on by respondent, decide nothing in conflict with this view. Both cases dealt with judgments which were operative without any action by the court in which they had been rendered. All that was held was that supersedeas was not applicable to such self-executing judgments.

At the hearing of the present application all the allegations of the petition were admitted to be true. Upon the facts set forth we think it clear that the injunction in question was mandatory. If Clute was in the actual possession of the hotel and the personal property in it, an order punishing him for preventing another person from entering and taking charge of the books, keys, and other property could have no other purpose or effect than to compel him to turn over his possession to such other, or at least to surrender his theretofore exclusive possession. It appears from the record that Clute, while in the actual management and control of the hotel, never asserted any ownership or possession in his own right, but claimed to be entitled to possession as manager of the corporation. It is accordingly contended by the respondent that as the possession of the servant is, in law, merely that of his master, an order directing the employé to deliver to his employer the latter's property works no change in the possession. The corporation, it is argued, was at all times entitled to the possession and in the actual possession of the hotel and its contents, and a surrender of the custody by one employé to another authorized to receive it leaves the status of the property, so far as possession is concerned, unaltered. But this argument fails to take into account the very point that was in dispute in the court below. While the parties seeking to oust Clute claimed to represent the corporation, it appears that he disputed their right and authority to act for it. His answer to the complaint, and the showing made by him in response to the application for an injunction, show that his contention at all times was that the persons who had assumed to remove him as treasurer and manager, and had caused suit to be instituted against him in the name of the Pacific Grand Hotel & Investment Company, were not in fact directors

of the corporation, and that accordingly he, and not the parties whom he was, by the injunction, required to admit to possession and control of the hotel, represented the company. If his contention was correct, the effect of the order appealed from was to require the possession of the corporate property to be transferred from the corporation itself to strangers. The status of the parties, at the time the injunction was issued, was this: Clute, claiming to hold on behalf of the corporation, was resisting a right of entry claimed by persons who, as he asserted, had no authority from the corporation to take possession. An order turning over the control of the property from him to the other claimants would certainly, if executed, operate to change that status. The injunction was, therefore, mandatory in effect, and this regardless of the fact that, in law, the corporation, rather than Clute, may be said to have been in possession. It is therefore unimportant that the court inserted in its order of commitment a finding that Clute was not in possession of the hotel or its contents. For the purpose of determining the effect of this injunction as mandatory or prohibitory, we must consider the result of an enforcement of the writ on the position of the defendant, as asserted in the court below. If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory.

The point is made by respondent that, if the order for an injunction be construed according to Clute's contention, it is an order requiring the delivery of real and personal property, and its enforcement cannot be stayed on appeal, unless the appellant gives a bond in an amount to be fixed by the court. Code Civ. Proc. §§ 943, 945. While it is not alleged that any such bond was given, it was shown by Clute in the contempt proceedings, without contradiction, that he had requested the court below to fix the amount of an undertaking to stay proceedings. Under the views herein stated, it was the duty of the court to comply with this request, and until, by such compliance, the appellant had been enabled to take the steps necessary to procure a stay, no contempt proceedings against him should have been entertained.

It is ordered that all proceedings on the order appealed from be stayed for a period of five days after notice to the appellant that the respondent has fixed the amount of an undertaking to stay execution, and that, if a good and sufficient undertaking, approved by the court, be filed within said five days, all such proceedings be further stayed during the pendency of the appeal.

We concur: BEATTY, C. J.; LORIGAN, J.; HENSHAW, J.; ANGELLOTTI, J.

(155 Cal. 21)

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO. v. STANISLAUS COUNTY et al. (S. F. 4,798.)

(Supreme Court of California. Dec. 28, 1908.)

1. WATERS AND WATER COURSES (§ 257*)—IRRIGATION COMPANIES—ESTABLISHED RATES—ANNULMENT—SUITS IN EQUITY—CONDITIONS PRECEDENT.

Act March 12, 1885 (St. 1885, p. 97, c. 115), § 6, provides that, at any time after the establishment of water rates under the law by any board of supervisors in the state, the same may be established anew or abrogated in whole or in part by such board, to take effect not less than one year after the first establishment upon the written petition of the inhabitants or of any persons, companies, or corporations, the rates of whose appropriated waters have been already established. *Held*, that an irrigation company whose rates were established by a county board of supervisors could not after the expiration of one year after the original establishment of such rates sue in equity for redress against the rates established without first resorting to the board of supervisors.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 257.*]

2. EQUITY (§ 43*)—DEFENSES—ADEQUATE REMEDY AT LAW—ADMINISTRATIVE TRIBUNALS.

Parties who are afforded by statute an adequate relief by application to a legislative or administrative municipal body must seek that relief from such body before being permitted to maintain an equitable action therefor.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 121; Dec. Dig. § 43.*]

3. COURTS (§ 92*)—OBITER DICTUM.

Dictum is not always to be disregarded, as a correct principle of law may be announced in a given case which it may not be necessary to there apply because of other principles on which the case may be disposed of, and it loses none of its force as law where the court recognizes it as a correct principle upon which it might have disposed of the case.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 335; Dec. Dig. § 92.*]

4. WATERS AND WATER COURSES (§ 216*)—PARTICULAR USES OR PURPOSES—WATER SUPPLY—STATUTORY PROVISIONS.

The provision of Act March 12, 1885 (St. 1885, p. 95, c. 115), that the use of all water appropriated for sale, rental, or distribution in this state shall be a public use and subject to regulation and control, is valid.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 216.*]

5. EMINENT DOMAIN (§ 2*)—PARTICULAR USES OR PURPOSES—WATER SUPPLY—STATUTORY PROVISIONS.

Under the provision of Act March 12, 1885 (St. 1885, p. 95, c. 115), that the use of all water appropriated for sale, rental, or distribution in the state shall be a public use, a company furnishing appropriated water for irrigation purposes has only the constitutional right that its property shall not be taken for public use without just compensation, viz., a fair return on the reasonable value of the property at the time it is being used for the public benefit.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

6. PLEADING (§ 225*)—DEMURRER—LEAVE TO AMEND.

Where a complaint is defective for failure to allege a condition precedent which it is conceded has not been complied with, it is proper

to sustain a demurrer thereto without leave to amend.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 575; Dec. Dig. § 225.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the San Joaquin & Kings River Canal & Irrigation Company against the county of Stanislaus and others. From a judgment sustaining a demurrer to the complaint without leave to amend, plaintiff appeals. Affirmed.

Frank H. Short, Garret W. McEnerney, and W. B. Treadwell, for appellant. Geo. W. Jones, Frank Kauke, and L. J. Maddux, for respondents.

LORIGAN, J. Plaintiff is a corporation engaged in furnishing water for irrigation purposes in the counties of Fresno, Merced, and Stanislaus, and brought this action in the superior court of Fresno county against the county of Stanislaus and the counties of Fresno and Merced, and the boards of supervisors of said three counties respectively, to have declared null and void certain orders of said boards establishing the maximum rates to be paid plaintiff by the inhabitants of each county for water for irrigation of lands therein. All the defendants demurred to the complaint, and their demurrers being sustained without leave to amend, and judgment being entered thereon against plaintiff, it appeals therefrom.

Referring to those portions of the complaint pertinent for consideration, it is alleged that the plaintiff organized as a corporation in 1871 for the purpose of constructing canals for irrigation purposes, and that since its incorporation it had been engaged in the business of appropriating water for irrigation, sale, rental, and distribution; that it owned and maintained a system of canals and waterworks therefor, heading in the San Joaquin river in Fresno county, and running through Fresno and Merced counties into Stanislaus county, furnishing water through said canals to the inhabitants of said counties of Fresno, Merced, and Stanislaus for irrigation; and that the works used in the appropriation and furnishing of said water to the inhabitants of said counties were of an actual and proper cost of not less than \$1,019,763.97. The complaint then sets forth specifically certain proceedings of the board of supervisors of Stanislaus county taken under the act of the Legislature of March 12, 1885, for the purpose of establishing water rates to be charged by plaintiff, and it is alleged that on June 24, 1896, said board estimated the value of plaintiff's canals, ditches, and other property used in the appropriation and furnishing of said water at the sum of \$337,000, and the annual reasonable expenses of plaintiff to be the sum of \$22,000, and thereupon made an order fixing certain

specified rates for water to be paid by the inhabitants of said county for irrigation purposes, and which the complaint proceeds to declare "then were, and ever since have been, grossly unfair and unreasonable, and such that, if rates were fixed by the boards of supervisors of Fresno and Merced in due proportion to the rates so fixed by said board of supervisors of said county of Stanislaus, the net annual receipts and profits thereof to the plaintiff could not possibly amount to 6 per cent., nor to more than $1\frac{1}{4}$ per cent. upon the value of its said property actually used and useful to the appropriation and furnishing of said water." The complaint then proceeds to allege similar proceedings by the board of supervisors of Merced and Fresno counties in the year 1904, an estimation by said boards of the value of plaintiff's canals, ditches, etc., to be \$832,681.20, and its annual expenses relating thereto, \$34,943.65, and the fixing of certain water rates to be charged in said counties for irrigation.

It is not alleged that these latter rates of the counties of Merced and Fresno were unreasonable, considered by themselves. It is, however, alleged "that the rates so fixed by the said boards of supervisors of the said counties of Stanislaus, Merced, and Fresno, taken as a whole, are grossly unfair and unreasonable, and will not and cannot insure to the plaintiff, or permit it to receive, net annual receipts and profits in said business of 6 per cent. upon the value of its said canal and other property actually used and useful to the appropriation and furnishing of said water to the inhabitants of said counties, nor more than two per cent. upon said value."

The prayer of the complaint is that the orders establishing said water rates made by the boards of supervisors of the three counties be declared void and the defendants enjoined from attempting to put in force or enforcing the rates established by them. The action was commenced on July 28, 1904.

The act of March 12, 1885 (St. 1885, p. 95, c. 115), under which the rates of which plaintiff complains were established by the boards of supervisors of the several counties sued herein, after providing that the use of all water in this state for irrigation, sale, rental, or distribution is a public use, declares that the right to collect the rates therefor shall be regulated and controlled in the different counties of the state by the boards of supervisors thereof. The act provides special proceedings to be taken by said boards for that purpose upon the petition of 25 inhabitants who are taxpayers of any county in which said waters are distributed, provides for a hearing upon the petition after public notice; an estimation of the value of canals, etc., belonging to the person, company, association, or corporation whose franchise is to be regulated and controlled; an estimate of the annual reasonable expenses, etc., of such person, company, association, or corporation,

including the cost of repairs, management and operating of such works; and requires the board of supervisors of the county thereupon to fix the maximum rate at which such firm, company, association, or corporation shall sell, rent, or distribute any appropriated water to any of the inhabitants of the county. In fixing such rates it is provided that, as near as may be, they shall be so adjusted that the net annual receipts and profits of the sale or distribution of such waters to the firm, company, association, or corporation appropriating and distributing them shall be not less than 6 nor more than 18 per cent. upon the value of the canals, etc. It is further provided that the rates as originally fixed shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated, as the act further provides they may subsequently be.

As to the establishing anew or abrogating of such original rates, the act then proceeds, by section 6 thereof, to declare as follows: "At any time after the establishment of such water rates by any board of supervisors of this state, the same may be established anew, or abrogated in whole or in part by such board, to take effect not less than one year next after such first establishment, but subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants as hereinbefore provided, or upon the written petition of any of the persons, companies, associations or corporations, the rates and compensations of whose appropriated waters have already been fixed and regulated, and are still subject to such regulation by any board of supervisors of this state, as in this act provided; and upon the like publication or posting of such petition and notice, and for the like period of time as hereinbefore provided, such board of supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association, or corporation, or any number of them, in the same manner as if such rates had not been previously established, and may, upon the petition of such inhabitants, but not otherwise, abrogate any and all existing rates theretofore established by such board." We quote at length this latter section of the act because it was made the basis of the decision of the superior court in sustaining the demurrers of defendants to the complaint. In doing so, that court held that, before plaintiff was entitled to invoke the aid of a court of equity to have annulled the order of the board of supervisors of Stanislaus county, it should have appeared from the complaint that plaintiff had exhausted all other remedies; that as the rates originally fixed by the board of supervisors of that county had been in force for more than a year—in fact for many years—before this action was commenced, and as section six quoted provided that under these

circumstances plaintiff might apply to have the rates originally fixed changed or established anew, it was the duty of plaintiff to first apply to the board of supervisors for such re-establishment of rates, and permit said board to readjust and correct them if for any reason they were unjust or unreasonable, before it could appeal to a court of equity to annul them as originally fixed.

It will be observed from the allegations of the complaint that the order of the board of supervisors of Stanislaus county, originally fixing rates for irrigation and other purposes to be charged by plaintiff to the inhabitants of Stanislaus county, was made in June, 1896. This action was not brought until July, 1904. It is apparent, too, from the allegations of the complaint, referring particularly to those portions which we have quoted above, that the gravamen of the complaint of plaintiff is only as to the rates established by the board of supervisors of Stanislaus county in 1896. It is alleged that the rates then established by the board of supervisors of that county are so grossly unfair and unreasonable that, if the same rates were fixed by the boards of Supervisors of Merced and Fresno in proportion to those fixed by the board of supervisors of Stanislaus county, the net profits to plaintiff could not amount to the minimum of 6 per cent. fixed by the act, nor to more than one and one-fourth per cent. on the value of the property of plaintiff. It is not complained that the rates fixed by the boards of supervisors of the counties of Fresno and Merced in 1904 are unfair or unreasonable of themselves, but only that the rates fixed by those counties, taken in connection with those fixed by the board of supervisors of Stanislaus county, are as a whole unreasonable and unjust to such an extent that the statutory minimum of 6 per cent. is reduced to less than 2 per cent. So that the unfair and unreasonable rates of which plaintiff complains are primarily, and, it may be said, exclusively the rates established by the board of supervisors of Stanislaus county, and not those established by the boards of supervisors of Merced and Fresno counties. But, if the rates of Stanislaus county were unfair and unreasonable, plaintiff had, under section 6 of the act, ample opportunity to have them changed or modified in the first instance by application to the board of supervisors of that county without at all applying to a court of equity for redress.

While it is true that under the act the rates as originally established by the board of supervisors of a county are binding and conclusive for not less than one year, said board must at any time after one year, upon petition by the inhabitants of the county establishing such rates, or by any person or corporation affected thereby, proceed to establish them anew, and in doing so proceed as if they had not been previously established. Once a board had originally established

the rates, it was powerless to change them unless upon such petition. The rates originally established by the board of supervisors of Stanislaus county, and of which the plaintiff complained, had been in force for almost eight years when this action attacking the order establishing them was commenced. Of course, during the year after they were established, as the statute made such rates unalterable by the board of supervisors under any circumstances, so as to be effective until the expiration of a year, plaintiff, on their original establishment, or at any time during the year, if it wished to attack them as being unreasonable, would have had to bring an action in equity to set them aside or annul them. During that period it could have no other redress. But after the year had expired, under the provisions of section 6, by simple petition to the board of supervisors plaintiff could have had the matter of the reasonableness of such rates re-examined, and the board, if satisfied that for any reason those rates as originally established were not just, could have fixed reasonable and just ones. It was the very purpose of section 6 to permit a re-examination or change of previously established rates, to give any person or corporation, against whom such established rates operated, an opportunity to obtain the very relief which plaintiff seeks to obtain in this action; and we think that as the statute afforded it a remedy and redress by appeal to the board of supervisors at the time when this action was brought, and for many years previously, it should have exhausted this remedy before it was entitled to appeal to a court of equity to annul the order of the board. It is the general rule that a party must exhaust all his legal remedies before he is entitled to redress in a court of equity. While this rule has application to legal remedies enforceable in an action at law, we perceive no good reason why the general principle may not be extended so as to require parties who are afforded by statute an opportunity to obtain adequate relief by application to a legislative or administrative municipal body, like a board of supervisors, with reference to the very matter of which they complain in an action in equity, to seek that relief from such body before being permitted to maintain an equitable action for the purpose.

In a case involving a consideration of the very statute here in question, and addressing itself to the terms of section 6 thereof, the Supreme Court of the United States has recognized this principle. It there said: "Coming now to the merits, the first thing to be noticed is that the ordinance complained of took effect in November, 1897, and that after a year from that date the appellant was free to apply for a modification of the rates. It did not do so. There is no allegation or suggestion that the board is corrupt or that it purposes and intends, without regard to evidence, to adhere to unjust rates so as to de-

stroy or impair the value of the appellant's works. Under such circumstances, the question arises whether this is much more than a moot case, in view of the principles adverted to in *Tennessee v. Condon*, 189 U. S. 64, 23 Sup. Ct. 579, 47 L. Ed. 709, or at least whether the appellant should be required to exhaust its other remedies before coming into court. In any event, the limited effect of the ordinance must be taken into account when we are called on to declare it such a flagrant attack upon the rights of property under the guise of regulation, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use." *San Diego, etc., Co. v. Jasper*, 189 U. S. 441, 23 Sup. Ct. 571, 47 L. Ed. 892.

It is claimed by counsel for appellant that this statement of the Supreme Court of the United States was simply dictum, as far as the disposition of that case was concerned. Conceding this to be true, it does not follow that the dictum of a court is always and at all times to be discarded. A correct principle of law may be announced in a given case, although it may not be necessary to there apply it, because of other principles upon which the case then under consideration may be disposed of. It was not necessary for the Supreme Court of the United States to apply the principle under discussion in the case in which it was announced because the matter was disposed of for other reasons. It is recognized by that court, however, as a correct principle upon which it might have disposed of it, and it loses nothing of its force as such because it was not applied. That the principle is a correct, and just one is obvious on slight reflection. No question can be made but that the act of 1885, in so far as it provides that the use of all water appropriated for sale, rental, or distribution in this state should be a public use and subject to regulation and control, is valid. *San Diego, etc., Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154. All that the plaintiff is constitutionally entitled to under it is that its property shall not be taken for public use without just compensation; a fair return on the reasonable value of its property at the time it is being used for the public benefit. *San Diego, etc., Co. v. National City*, supra.

This fair compensation under the terms of the act of 1885 it is the duty of the board of supervisors to establish by just and reasonable rates. If it does not do so originally, as the act makes the rates first established unalterable for at least a year, a court of equity may be resorted to at once by the aggrieved person or corporation to have the order establishing them declared void because unreasonable. All, however, that a court of equity can decree is that the established rates are unreasonable and restrain their collec-

tion. It has no power to establish rates or to restrain the board of supervisors from again fixing them. So that nothing is accomplished by the court in equity except to annul the order in question. As far as the board of supervisors is concerned, it may again proceed to establish them. It has the exclusive power to do so, and, when the limitation of one year has expired, the person, company, or corporation in the exercise of the public use may apply to have the original rates changed or modified if they are deemed unreasonable. As the board of supervisors is the only tribunal which can establish them at all, and as the person or corporation exercising the public use is subject to be controlled by the rates as established when reasonable, it is only proper that such person or corporation should be required to resort to the board for any relief which it is competent to give in order that reasonable rates may be established as the act contemplates. Had the plaintiff petitioned the board of supervisors of Stanislaus county to fix rates anew, as the act permitted might be done, plaintiff would have obtained all the relief to which, under the act, it would have been entitled had the rates originally established been in fact unreasonable, without any necessity of appealing to a court of equity to annul such original rates. The superior court properly sustained the demurrers because the complaint failed to allege such an application before commencing the present action.

Appellant further complains because the court, in sustaining the demurrers, refused it leave to amend the complaint. It is conceded here that in fact plaintiff made no application to the board of supervisors of Stanislaus county for a modification or change of the original order establishing rates, or for the establishment of rates anew before commencing this suit. Hence the complaint was incapable of amendment in this radical particular, and the refusal of the court to permit plaintiff to do so furnishes no ground for complaint.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

155 Cal. 39

Ex parte KELLY. (Cr. 1,500.)

(Supreme Court of California. Dec. 30, 1908.)

PARDON (§ 14*) — CONDITIONS — SUBSEQUENT OFFENSE—SERVING PRIOR SENTENCE.

A convict was pardoned on condition that if, after his discharge, he should commit a felony, the commutation of sentence should be void, and, in addition to the penalty assessed for the subsequent felony, he should serve so much of the sentence of his original conviction as he had not served at the time of the discharge. After the term of his original conviction had expired and after entries were made on the prison records showing the expiration of the sentence, he was convicted of a felony and sen-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tenced to prison, and, upon the expiration of that sentence, was detained by the warden by reason of the condition in the pardon. *Held*, that the detention was lawful, as the Governor, having the absolute constitutional right to pardon, except in cases of prior conviction, had the right to annex the condition.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 28; Dec. Dig. § 14.*]

Habeas corpus by Frank Kelly to secure his release from prison. Writ denied, and prisoner remanded to custody.

BEATTY, C. J. In April, 1897, the petitioner was sentenced to a term of 15 years' imprisonment in the Folsom state prison for the crime of burglary. Under the law allowing credits for good conduct—all of which he earned during the period of his confinement—his term would have expired on the 14th day of September, 1906. He was, however, discharged from the prison on May 15, 1905, in obedience to a conditional pardon or commutation of his sentence by Governor Pardee. The condition of his release was stated in the proviso: "That if, after said day of discharge, said Frank Kelly shall be convicted of any felony, this commutation of sentence shall become void, and, in addition to the penalty which may be imposed for said felony, he shall be compelled to serve so much of the sentence upon his aforesaid original conviction as he had not served at the time of his discharge under these presents." In January, 1907, the petitioner was again convicted of a felony upon which he was sentenced to a new term of two years' imprisonment at Folsom. This term, less the credits earned and allowed under the statute, had fully expired, but the petitioner was still detained by the warden of the prison, when he commenced this proceeding. The return to the writ shows that there is no warrant for his further detention except the enforcement of the condition stated in the above-quoted proviso of the Governor's commutation.

The prisoner was not represented by counsel at the hearing, but contended in his own behalf that the condition annexed to the commutation of his first sentence became inoperative from and after the 14th day of September, 1906, the date when that sentence expired by law, and when, in fact, its expiration was regularly entered in the records of the prison. He does not, as I understand his argument, question the power of the Governor, in granting a commutation of a sentence of imprisonment, to annex a condition subsequent, violation of which within the unsatisfied portion of his term, will work a forfeiture, but he insists that after the full term has expired such a condition is also at an end.

This question, so far as I am advised, is entirely new. No authorities are cited, and I know of none. Regarded as an original proposition it seems reasonable to say that since

the power of the Governor to grant pardons and commutations is absolute under the Constitution, except in cases of prior conviction, the power to annex to a pardon or commutation any reasonable condition, prior or subsequent, is implied upon the principle that the greater includes the less. No consideration of public policy stands in the way of this conclusion, for such action by the Governor is in perfect harmony with the policy of the parole system in force in this state, and is a useful and beneficial application of that policy to the class of cases in which the Governor would be willing to exercise clemency if he could exact some security for the future good behavior of the prisoner.

I think the present detention of petitioner is not unlawful, and he is therefore remanded to the custody of the warden at Folsom.

155 Cal. 41

HUNKINS-WILLIS LIME & CEMENT CO.
v. LOS ANGELES WAREHOUSE CO.

(L. A. 2,190.)

(Supreme Court of California. Dec. 31, 1908.)

SALES (§ 22*)—REQUISITES AND VALIDITY—
PROPOSALS AND ACCEPTANCE.

Defendant's agent wired to plaintiff an inquiry whether it would take an order for a specified number of barrels of cement on the same terms as those stated to a third person named, and defendant wired back an acceptance, provided the order was received in time to order that day from the mills, but further stated that the defendant was unknown and must wire reference or security, and the same day wired again, stating that on investigation, defendant's responsibility was satisfactory, and defendant's agent again wired, placing the order for the cement, and stating that particulars by letter would be sent. Plaintiff immediately wrote to defendant's agent stating that the price given the third person was a stenographic error, and that the price was higher than that communicated to the third person, and on the following day plaintiff again wrote defendant's agent that it had booked the order at the price specified in the letter of the day before. In reply defendant's agent wired, stating that he understood the price to be that given the third person, and that he could buy it for less than the new price claimed and therefore canceled his order. *Held*, that there was no contract, as there was no meeting of the minds of the parties.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 22.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Hunkins-Willis Lime & Cement Company against the Los Angeles Warehouse Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. W. Freeman and A. D. Laughlin, for appellant. D. P. Hatch, for respondent.

MELVIN, J. Action for breach of contract. Judgment was for plaintiff. Defendant appeals from the judgment and order denying a new trial. The alleged contract was evidenced by certain telegrams and letters be-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tween Mr. Charles F. Whittlesey, who was appellant's agent, and the respondent. So much of the correspondence as is pertinent is as follows:

"Los Angeles, Calif. May 9th, 1906. Hunkins-Willis Lime and Cement Co., St. Louis. Will you take order for seven thousand barrels cement Los Angeles delivery same terms as for Wentworth, Pasadena. Charles F. Whittlesey."

"May 10th, 1906. Chas. F. Whittlesey, Los Angeles, Cal. Will accept your order basis our today's wire to General Wentworth provided order received in time enabling us wire order mills today. Mill prices advance tomorrow. You unknown. Wire reference or security. Rush answer. Hunkins-Willis L. & C. Co."

"May 11th, 1906. Chas. F. Whittlesey, Los Angeles, Cal. Our investigation your responsibility satisfactory. Have arranged with mills extending time acceptance to today. Wire order. Hunkins-Willis L. & C. Co."

"Los Angeles, Calif. 11. Hunkins-Willis L. & C. Co., St. Louis, Mo. Your wire eleventh place order for seven thousand barrels particulars by letter today. Charles F. Whittlesey."

On May 11th a letter was sent by respondent to Mr. Charles F. Whittlesey, of which the following is in part a copy:

"May 11th, 1906.

"Mr. Chas. F. Whittlesey, Architect, Los Angeles, Cal.—Dear Sir: Referring to wires exchanged and enclosing herewith confirmation of our wires to you. In explanation of our first wire would state that in our proposition to Gen. Wentworth there was a stenographic error which, however, does not affect the results, but we thought it best to have the matter clearly understood, hence wired Gen. Wentworth and are to-day in receipt of his answer, which is satisfactory. We will furnish you from one car up to 20,000 bbls., subject to prior sale, of Atlas Portland cement delivered in car load lots on track at your city at \$3.85 per bbl. in cloth bags, which price includes the charge for the bags. Four bags or 380 lbs. equal a barrel. On return of the bags to the mills a credit of 7½ cts. each is allowed thus making the net price of the cement \$3.55 per barrel, not considering the freight to be paid for the return of the empty bags, a trivial sum. * * * Our proposition is good for any quantity you require as above stated, shipments to be made as desired by you prior to Oct. 1st, in as nearly equal monthly quantities as possible. Since wiring you early this a. m. we have arranged with our mills so as to extend time of acceptance up to and including the 15th. Referring to our first wires as to reference. You were entirely unknown to us, but investigation since has resulted satisfactorily and would feel honored to open business relations with your good self. Earnestly hoping to have the pleasure of serving you, we are, Yours truly, Hunkins-Willis L. & C. Co.

"P. S. Terms and other conditions as per reverse side of first sheet of this letter."

It is not necessary to quote the conditions mentioned, as they are the same as those appearing in the letter to Gen. Wentworth to which reference was made. The letter to Gen. Wentworth, dated May 3, 1906, contained practically the same terms as those appearing in the letter of May 12th just quoted above, with the exception of a statement that the net price of the cement would be about \$3.46 per barrel. This was obviously a mistake in calculation, and on May 10th had been corrected by the Hunkins-Willis Company by a telegram to Gen. Wentworth as follows: "Our proposition third three eighty-five including sacks, thirty cents barrel rebate when sacks returned mills. Net three fifty-five instead of three forty-six. Latter stenographic error."

On May 12, 1906, respondent sent the following letter to Mr. Whittlesey: "Mr. Chas. F. Whittlesey, Los Angeles, Calif.—Dear Sir: We received last P. M. wire reading: 'Your wire 11th. Place order for 7,000 bbls. Particulars by letter today.' In explanation we have booked your order for 7,000 bbls. of Atlas Portland cement. Price, terms and conditions as per our letter of the 11th. We are very glad indeed to have the pleasure of serving you and you can rest assured that preferred attention will be given to your orders. We now await your shipping instructions. Respt. Hunkins-Willis L. & C. Co."

A telegram to the same effect was sent on the same day. Mr. Whittlesey was also informed by wire on May 17th that the letter mentioned in his telegram of the 11th had not been received. On May 19th Mr. Whittlesey wired the respondent as follows: "Los Angeles, Calif. May 19. Hunkins-Willis Lime and Cement Co., St. Louis, Mo. Your letter received. Understood your price Wentworth three forty six. Can buy here less than three fifty. Cancel order for seven thousand. Chas. F. Whittlesey."

The respondent corporation refused to cancel the order, and shipped 1,080 barrels of cement to Los Angeles. This shipment was declined and no more cement was sent. Judgment was given for the loss caused by demurrage and cost of resale of this shipment and as to the remaining 5,920 barrels, in accordance with the provision of section 3311 of the Civil Code. Appellant contends that there was no meeting of the minds of the alleged contracting parties, while respondent's position is that Mr. Whittlesey's telegram of the 11th, "Your wire eleventh place order for seven thousand barrels particulars by letter to-day," and the respondent's letter of the same day, together with its telegram of the day following: "Wire received. Order booked. We await letter particulars"—constitute the closing acts in the contract. We find ourselves unable to agree with this view. Ignoring the final sentence of Mr. Whittlesey's telegram "particulars by letter to-day," there

Is abundant evidence in respondent's own telegram and letter that the contract was not considered complete. The former communication advised Mr. Whittlesey that the order was booked—not accepted—and referred to the expected letter of particulars, while the latter contains this very significant language: "Referring to our first wires as to reference. You were entirely unknown to us, but investigation since has resulted satisfactorily and we would feel honored to open business relations with your good self. Earnestly hoping to have the pleasure of serving you, we are," etc. There was not that meeting of the minds of the parties which must take place before a contract is complete. Upon this subject, in the case of *Four Oil Co. v. United Oil Producers*, 145 Cal. 624, 79 Pac. 366, 68 L. R. A. 226, Mr. Justice Henshaw used the following language: "The rules for determining whether or not a proposal and acceptance constitute a binding contract are well settled, and by this court have been expressed in the following language: 'To constitute a binding contract made in this form (letters) there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract. 1 Wharton on Contracts, § 4. A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. *National Bank v. Hall*, 101 U. S. 43, 51, 25 L. Ed. 822. An offer imposes no obligation unless it is accepted upon the terms upon which it was made. *Tilley v. County of Cook*, 103 U. S. 161, 26 L. Ed. 374. An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. Civ. Code, § 1585.' *Wristen v. Bowles*, 82 Cal. 84, 82 Pac. 1136." That there was not here a "proposal squarely assented to" seems too obvious to require further argument.

It follows that the judgment should be reversed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

155 Cal. 1

SIERRA COUNTY v. NEVADA COUNTY.
(Sac. 1,339.)

(Supreme Court of California. Dec. 28, 1908.)

1. COUNTIES (§ 8*) — ESTABLISHMENT OF BOUNDARIES.

Where a part of the boundary line of a county as defined by statute begins at the source of a stream and follows that stream down to its junction with another stream, the location of the line is so doubtful that its exact situation is a question of fact; for, while what are boundaries is matter of law, where they are is a matter of fact.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 8.*]

2. WATERS AND WATER COURSES (§ 38*) — WHAT CONSTITUTES A "WATER COURSE."

A water course does not lose its character as such because under certain conditions its

channel becomes dry in places, as a water course consists of bed, banks, and water; and, if there is a stream usually flowing in a particular direction, in a definite channel having a bed and banks, and usually discharging itself into some other body of water, it is a "water course," although it does not flow continuously.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 30; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7410-7413, 7833.]

3. APPEAL AND ERROR (§ 1011*)—QUESTIONS OF FACT—FINDINGS—BOUNDARY OF COUNTY.

Where the location of a county boundary line is a question of fact, and the evidence is conflicting, the finding of the court as to its location cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. COUNTIES (§ 8*) — ESTABLISHMENT OF BOUNDARIES—EVIDENCE.

Evidence, in an action to establish the boundary line between two counties, considered, and *held* to support the findings of the court that the source of a certain river, which was the starting point of a disputed county boundary, was certain snow-fed springs, and not a subterranean lake several miles lower down the stream.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 8.*]

5. COUNTIES (§ 8*) — ESTABLISHMENT OF BOUNDARIES—EQUITABLE RELIEF.

In an action between two counties to establish the location of the boundary line between them, the exercise of jurisdiction by one of the counties, by levying taxes in the disputed territory, was admitted, and the right was asserted to exercise such jurisdiction. The location of the boundary was uncertain, and its determination depended upon the construing of the statute defining such boundary. *Held*, that plaintiff was entitled to maintain an action in equity to determine the location of the line.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 8.*]

6. COUNTIES (§ 8*) — ESTABLISHMENT OF BOUNDARIES—EQUITABLE JURISDICTION.

Pol. Code, §§ 3969-3972, provide that if common boundaries and common corners of counties are not adequately marked by natural objects or lines, or by surveys lawfully made, they must be established by surveys jointly made by the surveyors of the counties affected thereby, to be approved by the boards of supervisors of such counties, or by a survey by the surveyor general, on application of the board of supervisors of any county affected, and that if the first mode is adopted, and the boards of supervisors do not agree, the surveyors must make a report to the surveyor general with surveys, maps, notes, and explanations touching disputed points, and that if from such data the surveyor general can collate a satisfactory description, he must establish the common boundaries and corners, but if the data is insufficient, he must cause surveys to be made, and when approved by him, such surveys shall establish the common boundaries and corners, and that all surveys finally approved under these sections are conclusive as to the location of the lines and corners included therein. *Held*, that the remedy provided in these sections can only be availed of where the language of an act defining a boundary is clear, and that, where the exact location of the boundary is left in doubt, or where it requires the interpretation of a court to ascertain what is meant by the language of the statute, an action in equity may be brought to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ascertain the exact location of disputed corners and boundary lines.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 8.*]

7. STATUTES (§ 176*) — CONSTRUCTION—JUDICIAL AUTHORITY.

The construction and interpretation of language used in a statute are matters exclusively for the courts, under Code Civ. Proc. §§ 1858, 1859, providing that in the construction of a statute a judge is simply to ascertain and declare what is in terms or substance contained therein, and to ascertain the intention of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 255; Dec. Dig. § 176.*]

8. WORDS AND PHRASES—"SOURCE OF STREAM."

The term "source of stream" is defined by the new Revised Encyclopedic Dictionary as "the spring or fountain head from which its supply of water proceeds; any collection of water within or upon the surface of the earth from which a stream originates."

Department 2. Appeal from Superior Court, Plumas County; J. D. Goodwin, Judge.

Action by the County of Sierra against the County of Nevada. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. L. Jones, Dist. Atty., and Thos. S. Ford, for appellant. W. I. Redding, Dist. Atty., Frank R. Wehe (Solinsky & Wehe, of counsel), for respondent.

LORIGAN, J. This action was brought in the superior court of Plumas county by the county of Sierra against the county of Nevada, for the purpose of securing an injunction against the exercise, by the latter county, of jurisdiction over certain territory claimed by the former, the main point in the controversy, however, being as to the location of the boundary line running east and west which divides Sierra county on the north from Nevada county on the south. The complaint alleged that the true southern boundary of the territory of Sierra county, lying between said county and the territory which constitutes the county of Nevada as established by law, has since the year 1874 been, and still is, as the statute of that year (Pol. Code, § 3921) established the same to be, as follows: "Thence south on said state line [state of Nevada] to the northeast corner of Nevada county, a point east of the source of the South fork of the Middle Yuba river, thence west to the source of, and down the South fork and Middle Yuba river to a point ten miles above the mouth of the latter." The complaint then designated the particular location of said boundary line by reference to United States government surveys, and then alleged that the county of Nevada had been for some years past encroaching on the jurisdiction of Sierra county, over portions of its territory north of its boundary line, and was claiming jurisdiction over a strip of land north of said boundary about 25.56 miles in length and averaging 1.22 miles in width, and containing over 31.29 square miles, and had

actually attempted to exercise jurisdiction within said strip by the levying and collection of taxes therein, and in divers other ways; that no survey fixing the line between said counties could be had until the disputed boundary was settled; that plaintiff had no adequate remedy at law, and on account of such proceedings on the part of Nevada county, and in order to avoid a multiplicity of suits among the persons occupying said disputed territory, the right to equitable redress had arisen. The prayer was that the disputed boundary be established by the court to be as claimed by the plaintiff, and that Nevada county be enjoined from asserting jurisdiction over the territory north of said boundary line. The answer of Nevada county expressly admitted that the true boundary line between the counties was as averred in the complaint, namely, from the state line "west to the source of the South fork of the Middle Yuba river and down the South fork and Middle Yuba river to a point ten miles above the mouth of the latter," but expressly denied that the location of the boundary line with reference to the government surveys was as described in the complaint, but on the contrary, alleged four distinct lines, widely separated from each other, and all different from the line claimed by Sierra county, and each of which lines Nevada county alleged was the true east and west line, and hence the true boundary line between the counties. The trial court found the true boundary line to be as alleged by Sierra county, and particularly described in the complaint by reference to United States government surveys, and entered a decree so establishing it, and enjoined Nevada county from exercising any jurisdiction or governmental power over any territory north of said established line. Nevada county appeals from the judgment, bringing up the evidence on a bill of exceptions, in an attack upon the findings of the court.

It will be observed that the act of 1874 (Pol. Code, § 3921) in designating the southern boundary line of Sierra county fixes its point of commencement on the state line (state of Nevada) at a point east of the "source of the South fork of the Middle Yuba river, thence west to the source of and down the South fork and Middle Yuba river." The main contention between the counties in the trial court was as to the location of the point described as the "source of the South fork of the Middle Yuba river" and the location of the South fork itself. It was agreed between them that the true boundary line between the counties was a line running westerly from the state line to the source of the South fork, and down the channel of that stream to the junction of the Middle Yuba, but the main contention was as to where was the source of the South fork, and where was the South fork of the Middle Yuba located.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It was the contention of the respondent, and the court so found, that the source of the South fork consisted of several springs in the Sierra Nevada Mountains; that the waters therefrom collect and form into a stream, which runs down to the middle of the main valley or depression and watershed in a general northwesterly course in a well-defined natural channel, with bed and banks, until it emptied into the Middle Yuba river, and that the stream, taking its source in said springs and emptying into the Middle Yuba, was the South fork of that river. From the source of the South fork, as fixed by the court, to where its water emptied into the Middle Yuba river is about eight miles.

While the contention of the appellant was against this claim of respondent, and while it alleged that the South fork took its source at several other points than as claimed by respondent and found by the court, its principal claim, and that to which its evidence was practically addressed, was that the true source of the South fork was in a lake, which was designated by the witnesses for appellant as "English Lake," and which was many miles westerly from the source established by the findings of the court. This body of water, which, when speaking as of the time of its existence, is characterized as a lake, was located about three miles above the junction of what is conceded to be part of the South fork with the Middle Yuba, and about five miles down stream from the source of what the court found was the South fork of the Middle Yuba. This body of water, designated as "English Lake," was not a natural lake, but simply an artificial reservoir. It appears that about three miles above the mouth of the South fork that stream in its unrestrained condition runs through a narrow gorge in the mountains. At some date, not earlier than 1861, the Milton Water Company, for the purpose of impounding and appropriating the waters of the South fork and its tributaries, and conveying them to another watershed, built a dam across the South fork, where it passed through the gorge. This dam was 130 feet in height, and was known as the "English dam." The high mountain ranges through which the South fork takes its course separate just above where the dam was constructed, leaving a small valley between, known as "Musco Valley," and which is located on the north side of the South fork stream. When the dam was constructed, its effect was to back the waters of the South fork up its channel to the southeast some 9,000 feet, or nearly two miles, in the valley, and for a width of some 1,800 feet. This body of water was called English lake, and it is claimed by appellant that this large body of water, which existed in 1874, when the Legislature fixed the southern boundary of Sierra county, must be deemed to have been meant as the source of the South fork of the Middle Yuba river. The dam which

held this water broke in 1883, the immense body of water was precipitated into the canyons and valleys below, and the dam was not thereafter rebuilt. Aside from the fact that this reservoir with its large body of water was in existence in 1874, when the act establishing the southern boundary of Sierra county was passed, and independent of it, it is further contended by appellant that in prehistoric times a large subterranean glacial lake covered the floor of the Musco valley; that by glacial deposits its basin became gradually filled with loose stone, gravel, boulders, and other deposits, but that, notwithstanding this, it still constituted a large subterranean glacial lake, all the waters of the stream of the basin centering to it, and losing themselves within it, the water sinking beneath the surface and filling it; that across the foot of this lake ran an impenetrable dyke of metamorphic rock, forming a barrier over which the overflow water found an outlet and flowed into the channel of the South fork below the lake, and that this glacial lake constituted the only true source of the South fork of the Middle Yuba river; and that the stream making out from said lake and emptying into the Middle Yuba constituted the true and only South fork of the Middle Yuba.

We mention this contention of the respective parties as to what constituted the source of and the South fork, not for the purpose of examining in detail the evidence which was addressed to their respective claims, but to show how divergent were these claims as to what constituted the South fork and its source. It is not for us to determine what constituted the South fork of the Middle Yuba river, or where its source was. That was a matter for the trial court. All that we are called on to consider is whether as to those matters the findings of the trial court are sustained by the evidence, and that they were, we think, is not open to serious question. "What are boundaries is matter of law, and where they are is matter of fact." *White v. Spreckels*, 75 Cal. 610, 616, 17 Pac. 715, 717. What the southern boundary of Sierra county is, is declared in the statute, but where that boundary is, is not so definitely stated, either as to what constitutes the South fork, or where its source is, so that they can be ascertained without evidence addressed particularly to their establishment. Here the statute simply designated the South fork of the Middle Yuba river, from its source to its junction with the Middle Yuba river, and a line from its source to the state line, as the southern boundary. It does not designate where or what the source is, but leaves that matter to be determined, as it can only be, from the testimony of witnesses speaking from actual examination of the ground, those who, having sufficient knowledge and experience to so determine, had carefully examined the various water courses, one of which would constitute the South

fork, and after ascertaining which one did so constitute it, had followed it up to the point of its origin; had examined the physical conditions which would establish the fact of where the source was. When the boundary line of a county is designated by mere indefinite reference to the source of a stream as the point from which a line is to be projected as part of the boundary, and the south fork of a main river as another part, the designation is so doubtful and uncertain that no court can say, as a matter of law, where the boundaries are. Under such circumstances, the whereabouts of the boundaries is a question of fact. Neither does the statute define the South fork. A stream may have several branches tending in a southerly direction, and superficial observers might disagree as to what branch in reality constituted the south fork, so that it would be necessary to make an actual traverse of the streams and examination of the topography of the country through which they pass in order to determine as a fact which was the main southerly branch, and hence which was the south fork. *Reynolds v. West*, 1 Cal. 322; *Taylor v. Fomby*, 116 Ala. 621, 22 South. 910; *Johnson v. Archibald*, 78 Tex. 96, 14 S. W. 266, 22 Am. St. Rep. 27; *Reynolds v. McArthur*, 2 Pet. 417, 7 L. Ed. 470; *Rhode Island v. Massachusetts*, 39 U. S. 210, 10 L. Ed. 423; *Marsh v. Richardson*, 106 N. C. 539, 11 S. E. 522.

The record in the case before us shows that by abundant evidence, consisting of surveys, a topographical model, photographic views, and the testimony of witnesses, some of whom had actually traversed the channel of the stream, claimed by the respondent to be the South fork, to its source, the court was fully warranted in finding that the South fork and its source were as contended for by respondent. The evidence showed that the South fork of the Middle Yuba river took its source from a number of springs near the summit of the Sierra Nevada Mountains, which were fed by almost perpetual snows, and flowed thence from the southeast to the northwest between two high mountain ridges, which came together on the southeast and formed the entire watershed of that stream; that its waters were derived solely from the melting snows, which fell to a great depth on the surrounding mountains during the winter; that it was a torrential stream during the spring and early summer; that its course, which extended about eight miles, was through a continuous channel extending from the source down to and through what is called the "English reservoir" to its junction with the Middle Yuba river, the channel having bed and banks and water wash well defined, and having a width in places of as much as 18 feet, and in other places being as narrow as 8 feet. It is true the evidence shows that towards the end of every dry season, and when the waters fall in the stream, there are places in the channel of this South fork above the reservoir which are dry, but a water

course does not lose its character as such because in dry seasons, or under certain climatic conditions, its channel may become dry in places. In fact the channel is also dry at times in that portion of the South fork below the reservoir, and which appellant contends is the true and only South fork. As said by Angel on Water Courses: "A water course consists of bed, banks, and water, yet the water need not flow continually; and there are many water courses which are sometimes dry. * * * It need not be shown to flow continually as stated above, and it may at times be dry; but they must have well-defined and substantial existence. * * *" Angel on Water Courses, §§ 3, 4. "There must be a stream usually flowing in a particular direction, but it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream of body of water." *Hoyt v. City of Hudson*, 27 Wis. 656, 9 Am. Rep. 473. Many other authorities might be cited to the same effect. It is hardly necessary to pursue this matter further. It being a question of fact for the determination of the trial court as to where the southern boundary of Sierra county was located, and the evidence being at least conflicting on the point, the finding of the court, as to the source and location of the South fork arising out of that conflict in favor of respondent, Sierra county, cannot be disturbed on appeal. There was ample evidence, as believed by the court, to sustain the finding made in that respect, and it is therefore not open to challenge.

As far as the claim of appellant is concerned that the English reservoir, or the glacial lake which we have described, should have been found to be the source of the South fork, and that the South fork consisted only of that portion of the stream below the lake, it is entirely without merit. When the Legislature of 1856 (St. 1856, p. 143, c. 122) defined the northern boundary line of Nevada county, which constituted the southern boundary line of Sierra county, it defined it as "thence up said Middle Yuba river to the mouth of the South fork of the same; thence up said South fork to its source; thence due east to the eastern line of the state." From that date until now, and irrespective of other changes which have been made in the boundaries of Sierra county, its southern line has always been defined by the Legislature as in effect a line produced from the east line of the state due west to the source of the South fork, and from said source thence down the stream to its junction with the Middle Yuba river, etc. When the act of 1856 was passed defining the southern boundary of Sierra county, there was no reservoir nor lake known as English lake or reservoir. That reservoir was not built earlier than 1861, and in the nature of things it is to be assumed, and in fact the expert evidence so discloses, that what is called the glacial lake was fully filled

up with débris from the surrounding mountains at that time and covered with a deep alluvial deposit. There is no evidence that there was a lake at that time; that is, that is contained any surface water. It must be assumed that the Legislature had full knowledge respecting those matters concerning which it was legislating; that in fixing the boundaries of counties in 1856 by reference to streams, it knew the locality, trend, and source of such streams. If there had been, in the common acceptance of that term, any lake, as contended for by appellant, on the site where the English reservoir was subsequently established, the Legislature must have known it, and, knowing it, if it had intended it to be considered as the source of the South fork, would undoubtedly have so designated it by name. Or, if in 1874 it had intended the English reservoir, which was then in existence, to be deemed the source of the South fork, it would have said so. The fact that it did not is persuasive evidence that it was not intended that the assumed lake, or actual reservoir, was intended to be designated as the source of the South fork, but the source was intended to be where the Legislature must be conclusively presumed to have known it was, namely, the snow-fed springs of the Sierra Nevada Mountains, some five miles above the dam, in which springs the South fork had its origin as a stream, and from there took its course down to and through the assumed lake, or through the reservoir, and continued its course to the junction of the Middle Yuba. It takes that course now through the site of the reservoir, in a well-defined channel, and from the nature of things must have taken that course before the reservoir was constructed. It is true that when the act of 1874, establishing the southern boundary of Sierra county, was passed the reservoir was in existence, and it held its waters backed up in the channel of the South fork for almost two miles. But this could not make the South fork any the less the boundary line between the two counties. That channel, having been defined by the Legislature as the boundary, could not be changed or obliterated by erecting the English dam across it and backing up the waters of the stream. It still remained the channel of the South fork and the boundary line as fixed by the Legislature. This English reservoir, instead of being the source of the South fork, as claimed by appellant to exist only from below the dam to the Middle Yuba river, was but an incident to the main stream—the South fork—flowing from its source to the Middle Yuba rivers. The waters gathered in the reservoir were from the South fork and its tributaries, as that stream flowed in its channel towards and through the gorge where the dam was built. The creation of the reservoir was effected by blocking the channel at a point where the stream would otherwise naturally flow beyond it. But it was none the less the

natural channel of the South fork because by artificial means waters were accumulated and spread out and covered the original channel. We are satisfied that the claim of appellant that the finding of the court that the source, and the location of the South fork of the Middle Yuba, as claimed in the complaint of plaintiff, was not justified by the evidence is not well taken.

It is insisted, however, by appellant that, even should we conclude that the evidence was sufficient to justify the trial court in its finding as to the source and location of the South fork, still the judgment should be reversed, because the evidence was insufficient to justify the decision of the court to the effect that respondent was entitled to equitable relief against appellant, and because, further, it is claimed there was no evidence to sustain equity in favor of respondent. We have heretofore stated the allegations of the complaint which were made the basis for equitable relief. The court found such allegations to be true. This was warranted under the pleadings, because, while appellant insists that these allegations were denied by the answer, our examination of that pleading discloses that they were not. There was no denial that Nevada county had attempted, and was attempting, to exercise jurisdiction by the levying and collecting of taxes in the territory which the court found was part of Sierra county. In fact it admitted by the answer that it so claimed jurisdiction over the territory north of the line alleged by respondent to be its true southern boundary, because it was claimed as territory belonging to Nevada county. The admission of the exercise of jurisdiction, and the assertion of the right to exercise it in the territory claimed to belong to Sierra county, coupled with the fact of the uncertainty and dispute between the counties as to the true boundary line, and the necessity of construing the statute defining such boundary in order to determine its location, shows sufficient equity to entitle the respondent to maintain the action against appellant. *Wetherbee v. Dunn*, 36 Cal. 253; *Beatty v. Dixon*, 56 Cal. 619. Counsel for appellant cite us to no authority supporting their claim to the contrary.

It is further claimed by appellant that respondent was not entitled to equitable relief because it had an adequate remedy at law; it being insisted in that respect that the law provides a special legal remedy for the determination of the disputed boundary line under sections 3969–3972 of the Political Code. These sections provide that, when common boundaries and common corners of counties are not adequately marked by natural objects or lines, or by surveys lawfully made, they must be established by surveys jointly made by the surveyors of the counties affected thereby, to be approved by the boards of supervisors of such counties, or by a survey made by the surveyor general on application of the board of supervisors of any county

affected thereby. If the first mode is adopted, and the boards of supervisors do not agree, the surveyors must make a report to the surveyor general with surveys, maps, notes, and explanations touching disputed points. If from such data the surveyor general can collate a satisfactory description, he must finally determine and establish the common boundaries and corners. If the data is insufficient for that purpose, he must cause surveys to be made, and when approved by him, such surveys establish such common boundaries and corners. All surveys finally approved under the provisions of the sections are conclusive ascertainment of lines and corners included therein. No official survey of the boundary between the two litigating counties has ever been made. It must be conceded that counties have a right to sue and be sued, and that the superior court has jurisdiction in all cases in equity, and that this is an action in equity, but it is insisted by the appellant that under the provisions of the Code to which we have referred, a mode is fixed by the Legislature whereby the boundaries of counties must be ascertained; that this legal remedy must be exhausted before the matter of conflicting boundaries can be presented for judicial determination in a court of equity. *People ex rel. Borrell v. Boggs*, 56 Cal. 648. In the case cited it appears that the action was brought by a taxpayer against the tax collector of Napa county, to recover money paid for taxes under protest; his claim being that the property assessed was in Sonoma county, and not in Napa county. The boundary line between the two counties had been approved by the surveyor general. Plaintiff attempted to prove that the approved survey by the surveyor general was erroneous, but the trial court refused to admit the testimony, holding the action of the surveyor general regarding it conclusive. This court approved the judgment, holding to the same view. The point was there made that section 3972, declaring the approval by the surveyor general conclusive, was unconstitutional, as investing that officer with judicial power. In answer to this it was said: "We do not think that the functions exercised by him are judicial in their character. He is not, under that section, to decide what is the law. The Legislature had already, in regard to the boundary between the two counties, fixed the law, viz., that the summit of the dividing ridge should be the dividing line. We think, it was competent for the Legislature to direct its officer to go upon the ground and run his lines along that ridge, and in doing so he was acting merely in a ministerial capacity; and we think that it was competent for the Legislature to declare that the lines so run—that is, the location of the boundary line upon the ground—should be thereby defined and fixed."

But it is obvious that the question presented in the case at bar, and the matter

before the court in the case cited, call for the application of different principles of law. In the case cited the court grounded its conclusion on the fact that the statute defining the boundary had fixed the boundary line of the counties as the summit of the dividing ridge, and that the act, which the Code section directed the surveyor general to do with reference to the establishment of said boundary, was simply to go on the ground and in his ministerial capacity run his lines along the ridge. Of course, where the Legislature has fixed a boundary along a ridge, a well-defined course readily determinable and ascertainable, there is no action on the part of the surveyor general called for but to run his survey line thereon on the ground. Where the language of an act so clearly defines the line that there is nothing to be done but run a survey along it, there is no room for question, but the sections of the Code relied on by appellant furnish a plain, speedy, and adequate remedy for the establishment of the line, and that a court of equity cannot be called upon to do what the law in the first instance provided for having done. But this legal remedy can only be availed of where the language of an act defining a boundary is clear. Where it is not clear, and where the description of the boundary is of doubtful import, or where it requires the interpretation of a court to ascertain what is meant by the language of the statute when mentioning localities, natural objects, or sources of streams as matters of boundary, the sections of the Code have no application. To leave the construction or interpretation of doubtful language used in a statute to the determination of the surveyor general would be to confer upon that officer judicial functions which, under the Constitution, may not be done. The construction of doubtful language, and the interpretation of language used by the Legislature, are matters exclusively for the courts. When the courts have interpreted the language of the act, and declared what the boundaries in dispute are as matter of law, then only can surveyors or the surveyor general act, and they act then, in establishing the line on the ground, solely in a ministerial capacity, and where the court has interpreted, from the indefinite or doubtful language of a statute, the Legislature intended to fix it.

Now it will be observed, by reference to the language of the statute fixing the southern boundary of Sierra county, which we have heretofore quoted, that the location from which the point on the state line is to be fixed is due east from the "source of the South fork of Middle Yuba river." The source of a stream is defined to be "the spring or fountain head from which its supply of water proceeds; any collection of water within or upon the surface of the earth from which a stream originates." *New Revised Ency. Dic.* And as said by the trial court in discussing the present objection of appellant

on demurrer to the complaint: "This definition, when applied to a torrential stream in the high Sierras, makes the said language, or the meaning of it, very doubtful. It is but common knowledge that such stream has many and varied sources, usually covering a large extent of watershed, and varying in length as it extends into said watershed. The Legislature did not mean that all such sources should govern in locating the point on the state line. Which one, if more than one, was meant in this case? Did it mean the summit of the ridge at the head of the main stream which collects the volumes of water from melting snows into the main channel? The meaning of the Legislature in these respects must be determined before a survey can be correctly made. The source of the stream as intended by the act must be definitely fixed as a starting point. Will it be contended that the surveyor general is authorized to do this? Under the language of the Supreme Court in *People ex rel. Borrell v. Boggs*, supra, we think not. It would be calling on him to declare what the law was. The court alone can do this, under the rule which the law provides for construing statutes. Sections 1858, 1859, Code Civ. Proc., or as the Supreme Court in the case of the *County of Mariposa v. County of Madera*, 142 Cal. 52, 75 Pac. 572, says: 'The only question to be considered is the proper construction of special statutes, and certain sections of the Political Code relating to the disputed boundary. We have, in other words, merely to determine the intention of the Legislature according to the established rules of statutory construction.' This is all this court is asked to do in the case at bar, for when the source of the South fork of the Middle fork of the Yuba river is fixed according to the intention of the Legislature, the marking of the line on the ground will be but the work of the surveyors." We think this is the correct view. The common boundary between the counties, as far as the question is involved here, is the South fork running from its source to its junction with the Middle Yuba, and a line projected from its source to the state line east. What the source of the South fork is, is not definitely fixed or determined by the act, and could only be determined by judicial inquiry to ascertain its location. It is only upon its ascertainment that the line therefrom to the state line could be run, or a surveyor be able to locate by survey the line called for. If it could be said that it was purely a ministerial act of the surveyor general to ascertain from the language used in the act this source and make his survey accordingly, it would be difficult to conceive of a case where the language of an act could be so uncertain or indefinite as to boundaries of a county, or with reference to any point from which boundaries were to be measured, so that a court of equity could be ever invested

with jurisdiction to construe the language of an act and determine as matter of law what the boundaries intended to be fixed by it were.

These are the only matters requiring consideration.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

9 Cal. App. 344

RISDON v. STEYNER (TERRY, Intervener).
(Civ. 469.)

(Court of Appeal, Third District, California.
Nov. 14, 1908. Rehearing Denied Dec. 12, 1908; Denied by Supreme Court Jan. 13, 1909.)

1. PUBLIC LANDS (§ 144*)—LANDS OF STATE—SALE—RIGHTS OF ASSIGNEE.

An assignee of a purchaser of state land acquires all the interest of the original purchaser under his certificate.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 399; Dec. Dig. § 144.*]

2. JUDGMENT (§ 682*)—CONCLUSIVENESS—PERSONS CONCLUDED.

Where, in a contest as to the priority of applications to purchase state lands, the purchaser whose certificate was prior in time transferred all his rights in the land by mesne conveyances to intervenor, his default did not affect intervenor's rights as his successor nor constitute an admission by intervenor of any fact alleged in the complaint.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1203; Dec. Dig. § 682.*]

3. PUBLIC LANDS (§ 144*)—LANDS OF STATE—APPLICATION TO PURCHASE—PRIORITY—BURDEN OF PROOF.

In a contest between applicants to purchase state land instituted by the applicant who is subsequent in time, the burden of proof is on him to establish the invalidity of the prior application, especially where the person claiming thereunder is in possession.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 394; Dec. Dig. § 144.*]

4. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS.

Where, in a contest as to priority of applications to purchase state lands, the court determined that intervenor owned the property by reason of the validity of the prior application under which he claimed, contestant was not prejudiced by an alleged erroneous finding that the reference by the Surveyor General was without jurisdiction because plaintiff's affidavit and application was not filed until more than a year had elapsed since defendant had paid the full price for the land.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1071.*]

5. APPEAL AND ERROR (§ 664*)—STATEMENT—PRESENTATION—TIME—DISMISSAL OF APPEAL.

Where there is a conflict in the evidence as to the time of presentation of a statement for appeal, it must be resolved on a motion to dismiss in favor of the appellant and the action of the trial court in settling the statement.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2856; Dec. Dig. § 664.*]

Appeal from Superior Court, Shasta County; Chas. M. Head, Judge.

Action by Ruth C. Risdon against George

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W. Steyner; W. I. Terry, intervening. From a judgment for intervener, and from an order denying plaintiff's motion for a new trial, she appeals, and intervener moves to dismiss appeal. Motion to dismiss denied, and judgment affirmed.

See, also, 97 Pac. 73.

W. A. Gett and Braynard & Kimball, for appellant. W. D. Tillotson (C. H. Dunn, of counsel), for respondent.

BURNETT, J. On March 29, 1906, the Surveyor General of California as such and as ex-officio register of the state land office made an order referring to the superior court of Shasta county the question which had arisen in his office as to which of the persons, the plaintiff, Ruth C. Risdon, or the defendant, George W. Steyner, was entitled to purchase of the state of California the S. E. $\frac{1}{4}$ of section 7, the N. E. $\frac{1}{4}$ of section 18, and the N. $\frac{1}{2}$ of section 17, township 34 N., range 2 E., M. D. M. The said Ruth C. Risdon on March 24, 1906, had filed with the Surveyor General her application to purchase said land with a protest against the issuance of any further evidence of title to the said George W. Steyner, who had filed his application to purchase the same as state school lands on January 21, 1889. Within the 60 days from the making of said order, as prescribed by law, plaintiff instituted in the superior court of the said county of Shasta an action against the defendant to have it determined who was entitled to a patent to said land from the state. The said W. I. Terry, by permission of the court, filed an answer and complaint in intervention, setting up his claim as successor in interest by mesne conveyances to all the right, title, and interest of said Steyner in and to said property.

The particular ground upon which plaintiff sought to prevail over the former application of Steyner is disclosed by this allegation of her complaint: "That each and all of the statements contained in said affidavit and application of said defendant that he desired to purchase the land therein described for his own use and benefit, and for the use and benefit of no other person or persons whomsoever, and that he had made no contract or agreement to sell the same, was at the time when said affidavit and application was filed, as hereinbefore alleged, ever since has been, and now is, false and untrue, and defendant did not, at the time when said affidavit and application was filed as aforesaid, and never has, desired to purchase all or any part of said land in said affidavit and application described for his own use and benefit." The foregoing allegation is specifically denied by the intervener and separate grounds of defense are set up, which we need not consider in detail. Among other things, the court found that "on or about the 2d day of December, 1891, said defendant paid to the said Surveyor General for

said state of California the full balance of the purchase price of said lands"; that his application was approved by said Surveyor General and a certificate of purchase was issued to said defendant which he sold and assigned, together with all his interest in said lands, to one W. K. Slack, and that the intervener has been invested by mesne conveyances with all of said interest; furthermore, "it is not true that each and all or any of the statements contained in said affidavit and application of said George W. Steyner * * * were at the time said affidavit and application were filed, or at any other time, false and untrue or false or untrue." The judgment was in favor of said intervener, and the appeal is from this judgment and an order denying plaintiff's motion for a new trial.

The proceedings, as far as the respective applications before the Surveyor General, the order of reference, and the trial of the contest by the superior court are concerned, appear to have been regular. There is no doubt that the intervener succeeded to all the interest of the said Steyner in and to the premises in controversy, and that he stands in the same relation to the cause as Steyner would stand if he had not parted with his interest. The default of Steyner was entered, but manifestly that cannot affect the claim or rights of his successor, nor be deemed an admission on the part of the latter of any fact alleged in the complaint. The pleading filed by the intervener is styled a "complaint in intervention," but in effect it is an answer denying plaintiff's allegations of fraud and pleading the statute of limitations and adverse possession, and praying that "said plaintiff be forever enjoined from asserting any claim to the premises adverse to the intervener, and that she be enjoined from purchasing or attempting to purchase the same from the state of California" and for general relief.

Several questions are discussed by counsel, but the only vital controversy relates to the burden of proof as to fraud. Although plaintiff alleged in her complaint that Steyner's application was filed many years prior to her own and that the recitals of his affidavit were false, she insists that it devolved upon Steyner or his successor in interest to show affirmatively that the statements contained in said affidavit and application were not false, but true. The contention is based upon the theory that each of the parties before the court is an actor and must prove the statements in his affidavit and application as in the first instance before the Surveyor General. While the earlier decisions of the Supreme Court uphold appellant in his contention, the correct rule is stated in *Bieber v. Lambert*, 152 Cal. 557, 93 Pac. 94. We quote from the syllabus as follows: "If the action is brought by the one who first filed a proper application, the statement of facts showing that the land was

subject to sale, that he is a qualified purchaser, that he has made due application to purchase, that the defendant claims under a subsequent application, and that the order of reference has been made will sufficiently show his own right and the inferiority of the right of the defendant, and he need not allege other facts to show that the defendant was not entitled to purchase, or that his application is void by reason of false statements or otherwise, and in such a case, if the defendant offers no proof, the plaintiff is entitled to judgment, for his application being first in time is *prima facie* first in right; and it is also held that, "where the action is brought by the one whose application is second in point of time, he must aver that there is a claim under an adverse application, and, if he alleges that it was filed prior to his own, and it is not defective on its face, he must overcome the presumption in its favor arising from such priority by averment and proof of some fact or facts, establishing its invalidity, otherwise judgment will go against him."

As we have seen, the plaintiff made the averment that the application of Steyner was filed prior to her own and the facts were alleged to show its invalidity, but there was no proof whatever offered of those facts, and, as the application of Steyner and the certificate of purchase issued to him and all the proceedings in relation thereto appear to be regular, the presumptions, as stated in the Bleher Case, *supra*, "that the law has been obeyed, that the first applicant is innocent of the crime of perjury, and that official duty has been properly performed come to the aid of the defendant." It may be, as intimated by the Supreme Court, that the rule would be otherwise if the subsequent applicant were in possession of the property, but no such contention is made here. On the contrary, we find in intervenor's pleading the allegation: "For a further and separate defense to said action intervenor alleges that for more than 10 years last past his grantors and predecessors in interest (except the state of California) have been and this intervenor now is possessed and in the possession" of said lands. This is not denied in what is denominated the "answer of amended complaint in intervention" filed by plaintiff, and it was undoubtedly intended to be treated as admitted. We have therefore the additional element of possession in favor of respondent to fortify the presumptions to which reference has been made. Hence it follows that the court was justified in holding "that the said intervenor, W. I. Terry, is the owner of the lands described in plaintiff's complaint, and the application to purchase the same and the certificate of purchase issued thereon, upon which the title of

said W. I. Terry was based, were good and valid applications and certificates, and the said intervenor is and for a long time prior to the application to purchase said lands made by the said plaintiff was entitled to a patent from the state of California for all of the said described land upon surrendering said certificate of purchase."

The court further found: "That the order of said Surveyor General * * * referring such alleged contest to the superior court of the county of Shasta for trial and determination was without jurisdiction, and invalid." This finding was based upon the fact that at the time plaintiff filed her affidavit and application more than one year had elapsed since the defendant had paid to the state the full purchase price for said land. But, conceding this conclusion to be erroneous, the error is without prejudice, for the reason that the court heard the contest and decided that the intervenor was the owner of the property by reason of the validity of the prior application as already stated. The finding in relation to the contest became, therefore, and is immaterial, since without it the judgment finds ample support.

A motion has been made to dismiss the appeal on the ground that the statement was not presented in time. There is, however, a conflict in the evidence as to this, and the conflict must be resolved in favor of appellant and the action of the court below in settling said statement.

The motion to dismiss the appeal is denied. The judgment and order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

RISDON v. PREWETT et al. (TERRY, Intervener). (Civ. 468.)

(Court of Appeal, Third District, California. Nov. 14, 1908. Rehearing Denied Dec. 12, 1908; Denied by Supreme Court Jan. 13, 1909.)

Appeal from Superior Court, Shasta County; Chas. M. Head, Judge.

Action by Herbert T. Risdon against N. C. Prewett and another; W. I. Terry, intervening. From a judgment for intervenor, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed. Motion to dismiss appeal denied.

See, also, 97 Pac. 73.

W. A. Gett and Braynard F. Kimball, for appellant. W. D. Tillotson (C. H. Dunn, of counsel), for respondent.

PER CURIAM. This case is in all essential respects like *Risdon v. Steyner et al.* (No. 469, this day decided) 99 Pac. 377, and for the reasons therein stated the motion to dismiss the appeal is denied and the judgment and order denying the motion for a new trial are affirmed.

9 Cal. App. 352

DEAN v. DUNN. (Civ. 483.)

(Court of Appeal, Third District, California.
Nov. 16, 1908.)

1. PUBLIC LANDS (§ 144*)—LANDS OF STATE—
RIGHT TO PURCHASE—MARRIED WOMEN—
APPLICATION.

Under Pol. Code, § 3496, providing that, if the applicant to purchase state land is a female, the affidavit must show that she is entitled to hold real estate in her own name, an affidavit alleging that the applicant was married and a native-born citizen of the United States, a citizen of the state, and of lawful age was sufficient to establish her personal capacity to purchase.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

2. PUBLIC LANDS (§ 144*)—LANDS OF STATE—
RIGHT TO PURCHASE—CONTEST—BURDEN
OF PROOF.

Where a protest against an application to purchase state land is filed and suit brought in support thereof by the person whose application is second in time and the first application is not defective on its face, the burden is on the contestant to allege and prove its invalidity.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

3. PUBLIC LANDS (§ 144*)—STATE LANDS—
SALE—CERTIFICATE—PRIMA FACIE EVIDENCE.

Under Pol. Code, § 3514, providing that a certificate of sale of state land is prima facie evidence of title in the holder, the burden is on a contestant to controvert or overcome the presumptions arising therefrom.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

4. DOMICILE (§ 10*)—MARRIED WOMEN—EVIDENCE.

Evidence held to sustain a finding that, at the time defendant applied to purchase certain state land in controversy, she was a resident of the state.

[Ed. Note.—For other cases, see Domicile, Dec. Dig. § 10.*]

5. ADVERSE POSSESSION (§ 13*)—NATURE OF
OCCUPANCY—EVIDENCE.

Plaintiff constructed and maintained for a time a reservoir on the land in controversy to reclaim adjacent desert lands taken up by him. After he acquired such land, for many years he had not used the reservoir for irrigating purposes, but only to water stock, and the pipes leading from the reservoir had been for years unfit for use. The reservoir was not inclosed by a fence, and other stock raisers used it as well as plaintiff. Held, that there was no occupation of the land by plaintiff adverse to defendant.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 13.*]

6. PUBLIC LANDS (§ 144*)—LANDS OF STATE—
PURCHASE—INDIVIDUAL BENEFIT.

Where a married woman purchased certain state land, her declaration that, in making the application, she desired to purchase for "our own benefit," meaning that she expected to permit her husband to graze his sheep on the land, did not show that she did not desire to purchase for her own use and benefit, and for that of no other person whomsoever.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.*]

Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by Thomas R. Dean against Anna

Elizabeth Dunn. Judgment for defendant, and plaintiff appeals. Affirmed.

J. H. Stewart and R. M. Rankin, for appellant. Pardee & Pardee, for respondent.

HART, J. On September 23, 1905, the defendant made an application in due form for the purchase of certain lieu land and thereafter the same was received and filed in the office of the Surveyor General, and subsequently, on the 30th day of April, 1906, was approved by that officer, and on July 6, 1906, the Surveyor General, as register of the state land office, issued to her a certificate of purchase, numbered 5257. On the 5th day of November, 1906, the plaintiff filed in the office of the Surveyor General his application to purchase the same land, and at the same time filed a verified protest against said application of defendant, together with a demand that the conflicting claims of plaintiff and defendant to purchase said land be referred to the proper court for adjudication. The plaintiff's application having thereupon been filed and numbered 5437, the Surveyor General, as ex officio register of the state land office, caused to be issued from his office an order of reference, by which the contest was referred to the superior court in and for Lassen county. Within 60 days after the order of reference (section 3417, Pol. Code), the contestant (plaintiff) filed his complaint in said superior court, and the defendant made answer thereto. The court found in favor of the defendant on all the material facts in the case and gave judgment accordingly. This appeal is by the plaintiff from said judgment upon a bill of exceptions.

The plaintiff, in his complaint, among other things, alleges: (1) That the statement contained in defendant's application to purchase the land in controversy that she desired to purchase the same from the state under the provisions of title 8 of the Political Code of this state was at the time made, and still is, false and untrue. (2) That her statement in said application that she desired to purchase said land for her own use and benefit, and for the use and benefit of no other person or persons whomsoever, was and is false and untrue. (3) That her declaration in said application that at the time said application was made she was a resident of the state of California was and is false and untrue. (4) That the defendant stated in her application that she was a married woman, but failed to state in said application and affidavit "that she is entitled to purchase and hold real estate in her own name," as required by section 3496 of the Political Code. (5) "That plaintiff alleges the fact to be that the statement contained in said defendant's application to purchase said land, that there was no occupation of said land adverse to any that she had, then

and there was and still is false and untrue." The foregoing averments of the complaint involve all the points urged against defendant's right to purchase said land, and it is here contended that the court's findings upon said points in favor of the defendant are not supported by the evidence.

The application of the defendant filed with the Surveyor General for the purchase of the land in dispute reads as follows: " * * * I, Anna Elizabeth Dunn, of Madeline, Lassen county, do hereby apply to purchase the land hereinafter described, and in support of my application I do solemnly swear that I am native born, a citizen of the United States, a resident of this state, of lawful age. That I desire to purchase from the state of California, under the provisions of title eight of the Political Code, the following described land in Lassen county, to wit: * * * containing 359.97 acres. That there is no occupation of said land adverse to any that I have. That I desire to purchase the same for my own use and benefit, and for the use or benefit of no other person or persons whomsoever, and that I have made no contract or agreement to sell the same. That said land is not suitable for cultivation; that I have not entered any portion of any lands mentioned in section three thousand four hundred and ninety-four of the Political Code (to wit, the unsold portion of the five hundred thousand acres granted to the state for school purposes, the sixteenth and thirty-sixth sections, and the lands selected in lieu thereof), which, together with that now sought to be purchased, exceeds 359.97 acres; and that said land is not timbered land." The said application was sworn to before a notary public. The plaintiff testified that in the year 1887 he built a dam 150 feet long, 26 feet high, and 20 feet wide on top, on a portion of the land in controversy, "for the purpose of holding water upon said land as a reservoir, and used the same ever since for stock and irrigation purposes; that he used said reservoir in the reclamation of desert lands about a quarter of a mile from said dam; that the water held by said dam covers about two-thirds of said 40 acres; that there has been water held in said reservoir every year since it was built." He declared that there was no other land, except that used for reservoir purposes, embraced in his application which was occupied by him in any way. The deposition of the defendant was then introduced in evidence by the plaintiff. She stated that, when she made her application to purchase the land, she was a resident of California, living in Clark's Valley, Lassen county; that in making the application she actually desired to purchase the land for "our benefit"; that she had no agreement to sell the same, nor any understanding "with any person whomsoever by which the title I might acquire would go to the benefit of any person except myself"; that at the time of the ap-

plication she was married; that at that time she had no other home, but "regarded Clark's Valley as my home at that time"; that she was under no disability which prevented her from holding property in her own name "that I know of"; that she had never previously made any other application for school lands in California. On cross-examination she admitted living during her married life of six years at Roop, Nev., in the winter months, but declared that in the summer she made California her home. She testified that her husband was engaged in the stock business; that he grazed his stock in the summer in Clark's Valley; that she intended, when she filed on the land in dispute, to return to Nevada with her husband after he had finished attending to the grazing of his cattle in Clark's Valley, in November some time. She also testified that her husband was postmaster at Roop, Nev.; that Roop was not a town, but that a post office was located there to accommodate the "ranch hands" in the matter of their mail; that her husband was the manager of the ranch upon which the Roop post office was located. The witness explained that she meant by the statement that "I actually desired to purchase the land for our benefit," that she would probably, upon completing title, permit her husband to graze his sheep upon the land.

Thomas J. Cox, called by plaintiff, testified that he had lived in Clark's Valley for over 20 years; that the home of James Dunn, husband of defendant, was in the state of Nevada in 1905; that Mr. and Mrs. Dunn did not reside in Clark's Valley in the year 1905. William H. Earl, a witness for the defendant, and a surveyor and civil engineer by profession, testified that he had known Mrs. Dunn for about 10 years; that in the month of September, 1905, she was living at Clark's Valley, Cal. He further testified as follows: "I know the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 20, township 36 N., range 12 E. I heard Mr. Dean's testimony in regard to the size of the dam on that 40. His testimony was approximately correct. I was there in August, 1905, and again, I think, in September last year. There was very little water in the reservoir in 1905; only about two or three acres covered with water. I run contours to ascertain what the area of the reservoir would be if it were full. The area would be about 12 acres. I noticed the pipes through the embankment. There were no headgates to them. The pipes were covered with dirt at both ends. There were no other improvements on the land." The foregoing involves a fair review of the testimony presented by the record covering the principal points in the case.

The most serious point urged against the defendant's right to purchase the land in dispute involves the finding of the trial court that, at the time she made her application to purchase said land, she was a resident of the

state of California. But we will first dispose of the other contentions of the appellant.

The defendant's application was not, as contended, fatally defective in that it omitted to "show she was entitled to purchase and hold real estate in her own name." She declared therein that she was "native born, a married woman, a citizen of the United States, a citizen of this state, of lawful age." The Political Code (section 3496) provides: "If the applicant is a female, the affidavit must show that she is entitled to purchase and hold real estate in her own name." We think the defendant's affidavit was sufficient to meet the requirement of that section. If the facts as therein stated were true, undoubtedly she was entitled at the time of the application to purchase and hold real estate in her own name. Section 3444 of the Political Code contains a similar provision relating to the purchase by a female of swamp and overflowed, salt marsh, and tide lands. In *Price v. Beaver*, 73 Cal. 625, 15 Pac. 356, the same point was urged against the respondent in that case, she having, with her application to purchase swamp and overflowed land, filed an affidavit almost identical in language to the one here. The Supreme Court rejected the point, saying: "There is nothing in this point. The Code, as we have seen, says that the affidavit must show a female is entitled to purchase, not simply state that fact. The defendant's affidavit fully complied with the law in this respect, and was sufficient."

The second point urged by the appellant virtually involves all the other vital findings of the court, and, therefore, necessarily the question of whether the defendant was a resident of California at the time of her application. Counsel for appellant seem to assume that it is the rule in this state that the burden lies with the defendant to prove the truthfulness of all the material averments of her affidavit, and that failure to do so would lose to her the right to purchase the land under her application. But our Supreme Court has quite recently made it very clear that such is not the correct rule; but that, "where the action is begun by the person whose application is second in point of time, the conditions are, or may be, reversed. In order to show that there is any contest to try, he must aver that there is a claim under an adverse application. If he alleges that this was filed prior to his own, and it is not defective on its face, he must overcome the presumption in its favor arising from such priority by averment and proof of some fact or facts establishing its invalidity. If his own proof shows a prior application by another party and the issuance of a certificate thereon by the Surveyor General and no defect or invalidity appears on the face of these papers, and no outside evidence is given to impeach them, such plaintiff must fail." *Bieber v. Lambert et al.*, 152 Cal. 557, 93 Pac.

94. See, also, *Risdon v. Steyner* (decided on November 14, 1908, by this court) 99 Pac. 377. The case at bar presents the same conditions as existed in the case from which the foregoing excerpt is taken. The action here is brought by the person whose application was second in point of time, and he charges that the application of the defendant is founded on an affidavit whose material averments are false and untrue. "The presumptions that the law has been obeyed, that the first applicant is innocent of the crime of perjury, and that official duty has been properly performed come to the aid of the defendant." *Bieber v. Lambert*, supra. Besides, the certificate itself is in express terms made prima facie evidence of title in the holder (section 3514, Pol. Code), and the burden was upon the plaintiff to controvert or overcome the presumptions in favor of defendant by proof introduced for that purpose.

We think the plaintiff signally failed to overcome the presumptions favoring defendant's right to purchase the land in dispute, and that the court found sufficient support from the evidence to uphold the finding that the defendant was a resident of California at the time she filed her application to purchase the land in question. She positively testified that she was a resident of this state at the time, and the witness Earl, who had been in her employ, strongly corroborated her upon the point. The most significant and potent fact tending to establish her residence to have been in another state when she applied for the purchase of the land is in the admission that her husband was postmaster at Roop, in the state of Nevada, at that time. But an examination of the testimony will show, as we have already seen, that "Roop" was not a town or a village, but merely the headquarters of defendant's husband when, as manager of an extensive "ranch," he found it necessary to be present on that part of said "ranch" situated in the state of Nevada. The "ranch," it seems, was owned by a corporation, and a portion was situated in the state of Nevada and a portion in California. The post office was not, as previously shown, established so much for the benefit of the general public as for the purpose of accommodating the employés of said "ranch." In fact, that appears to have been the exclusive purpose of establishing a post office at Roop. It is not shown whether the defendant's husband was a voter in the state of Nevada, nor was any other fact made to appear other than that Dunn himself was postmaster at Roop, tending to contradict the defendant's positive and unqualified declaration that she was a resident of this state when she made and filed her application. The testimony of a witness named Cox, a cook by occupation, in substance amounted to no more than a declaration that he did not see Mrs. Dunn in Clark's Valley about the time of the filing of her application. It may be admitted that if the residence of the defendant's husband had

been clearly and unmistakably shown to have been at Roop, Nev., when the application was made by her to purchase the land concerned here, it would have constituted sufficient proof to have established her residence in the state of Nevada. Section 103, Civ. Code. But the proof upon this point is not, as before observed, clear and convincing. He spent almost as much of his time in California as in Nevada. His business called him to both states at different seasons of the year, and we therefore think the plaintiff failed to impeach by the necessary proof the statement in defendant's affidavit that she was a resident of California at the time she filed her application to purchase this land.

The plaintiff undertook to show that he had been in the occupancy of a portion of the land in dispute for many years prior to defendant's application to purchase. The alleged occupancy consisted in the construction and maintenance for a time of a reservoir in which to store water primarily intended to be used for irrigating and thus reclaiming certain adjacent desert lands, "taken up" by plaintiff under the "Desert Land Act." Since running water on the desert land from the reservoir, after he "proved up" on said land, many years ago, he had not used it for irrigating purposes, but only for the purpose of furnishing water for his stock. He testified that the reservoir was not inclosed by a fence, and that other stock raisers equally with himself had used the water therefrom for their stock—in fact, the reservoir appears to have been used in common by all the stock raisers of the vicinity in which it was maintained. But the witness Earl described the condition of the reservoir and the pipes leading therefrom to be such for many years as to render it of no practical use. He said that there were no headgates to the pipes, and they were "covered with dirt at both ends." The court was justified in finding from the testimony of this witness that there was not and had not been occupation of the land adversely to defendant.

The appellant further contends that the testimony shows that the defendant did not desire to purchase the land for "her own use and benefit, and for the use and benefit of no other person or persons whomsoever." This contention is based upon the statement, before referred to, made by the defendant on her cross-examination, that "in making this application I actually desired to purchase the lands for our own benefit." The defendant in the same connection declared: "I had at the time no agreement to sell the same, and have had none since. I had no understanding with any person whomsoever by which the title I might acquire would go to the benefit of any person except myself." We have already seen that she explained that portion of her statement in which she used the expression "our benefit," and the explanation

seems to have been satisfactory to the trial court.

We think that there is absolutely no room for doubting the sufficiency of the evidence to support all the material findings of the trial court. It was, as we have pointed out, incumbent upon the plaintiff, under the pleadings here, in order to sustain his complaint, to impeach the truth of the essential averments contained in the affidavit accompanying defendant's application to purchase this land. He failed to sustain the burden thus resting upon him.

The judgment, for the reasons set forth herein, is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

9 Cal. App. 338

PEOPLE v. CHARLES. (Cr. 104.)

(Court of Appeal, Second District, California.
Nov. 13, 1908. Rehearing Denied by
Supreme Court Jan. 12, 1909.)

1. CRIMINAL LAW (§ 788*)—INSTRUCTIONS—FAILURE TO INTRODUCE EVIDENCE.

Where accused did not testify nor introduce testimony directly denying or explaining the prosecution's testimony, it was prejudicial error to instruct that evidence is to be estimated by its own intrinsic weight, and also according to the evidence which it is in the power of one side to produce and of the other to contradict, and that hence, if less satisfactory evidence is offered when more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust, especially in view of another instruction that the prosecution need not call as its own witnesses all persons shown to have knowledge of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1855; Dec. Dig. § 788.*]

2. CRIMINAL LAW (§ 775*)—INSTRUCTIONS—ALIBI.

It was not error to refuse to instruct on the defense of alibi, where accused's proof did not tend to show that he could not have been at the place of the offense at the time shown by the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1833; Dec. Dig. § 775.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

George W. Charles was convicted of robbery, and he appeals. Reversed and remanded.

T. M. McNamara and V. Rapp, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Defendant was informed against for the crime of robbery, which crime was shown to have been committed in El Centro, Imperial county, by the "holding up" of the keeper of a pool hall in his place of business, about 11:30 o'clock p. m. of the night of March 11, 1908. It is urged that the verdict of guilty and the judgment of the court resting thereon should be set aside

and reversed because of the giving to the jury by the trial court of the following instruction: "Evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict. Therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with distrust"—the defendant not having testified in his own behalf, or introduced any evidence in direct denial or explanation of the testimony of the prosecution.

The contention of the appellant is clearly sustained by the decision in *People v. Cuff*, 122 Cal. 589, 55 Pac. 407, where the same instruction was given and held to be prejudicially erroneous. In that case the jury were also instructed that the neglect or refusal of the defendant to be a witness in his own behalf could not in any manner prejudice him, or be used against him on the trial or proceeding; the court's instruction in that case being in this respect substantially the same as that of the trial court in this, which was that "no inference of guilt can be drawn against him [defendant] for a failure to testify in his own behalf." In both cases the vice of giving the instruction complained of was due to the fact that the defendant did not go upon the witness stand in his own behalf. In the opinion in the *Cuff* Case the attention of trial courts is called to the danger of giving instructions in criminal cases based upon subdivisions 4, 6, and 7 of section 2061 of the Code of Civil Procedure, which section by its terms limits such giving to "proper occasions." It is said: "In criminal cases the proper occasions are so few, and the improper occasions are so many, that it were best they should be given rarely, if at all."

While it is true that in respect to some instructions based upon certain of the subdivisions of this section, the Supreme Court has in later cases, declared them to be mere commonplace matters that jurors would be presumed to know about and act upon in the absence of such instruction, the court has gone no further than to say that the giving or refusal of such instructions will be held to be ground for reversal only where prejudicial to the defendant's case. In just such a case as this, however, that court has declared the instruction here under consideration to be prejudicially erroneous. We can therefore find no ground upon which to sustain the Attorney General's attempt at distinguishing the case of *People v. Cuff* from that at bar. Indeed, we are inclined to the view that, taking into consideration instruction 14, given by the trial court in this case, which is as follows: "The court instructs the jury that the prosecution is not required to call as its own witnesses all persons who were shown

to have knowledge of the case"—the effect of the entire charge of the court was to specifically direct the erroneous instruction toward the defendant's case, thus rendering the error in the case at bar more prejudicial than it was in the *Cuff* Case.

The refusal of the court to give the instructions based upon a defense of an alibi was not error. Neither of the two witnesses called on behalf of the defendant pretended to testify to his whereabouts at the time of the commission of the offense. The theory of the prosecution and all its evidence tended to show the offense was committed about 11:30 p. m. One of the witnesses for defendant saw him last before this time at 10 or 15 minutes after 10 o'clock, and the other at half past 8 or 9; the latter seeing him again when he came to bed, but without knowledge of the time. The circumstances of the transaction show that, accepting the testimony of both these witnesses as true, the defendant might still have been at the place of the commission of the offense at the time shown by the people's case.

The other specifications of error are not well taken, and no good purpose can be served by considering them in detail.

The giving of the instruction first above mentioned was reversible error, and for this reason the judgment and order are reversed, and the cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 350

KENNY v. KENNEDY. (Civ. 527.)

(Court of Appeal, Second District, California.
Nov. 16, 1908.)

1. NEGLIGENCE (§ 117*)—CONTRIBUTORY NEGLIGENCE—NATURE OF DEFENSE.

Contributory negligence must be affirmatively established by defendant, where it does not appear on the face of the complaint or cannot be inferred from plaintiff's evidence, and in such case it must be pleaded, since if there were no issue as to contributory negligence no finding thereon would be required.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 195; Dec. Dig. § 117.*]

2. APPEAL AND ERROR (§ 837*)—REVIEW—CONTRIBUTORY NEGLIGENCE—ISSUE NOT MADE BY PLEADINGS.

Where no issue as to contributory negligence is presented by the pleadings, in determining the question on appeal, only the evidence presented by plaintiff in establishing his case may be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 837.*]

3. NEGLIGENCE (§ 134*)—CONTRIBUTORY NEGLIGENCE—ACTIONS—EVIDENCE.

In an action for negligently selling plaintiff gasoline, instead of kerosene, plaintiff's evidence held not to show that he was negligent.

[Ed. Note.—For other cases, see *Negligence*, Dec. Dig. § 134.*]

4. NEW TRIAL (§ 108*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Newly discovered evidence merely cumulative, to be ground for a new trial, must be such

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as to render a different result probable upon the new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

5. APPEAL AND ERROR (§ 981*)—REVIEW—DISCRETION OF COURT—NEW TRIAL.

Whether affidavits of newly discovered cumulative evidence, presented on motion for a new trial, show such evidence as to render a different result probable upon a new trial, is for the trial court in the exercise of its discretion, the exercise of which will not be disturbed in the absence of a clear abuse.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3876; Dec. Dig. § 981.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by C. E. Kenny against E. I. Kennedy. From a judgment for plaintiff and an order denying a new trial, defendant appealing. Affirmed.

Haas, Garrett & Dunnigan, for appellant.
Powers & Holland, for respondent.

ALLEN, P. J. Action for damages. Findings and judgment against defendant, who appeals from the judgment and an order denying a new trial.

The findings of the court, all of which have support from the evidence, are, in effect: That plaintiff, through his wife, authorized in that behalf, applied to defendant, who was his family grocer, for a can of coal oil; that defendant in attempting to fill such order, carelessly and negligently delivered to plaintiff's wife gasoline instead of coal oil; that the wife of plaintiff, in ignorance of such fact, filled the lamps with the article purchased, and an explosion resulted, causing the destruction by fire of plaintiff's house and personal property.

No issue as to contributory negligence is presented by the pleadings, notwithstanding which fact defendant insists that the record discloses such contributory negligence upon the part of plaintiff as to preclude recovery. "It is the settled rule in this state that contributory negligence is a defense to be affirmatively established by the defendant, unless it is shown or can be inferred from the evidence given in support of the plaintiff's case." *Green v. Southern Pacific Co.*, 132 Cal. 254, 64 Pac. 255. "Contributory negligence is matter of defense, where it does not appear upon the face of the complaint, or by the evidence for the plaintiff." *Cahill v. Stone et al.* (Cal.) 96 Pac. 84. If therefore, under such circumstances, it is a matter of defense, it is incumbent upon the defendant by his answer to plead the same that he may avail himself of such defense, for, there being no issue as to contributory negligence, no finding in relation thereto would be required. *Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940; *Smith v. Ogden and N. W. R.*

Co., 33 Utah, 129, 93 Pac. 185. Under this rule, we may not upon this appeal, in determining the question of contributory negligence, consider any evidence other than that presented by plaintiff in establishing his case. A reference to plaintiff's evidence discloses that there is nothing therein tending to show contributory negligence. It is true that the wife of plaintiff testifies that on the night preceding the fire the lamps, which had been filled from the article purchased from defendant, acted badly and were extinguished on account thereof, and that on the day following she inquired of defendant as to the character of the oil he had furnished her upon which occasion defendant assured her that the oil was all right, but gave as an opinion that the burners of her lamps were defective. The wife of plaintiff then cleaned the burners, refilled the lamps, and at nightfall lighted them, when one of the lamps exploded. There is nothing in the evidence indicating that the opinion of the defendant as to the defect in the burners had any foundation in fact, or that the burners were in any wise defective, but, on the contrary, the evidence is most satisfactory that the article sold was gasoline, unfit for use in a lamp, dangerous, and on account of its peculiar character an explosion was inevitable.

We perceive no error in the action of the trial court denying the motion for a new trial based upon the affidavits of newly discovered evidence. By these affidavits defendant sought only to contradict certain witnesses of plaintiff who testified upon the trial. Applying to newly discovered evidence of this character the rule applicable where newly discovered evidence is merely cumulative, which is that the newly discovered evidence should be of such a character as to render a different result probable upon the new trial, and which fact is for determination by the trial court in the exercise of a sound discretion (*Oberlander v. Fixen & Co.*, 129 Cal. 692, 62 Pac. 254), we see no reason why the action of the trial court in this instance should be disturbed. The record discloses that the cause was tried by the court without a jury. The trial court, then, upon this motion for a new trial had before it the affidavits, and in denying such motion determined that the statements contained in the affidavits were not of such character as to change the result or affect the judgment of the court. In determining the effect of affidavits of this character a discretion reposes in the trial court, and its action will not be disturbed unless an abuse of such discretion is made apparent. No such abuse of discretion is here shown.

Judgment and order affirmed.

We concur: SHAW, J.; TAGGART, J.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
99 P.—25

9 Cal. App. 301

PEOPLE v. HAYES. (Cr. 153.)

(Court of Appeal, First District, California.
Nov. 9, 1908.)

1. HOMICIDE (§ 309*)—MANSLAUGHTER—MALICE—EVIDENCE.

Evidence, in a homicide case growing out of labor troubles and a conflict between union and nonunion men, showing that both parties to the conflict were armed with pistols, that both parties had previously armed themselves in anticipation of a possible conflict, that on the conflict arising both parties evinced a readiness to draw their pistols and promptly did so, a conflict as to who fired the first shot, but a certainty that defendant was wounded by a shot fired by deceased, an uncertainty as to who fired the shot that killed deceased, and the fact that, while defendant had deceased covered with his pistol all the time they were crossing the street, he only shot when deceased attempted to draw his pistol, presents a question of a killing without malice, requiring the submission of the issue of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 655; Dec. Dig. § 309.*]

2. CRIMINAL LAW (§ 368*)—EVIDENCE—CONDUCT OF THIRD PERSONS.

The state, on a prosecution for the killing of a nonunion man by a union man, may not show that persons, who were with the union men and defendant on the occasion, but who had not been examined as witnesses, had subsequently falsely denied being present.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 368.*]

3. HOMICIDE (§ 203*) — EVIDENCE — DYING DECLARATIONS—PREDICATE.

It was not error to refuse admission of the statement of deceased as a dying declaration that he fired the first shot at defendant; it being necessary to show that he made it under a sense of impending death, and that he had given up all hope of living, and the only evidence on that point being that on the way to the hospital deceased said, "I am done for," but that on arriving there the physician told him "his chances were pretty slim," implying that he did have some chance of living.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

4. HOMICIDE (§ 161*) — EVIDENCE — SUBSEQUENT CIRCUMSTANCES.

It being competent for the state to show that any or all the crowd that followed deceased and his brother, in a trouble between union and nonunion men, and were present at their shooting, were armed with loaded pistols, it could for such purposes show that immediately after the shooting one of them was seen running from the place unloading a pistol; this supporting the inference that it was loaded when he was with the crowd following the brothers, and that the killing was done in pursuance of a conspiracy.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 161.*]

5. HOMICIDE (§ 158*)—EVIDENCE—PREVIOUS STATEMENT.

Testimony that when on the day of, but some time before, the shooting, defendant was seen with a revolver, he said he was liable to use it before night, that the other crowd were carrying revolvers, and he was going to carry one too, was admissible; the circumstances strongly indicating that he referred to a crowd of nonunion men, on one of whom he did use the pistol before night.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.*]

6. CRIMINAL LAW (§ 364*)—RES GESTÆ.

Testimony that immediately after the shooting of nonunion men the crowd of union men, in which defendant was, scattered and ran, is admissible as part of the res gestæ; such act being the natural and spontaneous outgrowth of the main occurrence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805-818; Dec. Dig. § 364.*]

Appeal from Superior Court, Humboldt County; G. W. Hunter, Judge.

John Hayes was convicted of murder, and appeals. Reversed and remanded for new trial.

J. F. Quinn and Wm. Kehoe, for appellant.
Attorney General Webb, for the People.

HALL, J. Defendant was charged by information with the crime of murder for the killing of one William S. Jenks on the 8th day of January, 1907, in Humboldt county. Upon his trial the jury returned a verdict finding him "guilty of murder in the second degree at the extreme mercy of the court." Defendant made a motion for a new trial, which was by the court denied, and judgment was rendered that he be imprisoned for the period of 20 years. Defendant appealed from the judgment and order denying his motion.

The first and principal contention of appellant is that the court erred in refusing to give to the jury an instruction requested by defendant upon the subject of manslaughter. The court not only refused to give the requested instruction, but gave no instruction whatever upon the question of manslaughter.

The pertinent part of the instruction requested and refused is as follows: "But I charge you that murder, whether in the first or second degree, is the unlawful killing of a human being, with malice aforethought, and unless the malice aforethought is shown beyond a reasonable doubt the person doing such killing could not be found guilty of any higher crime than manslaughter, which is the unlawful killing of a human being without malice, and is of two kinds: (1) Voluntary, upon a sudden quarrel or heat of passion; (2) involuntary, in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death in an unlawful manner or without due caution or circumspection." It is not, and cannot be, contended that the requested instruction is not a correct statement of the law; but it is contended by respondent that there is no evidence in the record that tends to prove an unlawful killing without malice, and upon this ground justifies the refusal of the instruction. With this contention we find ourselves unable to agree.

The killing of William S. Jenks grew out of certain labor troubles in the city of Eureka. In the same affray his brother Albert Jenks was killed, and appellant shot through the body. On the 8th day of January, 1907, the steamer Gualala was being unloaded at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the wharf at the foot of Whipple street in the city of Eureka by a gang of nonunion stevedores. This was offensive to the members of the Longshoremen's Union, who, to the number of 30 or 40, including defendant, congregated near the foot of Whipple street shortly before the men engaged in unloading the steamer would quit work. A number of the union men were armed with pistols, as were also some of the men engaged in unloading the steamer. Both William and Albert Jenks were armed with pistols, and they were about the last, if not the last, of the men engaged in unloading the steamer to quit work for the day. This they did at about 5 o'clock, and took their way up Whipple street, passing through the crowd of union men without molestation, as previously had the other nonunion men, save that one Davis had been asked if he was scabbing, and had been chased and stoned by some members of the crowd. The Jenks brothers soon overtook two fellow workmen, Caughey and Stein, and with them proceeded on their way, walking on the sidewalk on the north side of Whipple street, going easterly; Caughey being between William and Albert Jenks, and Stein in the rear. The crowd of union men soon followed the group of nonunion men. Much evidence was given which tended to show that in so doing they had a hostile purpose towards the departing nonunion men; but, on the other hand, evidence was given by defendant and witnesses called on his behalf tending to prove that they did so with no hostile or unlawful purpose, but with the intent to disperse to their various homes, following the suggestion of one of their number that they go home. When the crowd of union men reached a point opposite a row of cottages on Whipple street, Hayes, who was armed with a pistol, worn at a belt, in front of his person, stopped and got a wheel that he had previously left there. He mounted the wheel, and started on; the crowd of union men giving way for him. He overtook the nonunion men and passed around them; his wheel falling upon the sidewalk in front of the Jenks brothers and Caughey. There is evidence that tended to prove that he intentionally dropped his wheel, and immediately drew his pistol and covered William Jenks with it. On the other hand, defendant gave evidence that, as he passed the Jenks brothers, they jumped from the sidewalk, and William attempted to draw his gun, which was worn at a belt under his coat; that this so startled him that he lost his balance on the wheel, and immediately covered William Jenks with his gun, and commanded him not to draw his gun or he would shoot. At any rate, there is considerable evidence that as they left the sidewalk William Jenks attempted to draw his gun, and Albert Jenks did draw his gun. There is a conflict in the evidence as to who first attempted to draw. The evidence shows that the members of the crowd of union men clos-

ed up, and that one, called "Art Smith," covered one of the Jenks brothers. The opposing groups crossed the street obliquely. The street is 60 feet in width and without a sidewalk on the south side. No shooting occurred until the Jenks brothers had entirely crossed the street. There is much evidence to the effect that the two groups, as they crossed the street, faced each other, each in a menacing attitude toward the other, defendant and Art Smith covering one of the Jenks brothers, and William Jenks with his hand on his gun at his belt, and Albert Jenks with his gun in his hand. While crossing the street defendant and William Jenks were but five or six feet apart. Several witnesses heard defendant tell William Jenks not to draw his gun, or he would shoot, and William reply that he would draw his gun. When the Jenks brothers had entirely crossed the street, the firing commenced, with the result that Albert Jenks was killed on the spot, falling with his pistol in his hand, William Jenks was shot four times, from the effects of one of which shots he subsequently died, and defendant was shot through the chest by William Jenks. There is a sharp conflict as to who fired the first shot. Defendant testified that, his attention being for a moment distracted, William Jenks drew his gun and shot defendant through the chest, who returned the fire. Other witnesses testified in support of this contention. On the other hand, there was evidence given that the first shot was fired by Art Smith, and also evidence that the first shot was fired by defendant. Other persons from the union crowd also fired shots, but the evidence does not show what particular person fired the shot that killed Jenks. He was wounded four times, but three of the wounds were unimportant as to results, and only one of the wounds had anything to do with causing death. Various witnesses estimated the number of shots at from seven or eight to fifteen.

From the foregoing statement of the evidence it is apparent that we have a case resulting in homicide, where both parties to the conflict were armed with guns, and where both parties had previously armed themselves in anticipation of a possible conflict; where, upon the conflict arising, both parties evinced a readiness to draw their guns and promptly did so; a conflict as to who made the first hostile demonstration, and a conflict as to who fired the first shot, but a certainty that defendant was wounded by a shot fired by deceased, while it is uncertain as to who fired the shot that killed deceased. The bullet that produced the fatal wound was shown to be much larger than the bullets that produced the other wounds, but which, if any, of the bullets corresponded with the caliber of the pistol used by defendant does not appear from the evidence. Upon this state of the evidence, we are clearly of the opinion that the court should have submitted to the jury the issue of manslaughter.

The case of *Stevenson v. United States*, 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980, is a case in its essential particulars similar to the case at bar. In the *Stevenson* Case the judgment was reversed solely for the reason that the trial court refused to submit to the jury the issue of manslaughter. The language of the court, speaking through Justice Peckham, is exceedingly appropriate to the matter before us. It was there said: "The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder. It is difficult to think of a case of killing by shooting, where both men were armed and both in readiness to shoot, and where both did shoot, that the question would not arise for the jury to answer whether the killing was murder or manslaughter, or a pure act of self-defense. The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court." In this case both men were armed and ready to shoot, and both did shoot. The trial court seems to have been of the opinion that the evidence showed either an unlawful killing with malice aforethought, or a killing in necessary self-defense. This was also the position of the trial court in the *Stevenson* Case, supra, and upon this subject it was said: "The ruling of the learned judge was to the effect that, in this case, the killing was either murder, or else it was done in the course of self-defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility, and tendency of the evidence, and decided as a matter of law what it seems to us would generally be regarded as a question of fact, viz., whether, under all the circumstances which the jury might, from the evidence, find existed in the case, the defendant was guilty of murder, or whether he killed the deceased, not in self-defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self-defense, and yet this question of fact is, under the evidence in the case, determined by the trial court as one of law and against the de-

fendant." See, also, *Gonzales v. State*, 35 Tex. Cr. R. 33, 29 S. W. 1091, 30 S. W. 224; *Riptoe v. State* (Tex. Cr. App.) 42 S. W. 381; *Gilcrease v. State*, 33 Tex. Cr. R. 619, 28 S. W. 531; *State v. Dunn*, 116 Iowa, 219, 89 N. W. 987; *Wheeler v. Com.*, 120 Ky. 697, 87 S. W. 1106.

Between a killing in necessary self-defense and an unlawful killing with malice aforethought there is a wide margin. We apprehend that it seldom occurs that where the jury rejects the theory of self-defense in a case where the killing is the culmination of an encounter where force is threatened and used by both parties, they might not properly find that the killing was without malice. If the jury believed that defendant brought on the difficulty, and was the first to draw his gun, it does not necessarily follow that he intended to kill or shoot Jenks. Although the evidence clearly shows that he had Jenks covered during all the time they were crossing the street, and could at any time have killed him while so doing, he did not shoot or attempt to shoot, but, according to the testimony of Caughey, the principal witness for the people, only shot when Jenks attempted to draw his pistol. Under these circumstances, can any one say that the jury might not believe that he did not draw his gun with any intent to kill or with malice? The drawing of a deadly weapon in a rude, angry, and threatening manner, in the presence of two or more persons, not in necessary self-defense, is a misdemeanor, but is not a felony unless done with felonious intent. Pen. Code, § 417. Where a difficulty is intentionally brought on for the purpose of killing deceased, the fact of imminent danger to the accused constitutes no defense; but when the accused embarks in a quarrel with no felonious intent, or malice, or premeditated purpose of doing bodily harm or killing, and under reasonable belief of imminent danger he inflicts a fatal wound, it is not murder, but may be manslaughter. *Wallace v. United States*, 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039. See, also, *Wharton on Homicide*, § 198; *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31; *Adams v. People*, 47 Ill. 376.

Over the objection of defendant, the district attorney was allowed to ask Erick Larsen, a witness for the defense, several questions, manifestly intended to get before the jury the fact that three named persons, who in fact were with the crowd of union men and defendant, upon the occasion of the killing of Jenks, had untruthfully sworn that they were not present on said occasion. None of these persons had been examined as witnesses upon this trial, but the evidence clearly showed that they were present at the affray. It is perfectly plain from the record that the object of asking these questions was to get before the jury the fact that these persons, associated with defendant, had subsequently falsely denied being present. The questions

should not have been asked by the district attorney, and the objections thereto should have been sustained.

The court excluded testimony of one John Davis that William S. Jenks, before his death, stated that he fired the first shot at John Hayes (defendant). This testimony was offered by defendant as a dying declaration. Before such testimony may be admitted, it must be shown that the person making it made it under a sense of impending death, and that he had given up all hope of living. The preliminary evidence is, of course, addressed to the court. The evidence in this case does not show that the court erred in rejecting the evidence as to what Jenks said. The physician who attended the deceased stated that on the way to the hospital Jenks said, "I am done for," but when they reached the hospital the physician told the wounded man that "his chances were pretty slim." This seems to have been the only information given the wounded man by the physician, and it implied that he did have some chance of living. The witness Davis, by whom it was attempted to prove the dying declaration, said, "I don't think he realized that he was going to die." The evidence falls far short of that held sufficient to admit testimony of a dying declaration in *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339, and we cannot say that the court erred in excluding the offered testimony.

A witness Fox testified that immediately after the shooting he saw Frank Sidelinger running from the scene of the shooting with a gun in his hand. He was then asked, "What, if anything, was he doing with it?" and, over the objection of defendant, was allowed to answer, "He was unloading it." This was not error. It was, of course, quite proper for the people to establish by any competent evidence that any or all of the crowd that followed the Jenks brothers and were present at their shooting were armed with loaded pistols. Such proof tended to establish an unlawful and hostile purpose on their part, and, in connection with other evidence tending to show that they acted in concert in following and bringing on an encounter with the Jenks brothers, tended to sustain the theory of the people that the Jenks brothers were killed in pursuance of an unlawful conspiracy. The evidence was not admissible as the act of a co-conspirator in furtherance of the common design, but was admissible as a fact that showed that Sidelinger was armed with a loaded pistol during the time that he was acting with defendant and the other members of the crowd that followed the Jenks brothers. The essential matter proved by this testimony is that the pistol was loaded. The incidental matter that Sidelinger was unloading it proved that it was loaded. This was the essential and pertinent fact which made the evidence admissible. The testimony that Sidelinger had a pistol when seen by the witness was admitted without

objection, and properly so, because it supported the inference that he had the pistol in his possession when, a few minutes before, he was with the crowd that followed and shot at the Jenks brothers. The fact that he was unloading the pistol when seen by the witness proved that the pistol was then loaded, and this supported the inference that it was loaded when Sidelinger was with the crowd that followed and shot at the Jenks brothers. This was a material and pertinent fact.

A witness Hiram Johnson testified that on the afternoon of the day of the shooting he had seen a revolver in the hand of defendant. He was then asked, "State under what circumstances, and what was said between yourself and Mr. Hayes at that time?" and, over the objection of the defendant, answered: "I made the remark that that was a fine revolver. He said: 'Yes, by God, and I am liable to use it before night, too. * * * Those other sons of bitches are carrying revolvers, and I am going to carry one to.'" In this the court did not err. The circumstances in evidence strongly indicated that defendant referred to the nonunion men working on the "Gualala," upon one of whom he did in fact use the pistol before night of that day.

Over the objection of defendant, the court permitted several witnesses to testify that the crowd ran away immediately following the shooting. Substantially every one of these witnesses testified that, immediately after the shooting, the crowd in which defendant was scattered and ran. We think that this was permissible as part of the *res gestæ*. The testimony went no further than to show that immediately after the shooting the crowd fled from the immediate vicinity of the scene where the affray took place, leaving Albert Jenks dead upon the ground, William Jenks lying upon the ground fatally wounded, and defendant wounded, but able with the assistance of Art Smith to walk across the street to his bicycle. The act of the crowd in immediately dispersing was spontaneous and concurrent with the main event within the rule as laid down by the courts. The dispersing of the crowd was the natural and spontaneous outgrowth of the main occurrence. Acts and declarations to be admissible need not precede or be precisely concurrent in point of time with the main fact. If they are the natural and spontaneous outgrowth of the main fact, they are a part of the *res gestæ*. *Heckle v. Southern Pacific Co.*, 123 Cal. 442, 56 Pac. 56; *State v. Arnold*, 47 S. C. 9, 24 S. E. 926, 58 Am. St. Rep. 867; *Castillo v. State*, 31 Tex. Cr. R. 145, 19 S. W. 892, 37 Am. St. Rep. 794; *State v. Kaiser*, 124 Mo. 651, 28 S. W. 182; *Mitchum v. State*, 11 Ga. 615; 2 Ency. of Ev. 306, 292. In discussing how far declarations are admissible as *res gestæ*, it was said, in *Heckle v. Southern Pacific Co.*, supra: "A declaration, to be admissible on that ground, must be an undesignated part, or incident, of the occurrence in

question. It must be in a general sense contemporaneous with the main occurrence, although, in case of a sudden accident or attack, the declarations would not be inadmissible merely because the blow or collision immediately preceded it; it must be the natural and spontaneous outgrowth of the main occurrence, and must exclude the notion of deliberation or calculation, or the design to manufacture evidence for future purposes." Most of the cases relate to declarations made at or immediately following the main fact; but there can be no difference in principle between declarations which, under this rule, are treated as verbal acts, and acts. In the case at bar it is acts of the participants in the affray that were proved. These acts were the natural and spontaneous outgrowth of the shooting, and occurred before the smoke of battle had cleared away. The flight proven was simply a sudden and natural dispersal of the crowd. A complete and intelligible account of the affray could scarcely be given without disclosing what became of the crowd. The case of *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401, cited by appellant, bears little or no analogy to the case at bar. In the *Stanley* Case four persons were seen by a policeman to attempt a robbery. Subsequently, after they had left the scene of their crime, they were arrested. After their arrest one of the four (not the defendant) broke away from the officers having him in charge and attempted to escape. This attempt to escape was clearly not a part of the *res gestæ*, and it was so held. The spontaneous and immediate dispersal of a mob or crowd engaged in a shooting affray is, we think, well within the rule of *res gestæ*, and the court did not err in allowing proof thereof.

For the errors hereinbefore noted the judgment and order are reversed, and the case remanded for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 298

PEOPLE v. SIDELINGER. (Cr. 152.)

(Court of Appeal, First District, California.
Nov. 9, 1908.)

1. HOMICIDE (§ 83*)—AIDERS AND ABETTORS—DEGREE OF CRIME.

If one in killing another only commits manslaughter, his aiders and abettors are only guilty of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 109; Dec. Dig. § 83.*]

2. CRIMINAL LAW (§ 424*)—EVIDENCE—DECLARATIONS—RES GESTÆ.

What the person committing a homicide said, in answer to questions after the homicide as to why he shot the boys, that "they were scabs," was nothing said or done in the course of the conspiracy, or a part of the *res gestæ*,

and so inadmissible against his aiders and abettors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Frank Sidelinger was convicted of murder, and appeals. Reversed and remanded for new trial.

J. F. Quinn and Wm. Kehoe, for appellant. Attorney General Webb, for the People.

HALL, J. Appeal from judgment of conviction of murder in the second degree and order denying motion for a new trial.

This is a companion case to the case of the *People v. Hayes* (this day decided), 99 Pac. 386, and several of the questions decided in the *Hayes* Case arise in this case. Sidelinger is charged with killing the same person that Hayes was charged with killing, apparently not upon the theory that Sidelinger fired the fatal shot, but upon the theory that he was present aiding and abetting the killing of William Jenks, or that he was a co-conspirator of Hayes and others, and the killing was the act of one of the co-conspirators. At any rate, there is no evidence in the record that connects this defendant with actually firing the fatal shot. The evidence concerning the killing, and the incidents leading up thereto, is practically the same as in the *Hayes* Case.

In this case, as in the *Hayes* Case, defendant requested the court to give an instruction upon the question of manslaughter entirely correct as a statement of law, but which the court refused to give, apparently upon the theory that under no aspect of the evidence could the jury find the defendant guilty of manslaughter. For the reasons given in the opinion this day filed in the *Hayes* Case, the court erred in so doing. The issue of manslaughter should have been submitted to the jury. If in fact Hayes actually killed Jenks, and in so doing only committed the crime of manslaughter, his aiders and abettors were only guilty of manslaughter. Wharton on Homicide, 57; Goff v. Prime, 26 Ind. 196; Polly v. Com. (Ky.) 24 S. W. 7; State v. Dunn, 116 Iowa, 219, 89 N. W. 987; Wheeler v. Com., 120 Ky. 697, 87 S. W. 1106.

The prosecution, as a part of its case in chief, proved by Mrs. Peterson that after the shooting she went over to Hayes. She was then allowed to testify, over the objection of defendant, that she "asked him if he shot the boys, and why he did shoot them, and he said 'they were scabs.'" What Hayes then said was in no sense something said or done in pursuance of the conspiracy, or a part of the *res gestæ*. The shooting was over, and the crowd had dispersed. The statement of Hayes was but a narrative concerning a past and completed act. What he then said about

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the matter could only be used as impeaching testimony after he had been a witness, and the proper foundation had been laid for proving statements inconsistent with his testimony. The action of the court upon this matter was clearly erroneous. *People v. Smith*, 151 Cal. 625, 91 Pac. 511; *People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *People v. English*, 52 Cal. 212. For the same reason the court erred in allowing the witness Olson to testify to what John Jacobson said to the witness subsequent to the day of the shooting.

The action of the court in disallowing challenges to several jurors for actual bias, as well as in disallowing a challenge to the panel for bias of the officers that summoned the panel, has been urged upon our attention; but, as the judgment and order must be reversed for the errors already noted, we do not deem it necessary to pass upon the action of the court in this regard. The same conditions as to the jurors may not occur upon the retrial. For the purposes of a new trial it is sufficient for us to say that in deciding challenges to jurors the court should have in mind the rule laid down in *People v. Helm*, 152 Cal. 532, 93 Pac. 99, decided since this case was tried, and where the law upon this subject is elaborately discussed.

For the errors herein noted, the judgment and order are reversed, and the action remanded to the trial court for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 341

PEOPLE v. GORHAM. (Cr. 105.)

(Court of Appeal, Second District, California.
Nov. 14, 1908.)

1. FORGERY (§ 12*)—"CHECK OR INSTRUMENT FOR PAYMENT OF MONEY"—WHAT CONSTITUTES.

Leaving blank the name of the payee of a check gives to any bona fide holder for value implied authority to fill the blank with his own name or that of a third person, and so, likewise, where all that was required to make a check out of a forged instrument delivered by defendant in payment was the insertion of the name of the payee, the delivery constituted the transferee defendant's agent with authority to fill in the blank with its own name; and a claim that the instrument was not a check or an instrument for the payment of money within the meaning of Pen. Code, § 476, when passed by defendant, is without merit.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 35; Dec. Dig. § 12.*]

2. BILLS AND NOTES (§ 60*)—OMITTING NAME OF PAYEE—EFFECT AS TO CHECK.

Where the name of the payee is left blank in a check, the effect of such paper until the name of the payee is inserted pursuant to authority conferred on the receiver by its delivery for value is that it is payable to the bearer, and passes from hand to hand by mere delivery.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 88; Dec. Dig. § 60.*]

3. BILLS AND NOTES (§ 341*)—OMITTING NAME OF PAYEE—EFFECT AS TO CHECK.

That an instrument does not designate any payee does not raise a presumption that it is in circulation without authority, and one who accepts it in that condition need not at his peril ascertain whether the person tendering it has authority to complete it or to authorize another to do so, but, on the contrary, bills and checks are often executed in full, with the exception of the name of the payee, which is left blank, that it may be afterwards filled up with the name of the actual holder who demands payment.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 829; Dec. Dig. § 341.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Dorothy Gorham was convicted of forgery, and she appeals. Affirmed.

Noleman & Smyser, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. As disclosed by the record, defendant negotiated for the purchase of a piano from the Wiley B. Allen Company at an agreed price of \$350. In payment therefor she gave to the salesman an instrument which purported to be signed by Mrs. S. M. Dimmick, whom she represented to be her sister, and for whom she was purchasing the piano. This check when handed to the salesman was in the following form:

"Los Angeles, Cal.,.....March 10,.....1908. No...9..
"The Farmers and Merchants National Bank
of Los Angeles. Pay to
.....or order \$..400..
.....Four Hundred.....Dollars.
Mrs. S. M. Dimmick....."

As a reason for presenting the check for a sum in excess of the required amount and with the name of the payee left blank, she stated that her sister was ill and had given her the check, not knowing from whom nor at what price she would make the purchase, but limiting the price to not exceeding \$400. Defendant was requested to fill in the blank space with the name of the payee, but declined to do so, saying it was customary to stamp that in. The salesman took the check to the office on the same floor, where the manager stamped the name of the Wiley B. Allen Company in the space left blank for the name of the payee. Upon inquiry made at the bank, during which time defendant was detained at the store, it was ascertained that the check was fraudulent, both as to the signature and absence of money deposited in the bank to account of Mrs. Dimmick. The manager then presented the check, with the name of the payee stamped therein, to defendant, who, holding one end of it while he retained the other, was asked if it was not possible that a mistake had been made, and she said that the check was good. She was then placed under arrest, and stated that she had found the check, and that her name was not Martin, as she had represented, but Gorham.

The piano was not delivered, nor was any money paid to defendant on said check. The check, as alleged in the information, and which defendant is charged with uttering, publishing, and passing, and that was offered in evidence in support of said allegation, had inserted therein as payee the name of the Wiley B. Allen Company. Defendant was convicted as charged, and appeals from the judgment and an order denying her motion for a new trial.

The ground upon which appellant bases her right to a reversal is the fact that the check at the time it was delivered to the Wiley B. Allen Company did not contain the name of the payee; hence, it is claimed the instrument was not a check or other document within the meaning of section 476 of the Penal Code, and that there was a fatal variance between the allegation in the information and proof offered in support thereof. It may be, as contended by appellant, that the instrument did not constitute a check until the name of the payee was inserted therein (Rex v. Richards, Russell & Ryan's [Eng.] Repts. p. 192; Rex v. Randall, Id. 195), though the contrary doctrine seems to prevail in the state of Indiana (Harding v. State, 54 Ind. 359). In any event, all that was required to make the instrument a check was the insertion therein of the name of the payee, and the filling in of such blank may be made by any one authorized so to do. When so filled, it relates back to the time of its delivery. Such authority may be conferred under an implied agency created by the maker's act in putting the paper into circulation. "Leaving such blank for the name of the payee gives to any bona fide holder for value an implied authority to fill the blank with his own name, or with that of a third person." Randolph on Commercial Paper, § 185; Rich v. Starbuck, 51 Ind. 87. By voluntarily delivering the instrument in question to the Wiley B. Allen Company in payment of the purchase price of the piano, defendant constituted the company her agent with authority to fill in the blank space with its own name, or that of any third person to whom said company as holder might transfer it. In legal effect, it was her act and made the check just what she designed it to be. The effect of such paper until the name of the payee is inserted pursuant to the authority conferred upon the receiver by its delivery for value is that it is payable to the bearer and passes from hand to hand by mere delivery. Under our view there is no merit in appellant's contention.

It is apparent from the foregoing views that the court did not err in instructing the jury as follows: "A check or order for the payment of money, however duly executed in other respects, but having the name of the payee omitted therefrom and delivered in that condition by the maker, carries with

it the authorization of the maker to the intended payee to supply the name of such intended payee, or the name of any other person to whom the intended payee may deliver the check or order with the intent to pass title thereto."

We cannot agree with appellant that "the fact that the instrument does not designate any payee at once raises the presumption that it is in circulation without authority, and one who accepts it in that condition must at his peril ascertain whether or not the person tendering it has authority to complete it or to authorize another to do so." On the contrary, bills and checks are often executed in full, with the exception of the name of the payee, which is left blank in order that it may be afterwards filled up with the name of the actual holder, who demands payment. Daniel on Negotiable Instruments, § 145.

We find no prejudicial error in the record, and the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 324
(Civ. 511.)

O'ROURKE v. FINCH et al.
(Court of Appeal, First District, California,
Nov. 12, 1908.)

1. ANIMALS (§ 74*)—INJURIES BY ANIMALS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for injuries through being bitten by a dog, evidence held to sustain a finding that defendant was the owner of the dog and had knowledge of its vicious propensity to bite.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.*]

2. ANIMALS (§ 74*)—INJURIES BY ANIMALS—ACTIONS—EVIDENCE.

Where, in an action for injuries through being bitten by a dog, defendant claimed that he did not own the dog, evidence that defendant had given the dog a collar bearing his name and defendant's initials was admissible.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.*]

3. ANIMALS (§ 74*)—INJURIES BY ANIMALS—ACTIONS—EVIDENCE.

Where, in an action for injuries through being bitten by a dog, defendant testified that the dog was a trick dog, evidence as to the kind of tricks the dog could perform was inadmissible, since, while it might have shown the dog's intelligence, it would not excuse his act of biting.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.*]

4. ANIMALS (§ 74*)—INJURIES BY ANIMALS—ACTIONS—INSTRUCTIONS.

Where, in an action for injuries through being bitten by a dog, one of defendants claimed that he did not own the dog, an instruction, that one who treats a dog as living at his house and undertakes to control his actions is the owner of the dog within the meaning of the law, was properly refused, since, if defendant owned the dog and kept him knowing his vicious nature, he could not escape liability on the theory that the dog lived with the other defendants and was sometimes with them.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by John Henry Joseph O'Rourke, a minor, by guardian ad litem, against T. J. Finch and others. There was a judgment for plaintiff, and, from an order denying a new trial, defendant Finch appeals. Affirmed.

See, also, 96 Pac. 784.

Lynch & Drury, for appellant. W. H. Morrissey, for respondent.

COOPER, P. J. This action was brought to recover \$5,000 damages on account of personal injuries to plaintiff, a minor, by being severely bitten and wounded by a dog alleged to have been kept by defendants, and allowed by them negligently to run at large. The case was tried with a jury, and a verdict returned for the plaintiff in the sum of \$1,000, upon which judgment was accordingly entered. Upon motion for a new trial by all the defendants the judge who tried the case and heard the evidence made an order for a new trial to be granted unless the plaintiff would remit from the amount of the judgment the sum of \$250. This amount was remitted by plaintiff by consent in writing duly filed, whereupon the court made an order denying the motion for a new trial, and thereupon judgment was entered for plaintiff in the sum of \$750. Defendant Finch prosecutes this appeal from the order denying a new trial. The other defendants have not appealed.

It is argued by appellant that the evidence is insufficient to show that he was, at the time the plaintiff was bitten by the dog, the owner or keeper of such dog, or that he had knowledge of its vicious propensity to bite. We have carefully examined the evidence, and are of the opinion that it is sufficient to sustain the verdict in both respects. In fact it was admitted by appellant that some time prior to the time this plaintiff was injured he knew of the dog having bitten one of Mrs. Kildea's children, and that he owned the dog at that time, and paid the doctor's bill for attending Mrs. Kildea's child. At the time the plaintiff was injured, the appellant lived with defendants Mr. and Mrs. Patrick, and the dog was kept at the same place. It had been bought and paid for by appellant. He had paid the license tax for keeping the dog. It had a collar on that he had bought, lettered and worded as follows: "Glen, from T. J. F." "Glen" was the name of the dog, and "T. J. F." were the initials of appellant's name. Appellant was seen daily upon his walks and rides in and about the neighborhood where he resided in company with the dog, and was very much attached to him. From all this the jury might well have believed that appellant was the owner of the dog at the time plaintiff was injured, and that the alleged gift of it to Mrs. Patrick was but a subterfuge in order to escape liability. The court did not err in allowing evidence

as to the circumstances connected with the appellant giving the collar to the dog, and having the name placed on the collar. As appellant claimed that he did not own the dog at the time of the alleged injury, these facts were very potent circumstances. The jury might well consider them in connection with the other evidence in the case in determining as to whether or not the appellant was the real owner of the dog at the time plaintiff was bitten.

Appellant testified that the dog "is a trick dog." His counsel then sought to prove by him the nature and kind of tricks the dog could perform, but the court sustained objections to such questions. The ruling was clearly correct. The time of the court should not have been taken up with an investigation of the various tricks the dog had been taught, or in witnessing exhibitions of such tricks, as that would not have tended to justify his biting the child. While it might have shown the intelligence of the dog, it would not excuse or mitigate the act of biting the child; and we do not know of any rule that presumes that an intelligent dog will not bite a child as quickly as one lacking in intelligence.

There was no error in refusing the defendants' requested instruction to the effect that one who treats a dog as living at his house and undertakes to control his actions is the owner of the dog within the meaning of the law. While such an instruction might have been given in a case where one had a dog living at his house, and had full charge and control of him, and was claiming that he was not responsible as keeper for the acts of the dog, yet such facts would not exonerate the true owner if such owner also had control of the dog. If appellant was the owner of the dog, and kept him knowing his vicious nature, he cannot escape liability upon the theory that the dog lived with the other defendants, and was sometimes with them or with either of them. As to the defendants Mr. and Mrs. Patrick, they are not complaining of the refused instruction, and, besides, they have not appealed.

The order is affirmed.

We concur: HALL, J.; KERRIGAN, J.

9 Cal. App. 318

LAS ANIMAS & SAN JOAQUIN LAND CO.
v. FATJO et al. (Civ. 521.)

(Court of Appeal, Third District, California.
Nov. 11, 1908.)

1. VENUE (§ 5*)—INJURY TO REALTY.
Code Civ. Proc. § 392, provides that actions for injuries to real property must be tried in the county in which the subject of the action, or some part thereof, is located. Civ. Code, § 658, provides that real property consists of land, and that which is affixed to land. Section 660 provides that a thing is deemed to be affixed to land when it is permanently resting on

it, as in case of buildings. *Held*, that an action for the destruction by fire of buildings belonging to plaintiff, and located on his land, was an action for an injury to real property, and was triable in the county where the real property was situated.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 9; Dec. Dig. § 5.*]

2. PROPERTY (§ 4*) — DISTINCTION BETWEEN REALTY AND PERSONALTY — PRESUMPTIONS.

In an action for the destruction by fire of a house and barn alleged to have been situated on plaintiff's land, it will be assumed, though not expressly alleged, that they were permanently resting on the soil.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 4.*]

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Las Animas & San Joaquin Land Company against L. Fatjo and others. From an order denying a motion for change of place of trial, defendants appeal. Affirmed.

Sullivan & Sullivan and Theo. J. Roche, for appellants. Edward F. Treadwell (F. G. Osterlander, of counsel), for respondent.

BURNETT, J. This is an appeal from an order denying a motion for a change of the place of trial from Merced county to the city and county of San Francisco. The motion was made upon the ground that the said city and county is the place of residence of defendants. The order is sought to be upheld for the reason that the action is local in its nature, relating to an injury to real property situated in said Merced county. The question is to be determined by a consideration of the framework of the complaint, and of sections 392 and 395 of the Code of Civil Procedure. The former section, as far as material here, is as follows: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this Code: (1) For the recovery of real property, or of an estate or interest therein or for the determination, in any form, of such right or interest, and for injuries to real property." The latter section provides that: "In all other cases, the action must be tried in the county in which the defendants or some of them reside at the commencement of the action." It is obvious, therefore, that the general rule is, as contended for by appellants, that the action must be tried in the county wherein resides the defendant, and the burden is upon him claiming otherwise to show that the case is within the exception. This the complaint clearly discloses, so it is affirmed by respondent and denied by appellants. The gravamen of the charge against defendants is contained in the fourth paragraph of the first count of the complaint as follows: "That on or about the 20th day of June, 1907, said defendants carelessly and negligently set out a fire on the property so owned by them * * * in the county of

Merced, and said fire so negligently and carelessly set out by said defendants spread from the land so owned by defendants onto the land so owned by plaintiff, and then and there burned and destroyed a house and barn upon said land and owned by plaintiff, to the damage of plaintiff in the sum of \$1,500." The complaint contains two other counts, but they vary simply in the method of alleging the negligence of defendants in relation to the fire. The purpose of this was to bring the case within different statutory provisions upon the subject, which we deem unnecessary to the discussion. It is clear, then, that the action is for damages caused by the destruction by fire of a house and barn belonging to plaintiff and located on his land.

The first inquiry is, Are the house and barn real property? The answer is found in the statutes. Section 658 of the Civil Code provides that: "Real or immovable property consists of: (1) Land. (2) That which is affixed to land. (3) That which is incidental or appurtenant to land. (4) That which is immovable by law"—and section 660 defines fixtures as follows: "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws." The house and barn were buildings and, while not expressly alleged, we must assume, what is usual and a matter of common knowledge, that they were permanently resting upon the soil. In *Commercial Bank v. Pritchard*, 126 Cal. 605, 59 Pac. 132, it is said: "In this case there is nothing to show that the building and concrete foundation did not rest upon the land, and it will be presumed that it did, and hence under the definition given it is real estate."

Again, plaintiff alleged that it was the owner and in possession of a certain parcel of land, describing it, "together with a house and barn and other improvements thereon." It, therefore, at least inferentially averred that the buildings were a part of the land. We have a case, then, where the defendants are accused of having destroyed a part of plaintiff's land to its damage in the sum of \$1,500. If the destruction of a part of real property, thereby damaging the owner, is not an injury to real property, then it is impossible to conceive of such a contingency. The cause of action arises from this injury. The purpose of the suit is to redress it, and it necessarily follows, if effect is to be given to the legislative will, that the trial must take place where the land is located; that is, in Merced county.

We are not without instructive suggestions on this subject from our Supreme Court. In *L. K. R. W. D. Co. v. K. R. & F. C. Co.*, 60

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Cal. 408. It is held, as stated in the syllabus: "The right of the plaintiff, as stated in the complaint, to have the water flow in the river to the head of its ditch is an incorporeal hereditament appurtenant to the ditch, and is coextensive with plaintiff's right to the ditch itself. The subject of the action is therefore situated in both counties, and the action might have been brought in either." The action was for the diversion of water from the said ditch. In *City of Marysville v. N. B. G. M. Co.*, 66 Cal. 343, 5 Pac. 507, the action was brought to abate a nuisance which it was alleged was produced by defendants in causing the tailings and debris from their mining claims to be deposited on the lands of plaintiff. The court said: "Being an action 'for injuries to real property,' it is not within the class of cases which 'must be tried in the county in which the defendants, or some of them, reside at the commencement of the action.'" *Drinkhouse v. Waterworks*, 80 Cal. 308, 22 Pac. 252, was a suit "to enjoin the defendant from building a dam, which plaintiff alleges defendant has commenced and is now constructing, and asserts its intention of completing, and which, it is alleged, will, when completed, permanently flood a certain trace of land in San Mateo county in which plaintiff has a leasehold estate." It was held that the action was for an injury to real property, and triable in the county where the land was situated. It is said by the court, through Chief Justice Beatty, "That the sole object and purpose of the action is to prevent a threatened injury to real property is clear," and it is further held that there is no distinction in this respect between an action to prevent an injury to the realty and one for damages in consequence of an injury already consummated. The language is: "The injury is the same, whether threatened or completed, and the privilege accorded to the plaintiff to prevent the injury by injunction ought not to be held to give him the right to have the trial in a county where the cause would not have been triable if he had waited the completion of the injury before seeking redress." To the same effect is *Last Chance, etc., Co. v. Emigrant Co.*, 129 Cal. 277, 61 Pac. 960.

But appellants contend that "an action to recover the value of the buildings burned and destroyed through defendants' negligence in handling the fire on their own land is not an action for trespass upon real property," and quite a number of cases are cited in support of the position, among which are *Phoenix Ins. Co. v. Pacific Lumber Co.*, 1 Cal. App. 156, 81 Pac. 976, *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189, *Daneri v. So. Cal. Ry. Co.*, 122 Cal. 507, 55 Pac. 243, and *Booker v. Aitken*, 140 Cal. 472, 74 Pac. 11. In this connection it is urged that we must resort to the common law to ascertain the technical meaning of "trespass." It is true that in the *Hicks* Case,

supra, it is said that: "While in this state all distinctions between common-law actions are abolished as relating to the procedure, yet it is plain that we are bound to consult the common law, and the classification of common-law actions, for the proper determination as to what the law-making power of this state had in mind when using the phrase 'trespass upon real property.'" But it is clear that the *Hicks* Case and the others cited have no application here, as the court was dealing with an entirely different section of the Code, and altogether different facts. It might be proper to resort to the common law to determine the meaning of the term "trespass," but it is hard to understand why we should go to such a source to find out what the Legislature meant, by "an injury to real property." It is unimportant whether this action is trespass or on the case, as known at the common law, since no question of the statute of limitations is involved. The act of the defendants in burning the property may not imply an actual physical invasion of plaintiff's land, but it is too clear for argument that injury to the land was caused by said act. Some other cases are cited by appellants to the effect that where fixtures are severed from the land, asported and converted or destroyed, the action for damages is not local, but personal. For instance, in *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550, the Supreme Court of Kansas held, as stated in the syllabus, that: "Where a mere wrongdoer enters upon land in the state of Missouri and severs sand therefrom, and transports it to Kansas, and there converts it to his own use, the sand remains the property of the owner of the land up to the time of the conversion, and he may afterwards recover from the wrongdoer the value of the sand in an action brought in Kansas, such action being transitory." But, as pointed out by respondent, that case and the others cited are entirely dissimilar to this because here the buildings were not severed or removed and afterwards converted, but the damage was done to the property while a part of the realty. Such damage could only be incurred on the land, and the action is therefore local.

All of appellants' points and authorities have been examined with care, but it is deemed unnecessary to pursue the discussion further.

The order is affirmed.

9 Cal. App. 327

We concur: CHIPMAN, P. J.; HART, J.

(9 Cal. A. 327)

BUTLER v. AGNEW et al. (Civ. 420.)

(Court of Appeal, Second District, California, Nov. 12 1908.)

1. TRIAL (§ 391*)—TRIAL BY COURT—FINDINGS.

Where the legality of a contract is involved in the judgment, a finding that a certain stipu-

lation was a part of the contract is not immaterial in passing on its validity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 914; Dec. Dig. § 391.*]

2. TRIAL (§ 394*)—TRIAL BY COURT—FINDINGS.

The statutory requirement that findings of fact and conclusions of law shall be separately stated is merely directory, and therefore, if correct findings or conclusions of law and fact be made, they may be considered in their true character wherever set out.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 924-926; Dec. Dig. § 394.*]

3. APPEAL AND ERROR (§ 931*) — PRESUMPTION—FINDINGS BY COURT.

Conclusions frequently partake of the nature of both law and fact, and, if there be doubt as to which class a finding belongs, it should be resolved in favor of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3769; Dec. Dig. § 931.*]

4. CONTRACTS (§ 138*)—ILLEGAL CONTRACT AS BASIS OF ACTION.

A contract against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

5. BROKERS (§ 19*)—REAL ESTATE AGENT—RELATION TO PRINCIPAL.

The relations between an agent for the sale of land and his principal are of a fiduciary nature, and the agent's acts in the course of his employment are governed by the same rules as those of a trustee.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 19.*]

6. BROKERS (§ 31*)—REAL ESTATE AGENT—SALE TO HIMSELF—VALIDITY.

A purchase by a real estate agent of the property in his hands for sale, without the knowledge of his principal, is sufficient to avoid the transaction, no matter if there was no actual fraud, or no injury to the principal resulted.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 24; Dec. Dig. § 31.*]

7. BROKERS (§ 31*)—REAL ESTATE AGENT—CONTRACTS FOR INTEREST IN LAND SOLD—VALIDITY.

Where an agent for the sale of land agrees with another that the latter shall purchase it for their joint benefit and conceals such sale from his principal, the contract by the purchaser to account to the agent for the profits is violative of law, contrary to public policy, and unlawful, under Civ. Code, § 1667, declaring not lawful that which is contrary to law, public policy, or good morals.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 24; Dec. Dig. § 31.*]

8. CONTRACTS (§ 138*)—INVALID CONTRACT AS BASIS OF ACTION.

The rule that a contract against public policy, good morals, or express mandate of law cannot be sued on, is based on sound policy, and has no consideration for the party against whom relief is sought, and takes no note of the benefit to him by the refusal to grant relief.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

9. CONTRACTS (§ 138*)—ILLEGAL TRANSACTION—DEMAND CONNECTED THEREWITH—ENFORCEMENT.

The test whether a demand connected with an illegal transaction may be enforced at law is: Does plaintiff require the aid of the illegal

transaction to establish his case? And, if he cannot prove his case without showing that he has broken the law, the court will not assist him, whatever the justice of his claim against defendant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

10. CONTRACTS (§ 137*)—SALE BY REAL ESTATE AGENT—SEVERABLE CONTRACT.

Where a real estate agent sells land under an agreement with the purchaser to hold and sell the land for their joint benefit, the agent's right to a division of the profits can be established only by introducing evidence of the entire contract of sale, and hence the transaction is not severable so as to permit him to recover thereon against the purchaser.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701-712; Dec. Dig. § 137.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by A. C. Butler against Mary C. and Elias N. Agnew. From a judgment for defendants, plaintiff appeals. Affirmed.

Geo. P. Adams and Chas. S. McKelvey, for appellant. D. M. Hammack and Hunsaker & Britt, for respondents.

TAGGART, J. This is an appeal from a judgment. The action is for an accounting, and plaintiff urges a reversal of the judgment in favor of the defendant because it is not supported by the findings. He also contends that by the elimination from the findings of a probative fact which he claims does not aid in sustaining the judgment, and certain conclusions of law which improperly and erroneously appear in the findings of fact, this court would not only be justified in reversing the judgment entered, but warranted in directing a judgment on the findings in favor of plaintiff.

The trial court found: That plaintiff was the agent of the trustees of the Doran estate for the sale of a lot of land in the city of Los Angeles and was employed by them to procure a purchaser for the said lot of land in consideration of a commission to be paid to him. That while plaintiff was employed and acting as such agent, he induced and procured defendant to buy said property. That defendant purchased the same, paid the consideration for, and received the conveyance thereof in her own name for the benefit of herself and the plaintiff (and not solely for her own use), pursuant to an agreement in writing, dated December 23, 1903, which was in the words and figures following: "This agreement made and entered into between A. C. Butler and Mary C. Agnew both of the city of Los Angeles, state of California: Whereby the said Butler and Agnew buy jointly the Doran property 55x135 feet with improvements at the southwest corner of Olive street and Olive court, Los Angeles, California. The property to be first put in the name of Mary C. Agnew, who when the property is acquired from the Doran estate,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said Mary C. Agnew is to deed to A. C. Butler a half interest in said property to be acquired by loans and sold within a year. Said purchasers Agnew and Butler to be jointly liable for debts of said property and share equally in profits from same." The court also found the following writing on the back of the contract to be a part thereof: "Concerning the within described property, whatever commission is paid me by the Doran estate I will divide equally with Mary C. Agnew. [Signed] A. C. Butler." That the defendant Mary C. Agnew raised money on her own credit and by mortgage on the Doran property in her own name to pay the purchase price to the trustees of the Doran estate. The interest of the plaintiff in the purchase was concealed from the said trustees, and they were ignorant of the making of the contract here sued on, and upon the consummation of the sale they paid to plaintiff the sum of \$300, being full commission on the price received from Mrs. Agnew. Of this commission no part was ever paid or tendered by plaintiff to defendant Agnew, or to any one else on her behalf. The said Mary C. Agnew at once entered into the possession of the property and collected the rents, issues, and profits thereof from the time of the purchase until August 14, 1904, when she exchanged it for an orange orchard in the city of Riverside, known as the "Ray ranch." This ranch she subsequently disposed of and converted the proceeds thereof to her own use. Both the exchange of the Doran lot and the sale of the Ray ranch were made without plaintiff's consent.

The probative fact sought to be eliminated from the findings is the promise of plaintiff to pay to defendant one-half of his commissions earned by the sale of the property, which was indorsed on the contract. It is admitted by appellant that this would be a proper finding if it were not that the judgment is predicated entirely upon the invalidity of the contract, and therefore, he contends, every other element of the case must be excluded from the findings. We are not prepared to say that this finding does not aid the court in arriving at the conclusion that the contract is against law, but there is another reason why the matter said to be merely probative is properly in the findings. The court finds that it was part of the contract, and, it being admitted that the question of the legality of the contract is involved in the judgment, it is certainly proper to find what constitutes the contract in order to pass upon its validity.

The requirement of the statute that findings of fact and conclusions of law shall be separately stated is merely directory. *Spencer v. Duncan*, 107 Cal. 426, 40 Pac. 549. Therefore, if correct findings, or conclusions of law and fact, be made, they may be considered in their true character wherever set out. It is not always easy to determine up-

on which side of the line prescribed by section 633, Code Civ. Proc., findings made upon issues raised by the pleadings should be placed. The conclusions reached frequently partake of the nature of both law and fact, and, if there be any doubt as to which class the finding belongs, the doubt should be resolved in favor of the judgment. *Paine v. San Bernardino Co.*, 143 Cal. 656, 77 Pac. 659. This question has arisen in connection with the finding of ownership a number of times, and it has been held that such a finding is to be regarded as one of ultimate fact, or as a conclusion of law, according to the issues tried. *Gardner v. San Gabriel Bank* (Cal. App.) 93 Pac. 900. A finding that there was "no lien" in response to an issue in the pleadings whether or not a judgment constituted a lien was declared to be one of fact in *Dam v. Zink*, 112 Cal. 93, 44 Pac. 331. The same rule was also applied to a finding that plaintiff "has no prescriptive right of way," in the case of *Weidenmueller v. Stearns, etc., Co.*, 128 Cal. 626, 61 Pac. 374, and such a finding declared to be one of fact. In none of these cases was there any independent finding of the ultimate fact which was necessarily implied by the inference under consideration. If the mixed conclusion of law and fact had not been considered as a finding of fact, the judgment would have been unsupported, and thus it became necessary to construe the finding as one of fact or the judgment would have fallen for lack of findings to sustain it.

In the case at bar facts justifying the conclusions in question were found by the court without the aid of the conclusions themselves. From this condition a different question might arise in some cases, but we do not think it necessarily does so here. The legal inferences declared, in so far as they are such, are correct conclusions of law based upon sufficient findings of fact. Conceding them to be purely conclusions of law, they would, at most, only have to be transferred to that portion of the findings which are denominated the "conclusions of law." Those to which the rule, applicable in cases of doubt, should be applied, if there be any such, are entitled to stand as findings of fact. We think therefore that in the consideration of the question whether or not the findings sustain the judgment, and of the right of plaintiff to a judgment on the findings, the so-called conclusions of law may be deemed part of the case.

The rule that a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable, has been declared so often as not to need repetition or citation of authority. This is not questioned by appellant, and it also appears to be conceded that the relations between an agent for the sale of land and his principal are of a fiduciary nature, and that the acts

of such agent in the course of his employment are governed by the same rules as those of a trustee; but appellant contends that the contract here is legal on its face, and that sufficient facts outside of the contract have not been alleged or found to show that the contract is illegal or contrary to public policy. He also claims that the contract is severable, and, while its validity in part may be questioned, its valid portion may be enforced, and he is entitled to recover under its provisions. The rule to be applied in such a case is based upon sound public policy, and has no consideration for the party against whom the relief is sought, and takes no note of the fact that he will be benefited by the refusal of the court to grant the relief. It is for the sake of the law itself that the machinery of the courts is not permitted to be used for the enforcement of such contracts, and the parties are left precisely where the breach of their illegal contract, or of either of them, would justify the court in retaining jurisdiction of such an action. *Union Collection Co. v. Buckman*, 150 Cal. 159, 164, 88 Pac. 708, 710, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164. It matters not that there is no actual fraud in the transaction, or that no injury resulted to the principal. The rule is intended to prevent the possibility of wrong, and, assuming that plaintiff and Mrs. Agnew paid full value for the property, this is not a defense. The purchase by the agent, without the knowledge of the principal, is sufficient to avoid the transaction. *Burke v. Bours*, 92 Cal. 115, 28 Pac. 57. The agency of the plaintiff, his concealment of the sale from his principal, the sale by plaintiff, as agent, to himself—that is, to defendant for his benefit—are all clearly alleged and found. This shows the contract sought to be enforced to be violative of law, contrary to public policy, and unlawful, under section 1667 of the Civil Code.

The test whether a demand which is connected with an illegal transaction may be enforced at law is: Does the plaintiff require the aid of the illegal transaction to establish his case? If the plaintiff cannot prove his case without showing that he has broken the law, the court will not assist him, whatever the justice of his claim against the defendant. *Berka v. Woodward*, 125 Cal. 127, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31. The right of plaintiff to a division of the profits and proceeds, either of the Doran lot or the Ray ranch, can be established only by the introduction in evidence of the entire contract. The whole texture of it is so interwoven, each part with the other, that it is inseparable. To hold the transaction severable, as contended for by the appellant, would be to separate the shadow from the substance and apply the rule to the shadow, while the violator enjoyed the benefit of the substance of his illegal contract. This is

not equity. The judgment is abundantly sustained by the findings.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 333

In re HATCH. (Civ. 616.)

(Court of Appeal, First District, California.
Nov. 13, 1908.)

1. COURTS (§ 1*)—"JURISDICTION."

Jurisdiction is the power to hear, determine, and pronounce judgment on the issues before the court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3876-3885; vol. 8, pp. 7697, 7698.]

2. PROHIBITION (§ 3*)—GROUNDS—EXCESS OF JURISDICTION.

The superior court, being a court of record of superior jurisdiction, has the power in a proper case to hear and determine the question of whether the grand jury returning an indictment was a legally constituted body, and, where the superior court determined that a grand jury composed of men drawn by the clerk from the grand jury box from a list selected and ordered by the court, and summoned, impaneled, sworn, and charged with the duties of a grand jury by and under the direction of the court vested with the power to impanel a grand jury, was a valid grand jury, and that an indictment found by it was valid, the court determined a matter within its jurisdiction, and it might continue its jurisdiction over the indictment and accused, though it erred in its decision, and prohibition will not lie to restrain it, the error being reviewable on appeal.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. § 5; Dec. Dig. § 3.*]

3. INDICTMENT AND INFORMATION (§ 10*)—VALIDITY—AUTHORITY TO FIND.

An indictment returned by a body of men who without any sanction of law assumed to act as a grand jury is void, and does not vest jurisdiction in the court.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 10.*]

In the matter of the application of Jackson Hatch for a writ of prohibition directed to the superior court of Santa Clara County and to one of the judges thereof to stay the trial of petitioner under an indictment. Writ denied.

Walter H. Linforth, for petitioner.

COOPER, P. J. Petitioner asks for a writ of prohibition, directed to the superior court of Santa Clara county, and to Hon. J. R. Welch, one of the judges thereof, to stay the proceedings and the trial of the petitioner upon an indictment charging him with the crime of embezzlement, committed in the manner and at the time and place stated in the said indictment.

The writ of prohibition will be issued only in cases where the court is exceeding or is about to exceed its jurisdiction, and there is no plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

§§ 1102, 1103; *Cross v. Superior Court*, 2 Cal. App. 342, 83 Pac. 815. Jurisdiction is the power to hear, determine, and pronounce judgment upon the issue before the court. It is not claimed that the court is not the proper court in which the offense should be tried nor is it denied that the court has the power to try the defendant for the crime of embezzlement as charged in the indictment. The petition alleges and states that after the court had made an order on the 31st day of January, 1908, designating the number of grand jurors for the ensuing year, the order was not made selecting and listing the grand jurors immediately, nor until the 29th day of February, 1908; that the order for drawing the grand jury did not designate the time at which the drawing would take place; that the jury was drawn under and by the method provided for drawing trial jurors, and not in the manner provided for drawing grand jurors; that the list was served by one Bray, who was not a deputy sheriff, because, it is said, Langford was not the sheriff of Santa Clara county, and that Bray was acting as deputy of Langford; that three jurors were improperly excused from the grand jury room; and that the district attorney was guilty of improper conduct in expressing to the grand jury his opinion as to the guilt of petitioner.

We are asked in this proceeding to investigate and pass upon the question as to whether or not the body of men who found the indictment constituted a valid, constitutional grand jury. It is sufficient to say that such body of men had been drawn by the clerk from the grand jury box from the list selected and ordered by the court, and that after they were drawn they were summoned, impaneled, sworn, and charged with the duties of a grand jury by and under the direction of the court vested with the power to impanel such grand jury. That court was and is a court of record of superior jurisdiction. It is its peculiar function to pass upon all questions that may be legally brought before it as to the regularity or validity of the grand jury that found the indictment in this case. It has the power in a proper case to hear and determine the question as to whether or not the grand jury is a legally constituted body. It has heard the question in this case by a motion to dismiss the indictment, and, having jurisdiction to hear such question, it had jurisdiction to determine it either way; and it cannot be said that, because the court determined that it was a valid grand jury, it is now proceeding in excess of its jurisdiction. If the court in such determination committed error, that is a matter that can be corrected on appeal; but the jurisdiction of the court continues. It continues for the purpose of deciding all questions, whether it decides them right or wrong. The questions sought to be raised and determined here relate to the method of procedure in impaneling the grand jury. We

are asked to consider the sections of the Code, and the methods adopted by the court, and determine whether or not the court committed error in the method of impaneling the said grand jury. We are also asked in this proceeding to collaterally determine the question as to whether or not the sheriff, who was recognized as such by the superior court of the county of Santa Clara, and to whom the list of jurors was directed, was the legal sheriff of said county.

It appears plain from the above statement that, if the grand jury was not regularly impaneled and selected, still it would not be an invalid body so as to make an indictment found by it void. Of course, if a body of men, without the sanction of law—such as the members of a baseball team, the directors of a corporation, or any other body of men without the pretense of legal authority—should assume to act as grand jurors, and return an indictment, and the superior court should proceed to the trial of defendant under such indictment, then the question would be quite different. The indictment in such case would be held to be waste paper, and not to vest the court with jurisdiction.

In *Levy v. Wilson*, 69 Cal. 105, 10 Pac. 272, a writ of prohibition was asked for on the ground that the grand jury was not a legal grand jury because formed partly from a special venire and not from the names in the grand jury box. The court held that the trial court did not follow the correct practice in filling the panel, but denied the writ, and in the opinion said: "There was no excess of jurisdiction in the order made for the special venire. * * * As they were qualified to sit as grand jurors, and were recognized by the court and sworn as a grand jury, the indictment found by it against the petitioner is a good indictment."

In *re Gannon*, 69 Cal. 541, 11 Pac. 240, the invalidity of the grand jury was sought to be invoked in a contempt proceeding to punish a person for refusing to testify before it. It was claimed that the term of the grand jury had expired by law, and that such grand jury was continuing to act when, under the statute, it had ceased to exist. The court said that, if it were to be so assumed, such fact would not "affect its authority to act. As an organized grand jury it would be competent to act under color of authority. Having been appointed to office and having taken the oath of office, the individual members are officers of the court, not only de jure, but de facto, and their acts are valid so far as public rights are concerned, although the title under which they perform those acts may be questionable. It is therefore sufficient to maintain the authority of a grand jury that it has acted under color of lawful authority. An indictment found by a de facto grand jury is as regular as one found by a de jure grand jury."

This case was followed and approved in *People v. Leonard*, 106 Cal. 302, 39 Pac. 617,

in which case the court said: "The fact that the grand jury was organized in November, 1893, and found the indictment against the defendant in January, 1904, does not render it invalid. * * * The action of the grand jury may be considered valid until discharged by the court or by operation of law; and it was said the expiration of a year did not effect such discharge by operation of law."

The subject is very fully and ably discussed in *People v. Petrea*, 92 N. Y. 128; and it was there held that an indictment found by a jury of good and lawful men, selected and drawn under color of law, and recognized by the court, and sworn as a grand jury, is a good indictment within the seise of the Constitution, although the law under which the selection was made is void. The court there said: "The grand jury, although not selected in pursuance of a valid law, were selected under color of law and semblance of legal authority. The defendant in fact enjoyed all the protection which he would have had if the jurors had been selected and drawn pursuant to the general statute. Nothing could be more unsubstantial that the alleged right asserted by the defendant under the circumstances of the case. He was entitled to have an indictment found by a grand jury before being put upon his trial. An indictment was found by a body summoned and sworn as a grand jury, before a competent court, composed of good and lawful men. This we think filled the constitutional guaranty. The jury which found the indictment was a de facto jury, selected and organized under the forms of law. The defect in its constitution, owing to the invalidity of the law of 1881, affected no substantial right of the defendant."

In *Eastham v. Holt*, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259, it was held that prohibition would not lie when the grand jury was impaneled by a court having jurisdiction, although irregularities existed as to the impanelment of such jury. See further, *Thompson & Merriman on Juries*, § 140; 1 *Wharton's Crim. Law*, § 472; *U. S. v. Ambrose* (C. C.) 3 Fed. 287; *People v. District Court*, 29 Colo. 87, 66 Pac. 1068.

Petitioner relies upon *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341. That case appears to have been based upon the fact that the court below had no power to appoint the elisor who summoned the jury. The opinion was by a divided court, three justices, including the chief justice, dissenting. The case does not appear to have been followed in any other case to which our attention has been called; and the later case of *People v. Leonard*, supra, was signed by the justice who wrote the prevailing opinion in the *Bruner* Case.

Counsel also relies upon *Terrill v. Superior Court*, 127 Cal. xviii, 60 Pac. 38. In that case a demurrer had been sustained to an

indictment found by a grand jury, and the court made an order resubmitting the matter to the same grand jury which had found the indictment to which the demurrer had been sustained. The case was based upon section 1008, Pen. Code, which provides that if a demurrer is allowed it is a bar to another prosecution, unless the court "directs the case to be submitted to another grand jury, or directs a new information to be filed." The matter was not resubmitted to another grand jury, and under the plain provisions of the section the learned judge who wrote the opinion held that the order sustaining the demurrer was a bar to another prosecution by the same grand jury. It is plainly seen by an examination of the case that the judge who wrote the opinion entertained the same views as we have expressed, because it is said in the opinion: "This is not a case where a grand jury, irregularly impaneled, acting under the semblance of right and lawful authority, but in the procedure affording every advantage to the accused he would have enjoyed had the proceeding been regular, has presented an accusation to a court having jurisdiction to try him (*People v. Petrea*, 92 N. Y. 128); nor is it an irregular assemblage of men legally qualified to act, and who do act, under the control of the proper court. Here the grand jury had no authority to act at all in the matter. The jurors were not qualified to act, and that fact was a matter of record." The decision is placed upon the correct principle that the body of men that found the indictment, under the provisions of the statute, had no power to act. That is not the case at bar.

We therefore conclude that the court is not exceeding its jurisdiction, and the writ is denied.

We concur: KERRIGAN, J.; HALL, J.

9 Cal. App. 417

BRALY v. FRESNO CITY RY. CO.

(Civ. 514.)

(Court of Appeal, Third District, California.

Nov. 25, 1908. Rehearing Denied by
Supreme Court Jan. 21, 1909.)

1. CARRIERS (§ 381*)—EJECTION OF PASSENGER—EVIDENCE—ASSAULT BY CONDUCTOR.

In an action against a street car company for an assault committed on plaintiff, who had refused to pay fare, evidence held to sustain a verdict for plaintiff, on the theory that he fell or was pushed from the car while in motion as the result of a difficulty with the conductor.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1449; Dec. Dig. § 381.*]

2. CARRIERS (§ 365*)—EJECTION OF PASSENGER—USE OF FORCE.

A person boarding a train or street car must pay the required fare or suffer ejection by the conductor, by the use of such force only as is reasonably necessary.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1451; Dec. Dig. § 365.*]

3. CARRIERS (§ 365*)—EJECTION OF PASSENGER—USE OF FORCE—COLLECTION OF FARE.

Where plaintiff boarded a street car and refused to pay fare, the conductor had no authority to collect the fare by force or other unlawful means, nor to eject plaintiff by using more force than was reasonably necessary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1450, 1451; Dec. Dig. § 365.*]

4. CARRIERS (§ 365*)—EJECTION OF PASSENGER—ASSAULT BY CONDUCTOR—RESISTANCE.

Where plaintiff, after refusing to pay fare on a street car, was assaulted by the conductor, he was justified in defending himself against such assault.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1452; Dec. Dig. § 365.*]

5. CARRIERS (§ 347*)—INJURIES TO PASSENGERS—ASSAULT BY CONDUCTOR—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a street railway company for an assault committed on plaintiff by the conductor of a car on which plaintiff was riding, evidence *held* to require submission of plaintiff's contributory negligence to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1402; Dec. Dig. § 347.*]

6. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The burden of proving contributory negligence rests on the defendant, unless the undisputed facts shown by plaintiff's own evidence clearly shows that plaintiff has not exercised due care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221, 229, 230; Dec. Dig. § 122.*]

7. CARRIERS (§ 338*)—ASSAULT BY CONDUCTOR—CONTRIBUTORY NEGLIGENCE.

That plaintiff did not exercise the best judgment in resisting an assault by the conductor of a street car on which plaintiff was riding did not, of itself, constitute contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1352; Dec. Dig. § 338.*]

8. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF REQUESTS.

It is not error to refuse requests to charge covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

9. CARRIERS (§ 384*)—EJECTION OF PASSENGER—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence did not show that defendant's street car conductor attempted to eject or remove plaintiff from the car when he assaulted plaintiff, but, on the contrary, that the conductor during the altercation was attempting to restrain plaintiff from leaving or stepping from the car, and no signal or proper steps had been taken by the conductor to stop the car when plaintiff fell or was thrown therefrom, the court properly refused to charge that a passenger who fails to ask for or obtain any written transfer, or other evidence of his right to ride in a street car, which he enters after leaving one in which he has paid fare, may be lawfully ejected, if he refuses to pay fare therein; the conductor not being obliged to take the passenger's statement as evidence of his right to ride.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1498; Dec. Dig. § 384.*]

10. TRIAL (§ 234*)—INSTRUCTIONS—STATEMENT OF EVIDENCE.

Where plaintiff testified that, before he boarded a street car from which he transferred to that on which he was assaulted by the conductor, he asked the motorman if the car was a

"Blackstone avenue car," which cars traversed S. street without change, and was answered in the affirmative, an instruction that, if plaintiff, before taking the car, inquired of one of defendant's agents if the original car would take him along S. street, and was informed that it would, and in reliance thereon plaintiff took the car as a passenger of defendant, intending to stop on S. street at a point near his then residence, etc., was not objectionable because it did not correctly quote plaintiff's testimony as to his question to the motorman.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 536; Dec. Dig. § 234.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by J. M. Braly against the Fresno City Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Everts & Ewing, Frank H. Short, and F. E. Cook, for appellant. L. L. Cory and M. K. Harris, for respondent.

HART, J. Action for personal injuries. The cause was tried by jury, and verdict for \$5,000 returned in favor of the plaintiff. Judgment was thereupon entered in favor of the plaintiff for the damages so assessed by the jury. The appeal is from the judgment and the order denying defendant a new trial.

The injuries complained of, and for which damages were awarded, were received by the plaintiff as the result of a fall from appellant's car in the city of Fresno, said fall having been caused, it is alleged, through the culpable negligence of the defendant, committed through its agent. The appellant owns and operates a street railway system in the city of Fresno. One of its lines runs from the passenger depot of the Southern Pacific Company, in said city, over and along J street to the conjunction of J and Stanislaus streets. At this point the track divides into two branches, one branch traversing north along J street and the other east along Stanislaus street. Certain of the cars—called the "North Park cars"—leaving the depot run out J street, and others go out as far as the intersection of J and Stanislaus streets, thence east out the latter street. The last-mentioned are called and known as the "Blackstone avenue cars." It is thus to be observed that a resident of Stanislaus street, by taking a Blackstone avenue car at the depot, would be carried out Stanislaus street without changing cars; but if such resident should take a North Park car, it would be necessary for him to transfer to the Blackstone car at the junction of J and Stanislaus streets, and receive a ticket or transfer for that purpose from the car upon which he started from the depot.

The facts, as we glean them from the testimony of the plaintiff, show that at about 11 o'clock on the night of July 5, 1904, said plaintiff, then about 80 years of age, return-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 99 P.—26

ing home from San Francisco, reached the city of Fresno by way of the Southern Pacific railroad, on what is known as the "Owl" train. At that time he resided on Stanislaus street in said city of Fresno. On alighting from the train he saw one of the cars of the defendant standing near the depot, and, accosting the motorman, inquired whether said car was a Blackstone avenue car, to which question the motorman made an affirmative answer, and he thereupon took a seat on said car. The plaintiff, so he testified, was under the belief, from what the motorman had said, that he would not be compelled to change cars in order to reach his home, and remained under that impression until said car had reached the intersection of J and Stanislaus streets, when, from the direction in which the car was proceeding, he learned for the first time that he was on a North Park car, and that it would therefore be necessary for him to transfer to another or the Blackstone car. Plaintiff testified that, immediately upon learning that he must change to the Blackstone car, he looked for the conductor for the purpose of securing a "transfer," but could not see him, and, the Blackstone car being about ready to start, he at once boarded it, taking an outside front seat on the right-hand side near the motorman. He further declared that, as soon as he took his seat on the Stanislaus car, he informed the motorman of the fact that he had come up from the Southern Pacific depot on the North Park car, and had failed to secure a transfer because he was unable to find the conductor on that car, and requested the motorman to let him off at L street. The motorman replied that he would have to see the conductor "about that." What occurred thereafter may best be told by the plaintiff himself, from whose testimony we, therefore, quote: "The car started immediately after I got on it, and it was soon after I spoke to the motorman, and he told me to see the conductor. I kept my eye back there to see when the conductor would come up. The conductor at the time was on the rear part of the car. He had not come up in front, but about the time we crossed K street, that was a block from the junction where we started, the conductor came out and asked me for my fare, and then I told him that I had come up on the car from the depot and had missed getting a transfer when I got off. I told him I had looked about when I got off, and didn't see the conductor on the car that I came up on. I told him up to that time I supposed I was on the Blackstone car, and would not have to have a transfer, but when I found I needed a transfer, I couldn't see the conductor any more to get one, and so I got on the car without a transfer. When I told him I wanted to get off at L street, to let me off at L street, he said I would have to pay another nickel. He said it in a very rough, brusque, abrupt sort of manner, like he

was trying to make himself as disagreeable as possible. It riled me a little, and I told him I would not. L street was the next street. Along when we were about halfway from K to L, and I told him I would not pay another nickel, he seized my arm, or my wrist. I was looking towards the rear of the car where he was, and he grabbed me by this arm in a very rough sort of way. My arm was out towards where he was, and he took a firm, hard hold of my wrist, and I told him to let go, and made an effort to pull my hand away from him, and I found it was very difficult to do that. In fact, I didn't succeed in doing it, he held on to it hard and fast. After making one vigorous effort to get my hand away, I raised up on my feet and turned my face over towards him, my back to the outside of the car. I had a small hand bag in my other hand, just a small traveling bag, and then the last I remember I was trying to wrench my hand away from him, and don't know anything more until I tried to get off the ground. When I came to myself on the ground I attempted to get up on my feet. * * * Up to that time the car hadn't stopped at all. It was going at full speed, so it seemed to me, and up to that time I hadn't made any effort to get off at all. I had no idea of making an effort to get off until the car stopped anyway. I had no overcoat, just that little satchel. When the conductor demanded a nickel of me, I told him to let me off at L street, and he was then within half a block of L street. Q. Now about what part of the street did you land, Mr. Braly? A. My satchel and hat were lying pretty near to the east side of L street, it was within a very short distance of the east side of L street. When I came to myself, the best I remember I was three or four steps farther towards the middle of the street, towards the west side of the street, but I had been on my feet. It seemed to me I had struggled to my feet after the difficulty, and had made three or four steps towards the middle of the street. At least that is what I thought when I got up. I couldn't remember distinctly, but that is what it seemed to me I had been doing. Anyway I know I was some three or four steps from where my hat and satchel were. Up to that time there had been no signal given to the motorman to stop the car at L street; nothing that I know of at all. I was right there at the motorman, and the car seemed to me to be keeping right up at full speed, so long as I remembered."

On cross-examination the plaintiff further testified: "I have been noticeably and considerably hard of hearing for a great many years, 20 or more, I guess. * * * For 20 years past I have had to be spoken to very much as you are speaking to me now, in a distinct tone of voice. It is not so much the loudness of a man's voice as the distinctness and the carrying tone of his voice.

I was trying all the time to wrench my hand away from the conductor. I know there was just that much of a scuffle. I know I tried repeatedly to get my hand loose from him, four or five times that I tried to wrench my hand away from him. He seemed to be trying to detain me. I couldn't see anything else he was trying to hold me for except to collect that nickel. At any rate, I didn't want him holding me. He had no right to hold my arm, and I didn't argue with him about letting go, but I wanted him to let my arm go. * * * I wasn't making an effort to get off, was not making any preparations to get off. I had told the motorman to stop, and I was all ready to get off if he stopped the car. * * * The car was going full speed, and I didn't propose to get off while it was going that way; didn't expect to; didn't want to. I was ready to get off if he had let my arm alone. That was the only preparation I had to make to get off. * * * After he got hold of my arm I tried to wrench it away from him, and he didn't let go. He was a little stronger than I was. Then I raised from my seat and got to wrenching my arm away from him, but he held on there very tight, and the next thing I knew after that I was getting up off the street, or was trying to. How I went off the car I can't tell you, but it was in the struggle with him. He had a firm, hard grip on my arm. * * * I was quite close to the conductor during the time I had that conversation with him, and I think I heard everything he said to me. * * * In trying to wrench myself loose from him I went overboard, and just exactly how I don't know."

The evidence introduced on behalf of plaintiff disclosing the important circumstances under which he sustained the injuries from which this action has arisen consists entirely of the testimony of the respondent himself, and the foregoing represents a fair résumé of the facts as they were detailed at the trial by him.

As to the nature and extent of the injuries received by the plaintiff, Dr. Hayden, who was immediately called in, testified: "I found him at his residence in bed. He had quite an abrasion, contusion on the left side of the forehead, and on examination I found the left shoulder broken, and he was considerably, somewhat dazed, if I remember right, and suffering a great deal of pain with his broken shoulder." After describing, in technical terms, the character of the injury to the shoulder, the doctor resumed: "I have examined Mr. Braly since, for the purpose of ascertaining the extent of the injuries, and their permanency. There never will be an entire recovery in my judgment, because with that kind of injury it is almost impossible to get a complete apposition of the parts and retain them there. * * * When it comes to raising the arm, like this, by the use of the large deltoid, this large

muscular plane that comes over the joint has shrunk very largely, and he is unable to raise his arm this way, but he can swing the arm back and forth this way. There is a permanent injury to that arm and its use in some of its motions, and he will never obtain the full and entire use of his arm again, in my judgment. * * * During the time I was attending him he suffered considerably, and his injuries were very painful."

Mrs. Braly, wife of the plaintiff, testified that he suffered so much pain from his injured shoulder for about a year that he was unable to obtain during that time, "a comfortable night's sleep."

The testimony offered by the defense differs materially from that given by the plaintiff concerning the circumstances leading to the injuries sustained by the latter. The conductor and the motorman testified that the plaintiff, after having been asked for his fare, refused to pay the same, and shortly thereafter arose from his seat, and placed one foot on one of the steps of the car while it was in motion as if he intended stepping off. The conductor said that he admonished the plaintiff not to undertake to get off the car until it was stopped, and, being apprehensive that plaintiff would not heed the warning thus given, or that he might fall from the car, he placed his hand on plaintiff's arm and clutched the clothing, so as to prevent him from either falling or trying to step off. The conductor denied that he caught hold of plaintiff's wrist in a violent manner, or at all, or that he placed his hand upon him until, as before stated, plaintiff placed his foot on the step. In fact the testimony of the conductor was, in substance, that no violent scuffle between them occurred, and that plaintiff's precipitation to the ground was due to his own carelessness. The motorman testified on cross-examination that the car was going at the usual speed until he reached L street, when, thinking plaintiff intended trying to get off, he put on the brakes so as to "slow down"; but that the conductor had given him no signal to stop. He further testified that he heard the conductor ask Braly, "Don't you think you ought to pay your fare?" that thereupon the plaintiff arose from his seat, at the same time saying that the conductor was trying to rob him, and that he would not be "buncoed" that way. "I did not see the conductor put his hand on Mr. Braly," continued the motorman, "until he got on the first step of the car. Then he reached out with his fingers and thumb. That did not have any effect on Mr. Braly to stop him or hold him. He went right on. In my position as motorman running that car, my face would be turned in the opposite direction from where these people were, and my duties there required my constant watching and attention. * * * Mr. Braly was about three feet behind me, and when he was talking to the conductor he had his back towards me. When he raised

to get off the car, the conductor took hold of him somewhere." Other witnesses, who were passengers on the car, testified that they heard or saw no violent trouble between the conductor and plaintiff prior to the accident. Two witnesses besides the conductor and motorman testified that they heard some one say "not to get off till the car stopped." All the passengers, except one, that were called as witnesses for the defense were either on the inside of the car or on the outside seats on the rear end of the car. But the witness Loper was riding on the "left-hand front end, open part, of the car" at the time, and he testified that, "as we approached L street, and just before the car stopped, I heard some one behind me say 'Don't get off until the car stops.'" Further he testified: "Previous to or at the time I heard those words 'don't get off till the car stops' I did not hear any scuffling or particular noise, excitement of that kind."

The foregoing is, in substance, the testimony received on behalf of the defendant.

Counsel for the appellant, while recognizing the rule in this state, established by the Constitution that the appellate courts are restricted in their appellate jurisdiction to the review and consideration of questions of law alone, urge, as among other reasons, which they contend must compel a reversal of the judgment and order, that the evidence is insufficient to justify the verdict returned by the jury. In support of this position it is argued with much earnestness and learning, that the story as related by the plaintiff is, upon its face, intrinsically improbable, and that it is so obviously so that we are required to declare that his case, resting as it does almost entirely upon his own testimony, must fall, because it is thus clearly manifest, and therefore must be said, that the evidence, as a matter of law, is totally insufficient to justify the verdict upon which the judgment is founded. We have, in view of this argument, examined the testimony of the plaintiff in connection and comparison with the other testimony presented by the record with unusual and critical care, and are not thus led to an assent to the learned counsel's criticism thereof. Cases may arise (and no doubt have arisen) in which the testimony directed to the support of the fact in dispute may bear upon its face the indubitable earmarks of falsehood; as, for instance, the facts thus brought out might themselves, upon their face, disclose that it was physically impossible that they, as stated, could have existed or occurred at all. But this is not such a case.

The argument is that, as none of the witnesses—passengers on the car at the time—other than the plaintiff himself saw or heard the trouble between the conductor and the former as it was described by the plaintiff, and, as it appears improbable that the apparently extended colloquy which the plaintiff testified took place between himself and the

conductor could have so taken place in the short distance traversed by the car, going at the usual speed, from the time the trouble began until plaintiff fell to the ground, therefore the story upon its face is so impressed with the characteristics of improbability that it is inherently unbelievable. It is, of course, impossible for this court to explain why the other passengers on the car would not have been attracted to and observed the trouble between the plaintiff and the conductor, if it was as violent and demonstrative as it was described by plaintiff to be, for he testified that the conductor roughly caught hold of his wrist, and that a struggle or scuffle, due to his efforts to extricate himself from the grasp of the conductor, ensued, and that many loud and acrimonious words passed between them during the altercation. But, as has often been declared by the appellate courts, such questions are matters which must be addressed entirely to the jury for solution—matters exclusively within the province of the triers of the facts to determine. The many tests afforded by the law which a jury may employ in determining the weight to which the testimony of witnesses may be entitled are essentially beyond the power of appellate courts to invoke. Among the most important of these tests is the manner of a witness in relating his story, for his manner may, of itself, be sufficient, in the judgment of a jury, to justify the rejection in toto of an otherwise apparently truthful narrative. Or take, for example, the case of the plaintiff here. His manner or style of testifying might have involved unnecessary prolixity or circumlocution (as is often the fact for various reasons, in witnesses unaccustomed to giving evidence in courts), so that from his testimony, as reproduced on paper, or even as given in court, it might appear that much more occurred in the way of conversation or colloquy between himself and the conductor than could possibly have taken place in the time within which the same must necessarily have occurred. We do not know, and, in the very nature of things we cannot know, the manner in which the plaintiff told his story. The jurors could of course observe his manner, and it was their duty, which presumptively they performed, to consider the same in weighing his testimony. A witness' memory may appear to the jurors, by the manner in which he testifies, to be faulty, and yet such fact would not and could not be made to appear so to a reviewing court, because his manner, when testifying, cannot be displayed by the record on appeal. These propositions are commonplaces in the law governing the determination of the weight to be given evidence in courts of justice, but their restatement here in connection with the point we are discussing is only for the purpose of again illustrating, if illustration of so obvious a proposition be necessary, how barren of just and efficacious results in the administration of justice would be the practice of appellate

courts, if such practice were tolerated, of passing upon questions of fact, presented "secondhand," so to speak, or where the facts were not directly from the lips of the witnesses in their presence. The case here is one in which there arises a substantial conflict in the evidence, and, while it would appear incredible that the passengers that testified did not hear and see the altercation resulting in plaintiff's injuries as the latter described it, if it happened that way, the verdict is a finding that the jurors reconciled all discrepancies and variances and seeming improbabilities arising in the evidence, whatever they were, to their satisfaction, and to this finding this court must submit. It is a significant fact, it may be suggested in this connection, that it was nearly two years from the time the injuries were received by plaintiff to the time of the trial, and it is not at all improbable that the manner in which some of the witnesses gave their testimony convinced the jury that their recollection of the facts as they occurred was somewhat vague, dubious, and uncertain. It is only natural that disinterested witnesses would not retain in their minds for so long a period all the details of a transaction such as the one from which this action originated. In addition to the foregoing observations, involving, as perhaps they do, speculation as to how the jury could, from the evidence, have reasonably reasoned out its verdict, it is to be noticed that there are two circumstances, admitted by the defendant's main witnesses, which would appear to be corroborative to some extent of plaintiff's version of the difficulty. These are that the conductor did lay his hands on the plaintiff during the altercation, although they said not violently, and that from the beginning of the trouble to the time the plaintiff fell from the car, no signal was given the motorman by the conductor to stop the car. It is also a significant admission, in some degree corroborative of plaintiff's story, that the last named said to the conductor that he (plaintiff) did not propose to be "buncoed." The plaintiff, although a very old man, was nevertheless an active man, physically, and from the testimony appears to have been in full possession of his intellectual faculties. He was, up to the time of the accident, engaged as a representative of a banking institution, acting in the capacity of land surveyor, the duties of which were to examine and appraise the value of lands on which the bank had been requested to make loans.

The facts, as found by the jury, show that the conductor violently grasped the plaintiff by the wrist, and held fast thereto until, in some manner not made clear, the latter fell to the ground. The car was going at full speed, and the plaintiff, as he had a right under the law to do, undertook to free himself from the grip of the conductor. No signal was given by the conductor to stop the car, and in the struggle in some way not, as

observed, clearly accounted for by the record, the plaintiff was thrown to the ground while the car was yet in motion. That there was no intention on the part of the conductor to stop the car is made to appear reasonably certain by the testimony of both the motorman and the conductor, for they both declared that no signal had been given to stop the car. And it may well be suggested, as a singular circumstance at least, of which the jury probably took the same view, that if, as the conductor testified, the plaintiff was in the act of stepping off the car while it was still in rapid motion, the former did not signal the motorman to stop the car. But we have already given a fair synopsis of the facts as they were proved at the trial, and found by the jury, and it is unnecessary to further recapitulate them. It is enough to say that the jury was fully warranted in concluding and finding that the difficulty on the car occurred as the plaintiff described it; that the conductor attempted, by unwarranted means and violence, to compel the plaintiff to pay his fare and that in the "scuffle" following the attack upon the plaintiff by the conductor the former by some means either fell or was thrown to the ground. It may be added that no effort was made, except, of course, such as was attempted by means of the unaccepted testimony of the conductor, motorman, and other witnesses for the defense purporting to give the circumstances of the trouble, to impeach the testimony of the plaintiff, and the jury having been persuaded, after full consideration of the whole case, of the truthfulness of his version of the transaction leading to his injury, and the facts as testified to by him having disclosed that his injury was received through the negligent act of the defendant or its agent, acting, when committing such act, within the scope of his authority as such, and through no fault of plaintiff himself, then, necessarily, no reason is made apparent by the record, so far as the evidence is concerned, upon which a disturbance by this court of the finding of the jury and, consequently, the judgment, could be justified.

Counsel for appellant have presented and reviewed many cases from this and other jurisdictions expounding the principles applicable to cases of the character of the one here. The principles thus exploited are well settled and elementary. No one has ever denied, or attempted to deny, that a person boarding a train or street car must pay the required fare, or suffer ejection therefrom; that upon a refusal to pay such fare the passenger may be removed from the train or car by the conductor, by the use of such force only as is reasonably necessary. All the cases cited by counsel go to this extent only, and, with the exception of three or four of the large number of cases thus brought to our attention, the injury alleged consisted entirely in the act of expulsion, and were not cases in which physical injuries were claimed to

have been inflicted through the negligence of the defendants. But it is said that "it is held by the authorities that to make a defendant liable it is necessary that the relation of carrier and passenger exist at the time of the assault, or at the time of the commission of the acts by the defendant"—citing *Reilly v. N. Y. City Ry. Co.*, 46 Misc. Rep. 72, 91 N. Y. Supp. 319, and *Palmer v. Winston-Salem R. & E. Co.*, 131 N. C. 250, 42 S. E. 604. As an abstract legal proposition, no one can question the soundness of the statement thus made; but it does not apply to this case. As we understand the argument of counsel, the contention is that, as the plaintiff had refused to pay his fare, he cannot be treated in law as a passenger, and hence the relation of passenger and carrier did not exist between him and the defendant at the time the injuries were received. No case to which our attention has been directed has carried the doctrine to that extent, and we think no such case can be found. In the case of *Reilly v. N. Y. City Ry. Co.*, supra, the passenger had voluntarily left the car at a station, after having trouble with the conductor on the car. The passenger awaited the conductor on his return trip. The conductor left his car, and stepped into the office of the company to which the car belonged, and there the passenger renewed the quarrel, and the conductor assaulted him. Obviously the company could not be held liable for the assault, because the relation of passenger and carrier had ceased, and it was so held. In *Palmer v. Winston-Salem Ry. & Electric Co.*, supra, the passenger had reached his destination and dismounted from the car. He had engaged, while on the car, in a quarrel with the motorman, and, after depositing his bundles on the sidewalk, returned to the car, renewed the altercation with the motorman, and then turned and left the car, whereupon the motorman followed him up, and, two or three steps from the car delivered a blow on the back of plaintiff's head with the lever which was used in controlling the car, knocking him down. It was held that the plaintiff could not recover from the company for the assault, inasmuch as the passage had terminated for the passenger, and that consequently the relation of passenger and carrier between the plaintiff and the defendant had ceased.

In the case at bar, while having refused to pay his fare, the plaintiff thus became a trespasser, and was therefore subject to be removed from the car, he was, nevertheless, a passenger in so far as the nature of the treatment due him from the defendant and its agents was concerned. The conductor had a perfect right to eject him, but he had no right to assault or otherwise maltreat him merely because he was primarily in the wrong by the refusal to pay the required fare. In other words, there was no authority in the conductor to collect the fare by force or other unlawful means, nor to remove the plaintiff by means of any more force than

might be reasonably necessary to accomplish that fact. In this connection, the language of the late learned Judge Sanderson, speaking for our Supreme Court, in *Needham v. S. F. & S. J. R. Co.*, 37 Cal. 419, the action being for damages for injuries to a horse inflicted through the alleged negligence of the defendant, is pertinent; "The Golden Rule is a corner stone of the law, as well as of morals, and in the department of the former finds its expression in the maxim '*Sic utere tuo, ut alienum non lædas.*' No more in law than in morals can one wrong be justified or excused by another. A wrongdoer is not an outlaw, against whom every man may lift his hand. Neither his life, limbs, nor property are held at the mercy of his adversary. On the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former; and, if by so doing he can avoid injuring the person or property of the former, he is liable if he does not, if, by reason thereof, injury ensues." The proposition will not be controverted that, if the conductor caught hold of the plaintiff in the manner described by the latter, and continued thus to hold him until the plaintiff either fell or was thrown to the ground, the act of the conductor involved an assault for which the defendant could be held liable; and if, as a result of such assault, and through no fault of his own, the plaintiff fell or was thrown to the ground from the car, while the same was in motion, receiving the injury for which he here asks damages, then the defendant is liable for damages for the injury so received. And it will not be disputed that, if the trouble originated and occurred as described by the plaintiff, the latter was justified in defending himself against the assault. We see nothing in plaintiff's testimony as it appears here from which the jury would have necessarily been justified in finding that he was guilty of contributory negligence, or, in other words, that any act of the plaintiff was the proximate cause of the injury received by him. Just how it happened that he fell from the car he did not know, and, as the jury evidently disbelieved and discarded the defendant's evidence, it must have concluded that, in his efforts to release himself from the clutch of the conductor, the plaintiff lost his balance and fell from the car—by no means an improbable theory under plaintiff's testimony. And, as we have seen, it must have been upon the testimony of the plaintiff alone that the jury founded its verdict, for the testimony offered by the defendant, if believed, would have forced a verdict for the defendant.

This is a case, therefore, where the question of contributory negligence was one peculiarly for the jury to determine. Indeed the question of contributory negligence is nearly always a matter for the jury, and the burden of proving it rests upon the defendant, unless the undisputed facts, shown by the plaintiff's

own evidence clearly disclose that the complaining party has not exercised such care as men of prudence usually exercise in positions of like exposure and danger, in which case it becomes a question of law for the court. *Glascocock v. C. P. R. R. Co.*, 73 Cal. 137, 14 Pac. 518; *Franklin v. S. C. M. R. Co.*, 85 Cal. 63, 24 Pac. 723; *Green v. P. L. Co.*, 130 Cal. 435, 62 Pac. 747; *Hodges v. S. P. Co.*, 3 Cal. App. 310, 86 Pac. 620; *Dinnigan v. Peterson*, 3 Cal. App. 764, 87 Pac. 218; *Williams v. S. F. & N. W. R. R. Co.*, 6 Cal. App. 715, 93 Pac. 122; *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Carr v. Eell River, etc.*, R. R. Co., 98 Cal. 368, 33 Pac. 213, 21 L. R. A. 354. Even if it be true that it subsequently developed that plaintiff did not exercise the best judgment in the manner of resisting the assault of the conductor under the circumstances shown by the record, yet that fact of itself cannot, and does not, constitute negligence on his part. "A passenger," says the Supreme Court in *Lawrence v. Green*, 70 Cal. 421, 11 Pac. 752 (59 Am. Rep. 428), "ought not to be deemed guilty of contributory negligence when he takes such risk as under the same circumstances a prudent man would take, citing *Shearman & Redfield on Negligence*, § 282; and, when the circumstances are such as would deprive a person of ordinary prudence of his self-possession (italics here ours), it is not to be expected that he will have all his mental faculties perfectly at his command." See *Robinson v. W. P. R. R. Co.*, 48 Cal. 421, *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. 747, and *Dinnigan v. Peterson*, supra. In cases where a party is suddenly put in a position of peril by the negligent act of another, "without sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although, if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault, and of such case it is said: 'Even if, in bewilderment, he runs directly into the very danger which he fears, he is not in fault. The confusion of mind, caused by such negligence, is part of the injury inflicted by the negligent person.'" *Schneider v. Market St. Ry. Co.*, 134 Cal. 490, 66 Pac. 734, citing and quoting *Shearman & Redfield on Negligence*, § 89. The plaintiff here, as seen, was a very old man, of intelligence, occupying a responsible position, and laboring under the belief—a mistaken one, it is true—that, having paid his fare to the first conductor, he was entitled to be taken to his home without producing a transfer check by explaining to the conductor on the car to which he transferred the circumstances attending his omission to secure such check. He was, according to his story, which was accepted by the jury, pounced upon by the conductor in a violent and brutal manner, and roughly commanded to pay his fare. Is it to be wondered that

in his indignation at such treatment he would become perturbed and confused? If, therefore, he acted injudiciously under the circumstances, upon whom should the responsibility of such want of discretion on his part be required to rest? The law answers that it must fall upon him by whose negligence such indiscreet conduct was caused. In dismissing this question of alleged contributory negligence on the part of the plaintiff we may assume, for the purposes of the argument, that he did not exercise the best judgment in his manner of resisting the assault of the conductor under the circumstances indicated, and, so assuming, may inquire, Is there anything in the evidence produced by the plaintiff, in support of the allegations of his complaint, disclosing such negligence by him as to justify the taking of the question of contributory negligence from the jury? If there is, it has not been pointed out, nor have we been able to find it.

The appellant complains that the court erred to his prejudice in refusing to read to the jury instructions Nos. 1, 2, and 3, requested by him, and in giving instruction No. 18 at the request of plaintiff. We think the law of the case was fully and fairly stated by the court in its charge to the jury. The principle declared in the rejected instruction, numbered 1, requested by defendant, was clearly covered by and declared in instruction No. 9, given by the court on the defendant's motion. Instruction No. 2 was properly rejected. The principle enunciated therein, was covered by the given instructions, particularly by instruction No. 10. But the rejected instruction contained a statement not authorized by the evidence. There was not, as we have seen, any evidence that the "conductor in charge of the car operated by defendant on which plaintiff was riding when he was injured, signaled the motorman to stop such car."

Instruction No. 3 was also properly refused. It reads: "A passenger who fails to ask or obtain any written transfer or other evidence of his right to ride in a street car which he enters after leaving one in which he has paid fare, may be lawfully, rightfully, and properly ejected if he refuses to pay fare therein, and the conductor is not obliged to take the passenger's statement as evidence of his right to ride." This instruction contains manifestly a correct statement of the law, and the rule as thus declared was, in effect, given in certain instructions read to the jury by the court. But the instruction is not altogether pertinent to the facts as established by the evidence, and for that reason alone the court was justified in refusing to submit it to the jury. The evidence does not show that the conductor attempted to eject or remove the plaintiff from the car. To the contrary, the testimony of both the conductor and the motorman was to the effect that the former was, during the altercation, attempting to restrain the plaintiff from

leaving or stepping from the car. Again, the evidence is, we may suggest at the expense of repetition, that no signal or other proper steps were taken by the conductor to stop the car so that he could "lawfully and rightfully" eject the plaintiff.

We are unable to perceive any tenable ground for the criticism to which instruction No. 18, given to the jury at the request of the plaintiff, is subjected by counsel for appellant. The instruction involves, we think, a fair statement of the theory of the plaintiff's case as developed by the proofs. But counsel particularly objects to the following portion, of said instruction: " * * * That the plaintiff * * * before taking the car, inquired of one of the agents of the defendant, to wit, the motorman of said car, if that car would take him along Stanislaus street, and was informed that it would; that in reliance upon said statement and information the plaintiff took said car as a passenger of the defendant, intending to stop at Stanislaus street at a point near his then residence." Counsel declare that there is no evidence that plaintiff inquired of the motorman of said car "if that car would take him along Stanislaus street, and was informed that it would." Strictly and literally speaking, counsel are right; but the jury could not have been misled by the instruction, in view of the evidence upon the point as to which the criticism is ventured. Plaintiff testified that he asked the motorman if "that car was a Blackstone avenue car," to which the motorman gave an affirmative reply. The evidence does show that the "Blackstone avenue car" traversed over Stanislaus street, and that said car would have taken him along that street.

We see no just reason for disturbing either the judgment or order, and they are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

[9 Cal. App. 376]

HENDRY v. IRVINE. (Civ. 533.)

(Court of Appeal, First District, California.
Nov. 23, 1908.)

1. SALES (§ 365*)—CONTRACTS—PERFORMANCE—FINDINGS.

A finding that a seller, contracting to construct and deliver an engine, performed his contract, is not erroneous, though he delayed the delivery thereof, where the buyer accepted it, unless the buyer was damaged by the delay.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 365.*]

2. SALES (§ 418*)—CONTRACTS—PERFORMANCE—DELAY IN PERFORMANCE—DAMAGES.

Where a seller, contracting to construct and deliver an engine for irrigating work, delayed the delivery thereof, but it appeared that the engine, which was delivered before a pump subsequently contracted for was delivered, was useless without the pump and the seller built the

pump according to a model furnished by the buyer, the delay in the delivery of the engine, on which alone plaintiff relied, did not cause any damage to the buyer, especially when the pump furnished was incapable of doing the work for which it was designed.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 418.*]

3. SALES (§ 418*)—CONTRACTS—PERFORMANCE—DAMAGES.

Where the engine furnished by the seller conformed to the contract, any expenses incurred or damages suffered by the buyer in making the engine efficient were not chargeable against the seller.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 418.*]

4. APPEAL AND ERROR (§ 1152*)—DISPOSITION OF CAUSE ON APPEAL—AFFIRMANCE—JUDGMENT.

A judgment for plaintiff was rendered, and a motion for new trial was denied in the lifetime of defendant. He took an appeal from the judgment, and, after his death, his administrator appealed from the order denying a new trial, and was substituted in the place of the judgment debtor. *Held*, that the court, on affirming the judgment, would not modify it so as to direct that it be paid in due course of administration, since such modification might embarrass proceedings against the sureties on the appeal bond.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1152.*]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by A. M. Hendry against William Irvine, in which, after defendant's death, Louis A. Irvine, administrator, was substituted as defendant. From a judgment for plaintiff and from the refusal of a new trial, defendant appeals. Affirmed.

George W. Towle, for appellant. Mullany, Grant & Cushing and Cushing, Grant & Cushing, for respondent.

KERRIGAN, J. On April 23, 1900, Charles Rapp and others, doing business under the firm name and style of Union Machine Company, entered into a contract with William Irvine, whereby they agreed to construct for him a double-cylinder gasoline engine, and two metal tanks, to be completed and delivered at San Francisco on or before June 4, 1900. According to the terms of the contract, Irvine paid \$1,000 on account of the purchase price of the engine when the contract was entered into, and the balance of \$550 was to be paid when the engine was set up on Irvine's premises and had been in successful uninterrupted operation for the period of 30 consecutive days thereafter, or for so much of the 30 days as Irvine should desire to operate it. The engine was delivered and set up, Irvine refused to pay the balance of the purchase price, and the claim of the Union Machine Company therefor was subsequently assigned to A. M. Hendry, who commenced this suit for its recovery. A second cause of action is set up in the complaint for goods sold and delivered and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

services rendered, amounting to the sum of \$258.45. Defendant Irvine in his answer denied that such an engine as had been contracted for was ever furnished; and alleged that the engine delivered could not be made to run continuously or uninterruptedly for 30 days, or for any substantial length of time; that the engine and tanks were not delivered within the stipulated time; and that the pump connections referred to in the second cause of action were not furnished for him, nor on his order, but had been furnished to and for the order of a third party. As a counterclaim, Irvine alleged damages for expenses incurred on account of alleged defects in the construction of the engine, and he also alleged that, by reason of the delay in the delivery of the engine, he was unable to irrigate his alfalfa crops, which died for want of water. The action was tried without a jury, and judgment went in favor of plaintiff. The defendant made a motion for a new trial, which was denied. Thereafter William Irvine died, and Louis A. Irvine, the administrator of his estate, was substituted as defendant herein. An appeal was taken by William Irvine from the judgment, and by Louis A. Irvine, his administrator, from the order denying the motion for a new trial.

We do not feel required to restate the evidence, or even to summarize the many pages of testimony appearing in the transcript. We shall content ourselves with saying that, while the evidence is conflicting, it is sufficient to support the findings of the trial court. There is ample evidence in the record to show that the engine was capable of doing exactly the character of work, and was of the design and horse power, called for by the contract, and we therefore conclude that there is no merit in the contention of the appellant that the Union Machine Company failed to fulfill its contract as to the engine.

There is also evidence to support the finding of the court of due performance by the Union Machine Company of the conditions of its contract. Appellant contends that, as the engine was not delivered until 30 days after the time specified in the contract, this finding is error. The delay in the delivery of the engine (it having been accepted by Irvine) did not make the finding erroneous, unless Irvine was damaged by the delay. Here a slight digression is necessary. William Irvine desired to purchase a pump which had been invented by one Morton, who agreed with Irvine that the latter could arrange with some machinist to construct it for him without paying Morton any royalty therefor. An oral agreement was made by Irvine and the Union Machine Company by the terms of which the machine company was to build the pump according to the Morton design. The appellant did not plead damages caused by any delay in furnishing

the pump. The only damage pleaded is on account of the alleged defects in the engine. As the engine was useless for irrigating purposes without the pump, and as the engine (as shown by the evidence) was delivered before the pump, the delay in furnishing the engine was immaterial, and that delay did not cause the loss complained of. But, in any event, as the pump—which was built according to a model furnished by appellant, and for the success of which the machine company was not responsible—was, when installed, incapable of doing the work for which it was designed, it was the pump, and not the alleged delay in furnishing the engine, which caused the alleged damage.

Appellant insists that the court erred in refusing to allow him to show the expenses to which he was put in his efforts to operate the engine on crude oil, also the expenses incurred by him in making the engine efficient, etc. The court having found, upon sufficient evidence, that the engine conformed to the contract, any expenses incurred, or damages suffered by appellant, concerning the engine, would not be a charge against the respondent. The court committed no error in excluding the offered testimony.

It is needless to pursue the discussion further. All the matters urged by appellant for a reversal of the judgment and order depend upon the proposition advanced by him that the evidence is insufficient to support the findings; but a careful examination of the record shows, as we have already said, that the findings are amply supported by the evidence.

This brings us to the last point in the case. The judgment was against William Irvine in his lifetime. Since then, and since the entry of the order denying him a new trial, he died, and his administrator has been substituted in his place. Appellant suggests that, if the judgment be affirmed, it should be changed so as to direct that it be paid "in due course of administration." The judgment, when affirmed, will be paid, as far as the estate is concerned, in due course of administration, but as the judgment when affirmed will become final as of the date of entry, and as the suggested change if made might embarrass the respondent in proceeding against the sureties on the appeal bond, it would be improper for this court to make the modification suggested.

The judgment and order are affirmed.

We concur: COOPER, P. J; HALL, J.

IRVINE v. RAPP et al. (Civ. 462.)
(Court of Appeal, First District, California.
Nov. 23, 1908.)

ACTION (§ 53*)—SPLITTING CAUSE OF ACTION.
Where a buyer, when sued for the price due by an assignee of the seller, cannot set up as a

counterclaim his claim for damages for breach of contract of sale because his claim is in excess of the amount claimed by the assignee and the seller is not a party to the suit, he may bring an independent action against the seller for such damages.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 53.*]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Louis A. Irvine, administrator of the estate of William Irvine, deceased, substituted as plaintiff in place of William Irvine, against Charles Rapp and others. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

George W. Towle, for appellant. Mullany, Grant & Cushing and Cushing, Grant & Cushing, for respondents.

KERRIGAN, J. This is an appeal from an order denying plaintiff's motion for a new trial. The plaintiff in this case is the defendant in the action entitled *A. M. Hendry v. Louis A. Irvine, etc.* (No. 533, this day decided) 99 Pac. 408, and is brought to recover the same claim which in said action numbered 533 had been set up by said Irvine as a counterclaim—the bringing of a separate action being made necessary by the fact that the claim for damages of William Irvine (defendant's intestate in said action numbered 533) was in excess of the amount claimed by plaintiff therein (who was the assignee of the Union Machine Company) and by the fact that the machine company was not a party to that suit. The two cases were tried together upon the same evidence, and in this case the court rendered judgment against plaintiff and in favor of defendants for costs. Plaintiff made a motion for a new trial, which was denied. The points urged for a reversal of the order are the same as those considered in said case numbered 533; and for the reasons there given we think the action of the court in denying plaintiff's motion for a new trial was correct.

The order is therefore affirmed.

We concur: **COOPER, P. J.; HALL, J.**

9 Cal. App. 382

TAYLOR v. MANSON et al. (Civ. 564.)

(Court of Appeal, First District, California. Nov. 24, 1908. Rehearing Denied by Supreme Court, Jan. 22, 1909.)

1. MUNICIPAL CORPORATIONS (§ 744*)—INJURIES FROM DEFECTIVE STREET—BURDEN OF PROOF.

In an action against the board of public works of a city for injuries from a defective sidewalk, plaintiff must prove that his injuries were proximately caused by a dangerous defect in the sidewalk.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

2. MUNICIPAL CORPORATIONS (§ 757*)—TORTS—DEFECTS IN STREETS—LIABILITY AT COMMON LAW.

At common law no action lies for injuries caused by a city's failure to repair a defective highway.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 757.*]

3. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—LIABILITY OF OFFICERS.

The board of public works, being public officers with prescribed duties, must perform their duties with due care; and, where the duty is plain, and is negligently performed, or not performed at all, the officer is liable to a private individual for injuries sustained by his negligence, but if the act is discretionary, or the officer has not the means to perform it, he is not liable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1565; Dec. Dig. § 744.*]

4. MUNICIPAL CORPORATIONS (§ 173*)—OFFICERS—LIABILITIES ON BOND.

The sureties on the official bonds of members of the board of public works will only be liable for their negligent acts when the members themselves would be liable.

[Ed. Note.—For other cases see Municipal Corporations, Cent. Dig. §§ 399, 400; Dec. Dig. § 173.*]

5. MUNICIPAL CORPORATIONS (§ 744*)—INJURIES FROM DEFECTS IN STREETS—LIABILITY OF OFFICERS.

Under San Francisco City Charter, art. 1, § 5, making the officers through whose negligence defects in streets remain unrepaired liable to the party injured for damages sustained, the board of public works would not be liable for failure to repair defective sidewalks, where they had no means with which to repair them.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1565; Dec. Dig. § 744.*]

6. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—INJURIES FROM DEFECTS IN STREETS—LACK OF FUNDS.

If a municipal officer has no funds, or inadequate funds, and no means of obtaining additional funds, he is not negligent in not doing work which requires the expenditure of funds, and may exercise a discretion in expending what repair funds he has, and is not liable for errors in judgment for applying the funds to repairs less urgently needed than others.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

7. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—INJURIES FROM DEFECTS IN STREETS—LACK OF FUNDS.

San Francisco City Charter, c. 1, art. 3, § 1, requiring the city boards, on or before the first Monday of April, to send to the commissioners an estimate of the amount of expenditures required in their boards, is only directory as to the time when the estimate shall be given to the commissioners, and the board will not be negligent for not making it on that date, where no injury resulted from its failure to do so, or the commissioners had time to consider the estimate notwithstanding the delay; and, where the board of supervisors refused an application made in June, for appropriations for repairing defective sidewalks, because the abutting owners should make such repairs, the board of public works were not negligent in not making their application in April, as provided by the charter, it being evident that the appli-

cation would have been refused even if then made.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

8. MUNICIPAL CORPORATIONS (§ 890*)—FISCAL MANAGEMENT—APPROPRIATIONS—REQUISITES—SUFFICIENCY OF STATEMENT.

Under San Francisco City Charter, c. 1, art. 3, § 1, requiring the city boards to give the supervisors a written estimate of the amount of expenditures required, specifying in detail the objects thereof, the board of public works need not specify each defective sidewalk to be repaired, in requesting appropriations for that purpose; a general estimate for repairs to defective sidewalks being sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1872; Dec. Dig. § 890.*]

9. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—DEFECTS IN STREETS—DUTY TO REPAIR.

San Francisco City Charter, c. 2, art. 6, § 16, requiring the board of public works to compel the owners of lots fronting on a defective sidewalk to repair the part of the sidewalk in front of the property, applies only to sidewalks on which the lots directly front, so that a triangular piece of sidewalk at the intersection of sidewalks of intersecting streets would not face on the corner lot, and the owner could not be compelled to repair that part of the sidewalk, and hence the board was not negligent in failing to compel the corner owner to repair the walk at the corner.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

10. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—DEFECTS IN STREETS—LACK OF FUNDS—PROCEEDS OF FINES.

Under San Francisco City Charter, c. 2, art. 6, § 18, authorizing the board of supervisors to prescribe penalties for neglect to repair sidewalks, and permitting any fines to be applied to payment of the expense of such repairs, where the board of supervisors did not provide that the fines should go into a special fund for that purpose, such fines would go into the general fund, and hence would not be available for sidewalk repairs so as to affect liability to one injured by a defective sidewalk.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

11. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—DEFECTS IN STREETS—LACK OF FUNDS FOR REPAIRS.

Where the board of supervisors had never provided that the fines, authorized San Francisco City Charter, c. 2, art. 6, § 18, for neglect to repair defective sidewalks should go into a special fund for that purpose, the board of public works was not negligent in not procuring the board of supervisors to make such provision so as to procure funds to repair defective sidewalks, and hence would not be liable to a person injured from the defect, because of its failure to procure funds from that source to repair the defect.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

12. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—DEFECTIVE SIDEWALKS—CARE REQUIRED.

The city is not an insurer against accidents from defective streets, and the commissioners of public works are not bound to have sidewalks maintained so as to be absolutely safe for use by all persons under all conditions, and are not liable for injuries caused by defective sidewalks, unless the sidewalk was so out of re-

pair as to endanger persons of ordinary health and strength in using it.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

13. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—DEFECTIVE STREETS—NATURE OF DEFECT.

In an action against members of the board of public works for injuries from falling on a sidewalk, claimed to be defective because of a depression of three or four inches where the cemented portion of the sidewalk joined the dirt walk, an instruction should have been given that the board would not be liable for every defect, and were not liable if the sidewalk was in a reasonably safe condition for those exercising due care.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

14. MUNICIPAL CORPORATIONS (§ 744*)—TORTS—DEFECTIVE STREETS—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action against members of the board of public works for injuries sustained because of a depression where the cement sidewalk stopped, where there was evidence tending to show that the injury was caused by falling off the curb into the street, a requested instruction should have been given that, if plaintiff was not injured by any defect in the sidewalk, defendants were not liable.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 744.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

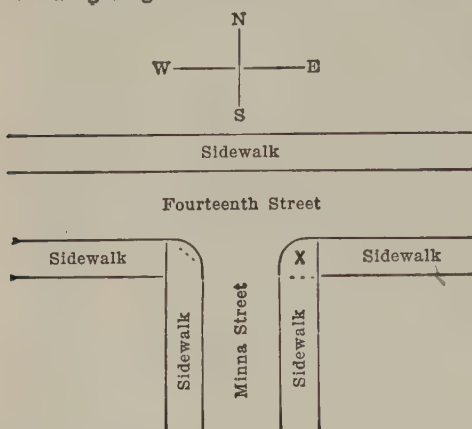
Action by Charles D. Taylor against Marsden Manson and others. From a judgment for plaintiff, and an order denying a motion for new trial, defendants appealed. Reversed.

Stratton & Kaufman, Lloyd S. Ackerman, Finch & Melsted, and Devoto & Richardson, for appellants. Ray P. Saffold, for respondents.

COOPER, P. J. This action was brought against the defendants Manson, Schmitz, Woodward and Casey, members of and constituting the board of public works of the city and county of San Francisco, and against the other defendants as sureties upon their official bonds, to recover damages for personal injuries sustained by plaintiff by falling off a sidewalk in the city and county of San Francisco, alleged to have been in a defective condition and dangerous to the traveling public. The jury returned a verdict for the plaintiff, upon which judgment was entered, and this appeal is from the judgment and an order denying the motion of the defendants for a new trial.

It appears from the record that between 8 and 9 o'clock on the evening of April 27, 1904, the plaintiff, then about 71 years of age, accompanied by his son T. K. Taylor, while traveling on the sidewalk on the south side of Fourteenth street going west toward Minna street, fell and sustained a severe fracture of the right hip, and was in conse-

quence for a long time confined in a hospital under the care of physicians. The position can be better understood by reference to the following diagram:



(X) Shows place where injury occurred and place where sidewalk is alleged to have been defective.

The sidewalk on Fourteenth street was of artificial stone or concrete, and ended on the property line where Minna street intersects Fourteenth street, so that in the triangular space in which the letter "X" appears there had been no sidewalk laid, but the curb ran in a segment of an approximate circle around this triangular portion upon which no sidewalk had been laid. The area of the sidewalk marked with the letter "X" had never been paved, nor a sidewalk of any kind laid thereon, but consisted of the sandy soil of which the earth was formed in the vicinity. The sidewalk on Minna street had been paved with cement, and the pavement ended on the property line where Fourteenth street intersects Minna street. The curbstone had been placed in a circle from the northwest corner of the paved sidewalk on Fourteenth street to the northwest corner of the paved sidewalk on Minna street. The evidence entirely falls to show the width of the sidewalk on either Fourteenth or Minna streets, or the area in any manner of the place marked "X" on the diagram, or the elevation of the curb above the floor level of the street. The testimony of plaintiff's witnesses as to the depth or depression of the uncemented portion of the sidewalk below the edges of the pavement and the curb varied, and the surface of such triangular portion was variously stated as from $1\frac{1}{4}$ to 4 or 5 inches below the sidewalk. The son of plaintiff, whose testimony may probably be considered to be as favorable to plaintiff as the facts would justify, testified: "I should say the depression in the sidewalk was about 4 inches. It was a level place, and there hadn't been any pavement put in there; just a sandy bottom, a level hole the width of the sidewalk." Other witnesses testified that water would stand in this depression or sandy part of the side-

walk during rainy weather, and that there was a board in or across it that had partly sunk in the sand. It had been in this condition for many years, and there is no evidence that any one was ever injured there before. It was incumbent on plaintiff to prove that the fall and the injury he received were proximately caused by a dangerous defect in the sidewalk. As to whether the plaintiff fell by stumbling when he reached the end of the cement sidewalk on Fourteenth street, or when he stepped off the curb into the street, is not at all clear from the testimony. Plaintiff's son, who was the only person present besides plaintiff at the time of the accident, testified that plaintiff stepped into the pavement or hole and stumbled and fell; but he also testified in other parts of his testimony that plaintiff "fell over into Fourteenth street; that was, over the curb. He stepped off the sidewalk. * * * He stepped off the edge of the sidewalk into the hole. He fell on the curbing and right over into the street. When I picked him up he was lying right in the street. It was very dark. I didn't see whether he struck the curb or went right over it. I don't know what he did strike. It was done so quickly I could not see." The plaintiff testified: "Just as I got to the corner I stepped off, and felt myself going, and I went down, and in trying to recover myself I pitched out toward the street and struck on my right side, and as near as I can remember, there were cobblestones. I stepped into the hole. I stepped off at Fourteenth street down as Minna street crosses. As Minna street crosses I stepped right off the corner. * * * I cannot say whether the hole was inside or outside the curb, because I did not see it."

Plaintiff relied upon proof of the injury as above stated, and proof of the official position of defendants as members of the board of public works, and the due execution of the official bonds by the other defendants, without any attempt to prove affirmatively any act of negligence by defendants or either of them. He alleged in his complaint that the sidewalk was "in a dangerous and defective condition, unfit and unsuited for the passage of pedestrians thereon"; that the defendants, as such members of the board of public works, knew of such dangerous and defective condition, and thereafter "wholly refused and failed to repair or reconstruct said sidewalk." Without discussing the question as to whether or not the evidence is sufficient to show that the injury was caused by the alleged defect in the sidewalk we will proceed to a consideration of the question as to the legal liability of the defendants. At common law no action would lie for an injury caused by a failure to repair a highway (Whitaker's Smith on Negligence, 108 and cases cited; Shearman & Redfield on Negligence [5th Ed.] § 337). In many of the United States municipal corporations and counties are liable in such case, while in others

road overseers, superintendents of streets, or boards of public works are liable for negligence in failing to keep the roads or streets in repair, as the case may be. It is under the latter class that the present action is brought. As the members of the board are public officers, with their duties prescribed by law, and as the other defendants are sureties on their official bonds, they can only be held for nonfeasance as to some act or duty required of the board by reason of their office, or for the negligent performance of some act or duty where the act or duty is plain. It is only where the duty is plain and certain, and such duty is negligently performed, or not performed at all, that the officer is held liable to a private individual. If the act is a matter of discretion, or the officer has not the means or ability to perform it, he is not liable, nor are his sureties on his official bond. *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; *Shearman & Redfield on Negligence*, § 340, and cases cited; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Elliott on Roads and Streets*, 506. The reason for the rule is plain. An officer is a public servant. His remuneration is often small. His implied agreement is to faithfully perform the duties required of him by law. He must perform such duties, not negligently, but with due diligence. He is not required to furnish his own funds to perform acts which are to be performed at the public expense. The charter of the city and county of San Francisco provides (section 5, art. 1) that no recourse shall be had against the city for damage or loss by reason of any defective condition of any sidewalk or public street or sewer, "but in any such case the person or persons on whom the law may have imposed the obligation to repair such defect in the sidewalk, street, public highway or in the sewer, and also the officer or officers through whose official negligence such defect remains unrepaired, shall be jointly and severally liable to the party injured for the damages sustained." It is certainly not plain that the above-quoted section applies to the present case, where the alleged cause of the injury was not a defect in the sidewalk, but the fact that no sidewalk had ever been built closing the corners of the sidewalks to Fourteenth and Minna streets. But for the purposes of this case, and not intimating that such is the law, it may be conceded that the fact that no sidewalk had been built was a defect in the sidewalk, and yet the defendants cannot be held liable under the law. It was shown by uncontradicted testimony that the defendants constituting the board of public works had no funds with which to repair any of the sidewalks at any of the times named in the complaint. It is not even claimed by the respondent's attorneys that they had such funds. It is well settled by all the authorities that the duty to make repairs does not exist where there are no funds with which to make them, and no legal means

by which the officer can procure such funds. It is said in *Shearman & Redfield on Negligence* (5th Ed. § 340): "If such an officer has no funds, or inadequate funds, and no means of obtaining any more, he cannot be said to be guilty of negligence in not doing the work which requires the expenditure of money. He owes no duty to any one to undertake work than the funds in his hands will pay for; and he may exercise a discretion as to what repairs he will undertake to make with such funds as he has. He is not responsible for an error of judgment in applying deficient funds to repairs less urgently needed than others, nor for such mistakes as selecting unsuitable timber for repairing a bridge." The rule is stated in *Smith v. Wright*, 27 Barb. (N. Y.) 621, as follows: "By their means I understand that funds in their possession not those which they might obtain at a future period. They cannot, and should not, be required to advance their individual moneys for public purposes. Their duties which the law compels them to perform are onerous enough without that. If our public officers would only faithfully apply what they actually receive, people would have no cause to complain." It is not necessary to quote further from the authorities, as they all sustain the proposition as stated in the quotation from *Shearman & Redfield on Negligence*. See *Barker v. Loomis*, 6 Hill, 463; *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Hines v. City of Lockport*, 50 N. Y. 236; *Monk v. Town of New Utrecht*, 104 N. Y. 553, 11 N. E. 268.

Respondent claims that the board of public works were guilty of negligence because they did not properly seek an appropriation from the board of supervisors of funds with which to repair defective sidewalks. It is admitted, and the evidence shows, that the board did ask for and seek an appropriation, but it is claimed that the application was required to be made on or before the first Monday in April, whereas in fact it was not made until the latter part of May or the 1st of June; and further that the application should have specified the particular sidewalks that needed repairs. In our opinion there is no merit in either contention. The provision of the charter (article 3, c. 1, § 1) is as follows: "On or before the first Monday of April of each year the heads of departments, boards and commissions of the city and county shall send to the supervisors an estimate in writing of the amount of expenditure, specifying in detail the objects thereof, required in their respective departments, offices, boards and commissions, including a statement of the salaries of their subordinates." The provision as to time in the above-quoted section is only directory; and in cases where no injury was done, or where the supervisors had due time to consider the application, it will not be held that a board or a head of a department was guilty of negligence because the application was not made

on or before a certain day. The only funds that could be available for the repair of sidewalks for the year 1904 up to the time the plaintiff was injured in April were those which might have been allowed in the budget of 1903. Defendant Schmitz was not appointed to the board of public works until the 8th day of April, 1903, and defendant Woodward was not appointed until January, 1904. It is evident that they could not have made an estimate and request for an appropriation prior to the first Monday of April, 1903. The testimony shows that in the latter part of May, or early in June, 1903, before the budget had been prepared by the supervisors for the fiscal year 1903-04, the members of the board of public works appeared before the finance committee of the board of supervisors, and asked for an appropriation for the repair of defective sidewalks. The board of supervisors refused, as they always had refused, to make any appropriation for the repair of defective sidewalks, holding that such expense was a charge against, and should be paid by, the abutting property owners. The board of supervisors having considered the matter, and refused the appropriation upon the ground that the expense should not be a charge against the city, shows that the time at which the application was made could not have made any difference, and that such application would have been refused if made at the time designated in the charter.

The appropriation sought for the repair of defective sidewalks was sufficient as to the requirement that it should "specify in detail the objects thereof." The charter does not contemplate that each and every defective sidewalk of the several hundred miles of sidewalks in the city and county of San Francisco should have been specified. If such were the case, it is evident that for any defect that might have become such after the request was made there would be no funds with which to repair it until an appropriation could be asked for the following year.

It is further claimed that the board was guilty of negligence in not strictly complying with the law in the endeavor to compel abutting property owners to make the needed repairs to the sidewalk. The language of the charter (section 16, c. 2, art. 6) is that when a public sidewalk or street is so out of repair as to endanger persons passing thereon, "the board of public works shall require the owners or occupants of lots or portions of lots fronting on said portion of said street, avenue, alley, lane, court or place, or fronting on such portion of said sidewalk so out of repair as aforesaid, by a notice in writing, to be delivered to them or their agents, to repair forthwith said portion of said street, avenue, lane, alley, court or place to the center line thereof, or said portion of said sidewalk, in front of the property of which he is the owner or tenant or occupant." It is difficult to conceive in this case how any private person could be the owner of a lot,

or portion of a lot, fronting on the particular piece of sidewalk in question. The front of a lot by the very terms means that part of the same which faces upon a street. This triangular piece of land was a part of the public street, to wit, a part of Fourteenth street. The owner of the corner lot, bounded on the north by Fourteenth street and on the west by Minna street, owned no frontage on the triangle. Such lot fronted or faced the sidewalk on the north and the sidewalk on the west, and the lot had in all probability been assessed or made to pay the cost of such sidewalks. In *City Street Improvement Company v. Laird*, 138 Cal. 27, 70 Pac. 916, the court, considering the question of whether or not property can front on a crossing formed by the intersection of two streets, said: "In order that the protest may be available it is also necessary that the written objection should be made by the owners of a majority of the frontage of the property fronting on said proposed work or improvement. It is apparent that these provisions of the statute can have no application in the present case, for the reason that the proposed improvement is not for one block or more, and for the further reason that there can be no property fronting on the proposed work. A crossing is the intersection of two streets, and from the nature of the term can have no property fronting upon it." In *Martin v. Wagner*, 120 Cal. 623, 53 Pac. 167, while the court held that a triangular piece of land is liable for an assessment for the repairing of a street on which it corners, because it had a frontage on an intersecting street, it said: "Here, as the land only cornered on Eldorado street, there could be and was no assessment for frontage on that street; but the assessment for the frontage on Freemont street was clearly authorized." While the charter makes provision for assessments for street corners, for the expense of work done where a main street terminates in another main street, where an alley crosses a main street, where an alley terminates in another street, lane, or alley, and for other conditions, we have examined in vain to find any provision as to an assessment, upon a person who is not an abutting owner, to build a sidewalk upon a triangle such as we have in this case, and counsel have pointed to no such provision.

The evidence shows that the board served and posted notices, advertised for bids, in every case where a defective sidewalk was reported to them. It is not pretended that the members of the board were ever personally notified of the alleged defect. No evidence was offered as to any act of negligence on the part of either of them. We cannot hold that the board was negligent in not having the person or persons neglecting or refusing to make the repairs arrested, and thus collecting penalties for a repair fund. As before shown, there was no person owning abutting property who could be compelled to make the repairs, nor has our attention been called to

any ordinance or provision of the charter that makes it the official duty of the board of public works to prosecute persons for violating the law, or to have persons arrested and prosecuted. The charter provides (chapter 2, art. 6, § 18) that the board of supervisors may prescribe penalties for the neglect to make repairs, and that such penalties may be applied in the case of fines to the payment of the expense of any such repairs. It does not appear that the board of supervisors, by ordinance or otherwise, have ever prescribed that the fines or penalties shall go into a special fund for the repair of streets. In the absence of such ordinance a fine, when collected, would have to be paid into the general fund. The board of public works had no power to enact such ordinance, and it certainly was not guilty of negligence because it did not procure the board of supervisors to pass such an ordinance.

The defendants requested, and the court refused to give the following instructions:

"I charge you that the duty imposed on the defendants commissioners of public works was to repair only such sidewalks as were so out of repair as to endanger persons passing thereon, and that defendants are not liable for every defective sidewalk, but only for such as are so out of repair as to endanger persons passing thereon."

"I instruct you that, if you find from the evidence that the sidewalk where the plaintiff has testified that he was injured was not so out of repair as to endanger persons in ordinary health and of ordinary strength, and with the ordinary control of their muscles and faculties while passing thereon, you must find for the defendants."

"I instruct you that it is not, and was not, at any time the duty of any of the defendants in this action to see to it that any sidewalks should be so constructed and maintained as to be absolutely safe for the passage of all persons under all conditions, and that if the sidewalk at the point where plaintiff testified he was hurt was in a reasonably safe condition, you must find for defendants."

The above instructions stated the law correctly, and were peculiarly applicable to the evidence in this case, and the refusal to give them was error. Counsel for respondent has not pointed out any other instruction, or instructions giving them, or the substance of them, and we have been unable to find in the record any instruction covering them. In our opinion they were very important. As to whether the evidence as matter of law was sufficient to show that the sidewalk was in a dangerous and defective condition, we are not called upon to decide, in view of the refusal of the court to give the above instructions, or the substance of them, to the jury. In a case where the only defect in a sidewalk was the depression of some 3 or 4 inches of the surface of the earth between the cement sidewalk and the westerly end of the sidewalk, the jury certainly were entitled to be

fully instructed as to the fact that, if the sidewalk was in a reasonably safe condition for those exercising due care, the defendants were not liable. It is a matter of common knowledge that no sidewalk is perfect, and that certain irregularities and inequalities in the surface of such sidewalks exist, not only in the city and county of San Francisco, but in all cities. In many instances a wooden or concrete pavement will terminate, and the sidewalk then consist of the surface of the street, and there will be a step of a few inches depression from the artificial sidewalk to the earth. In many cases there is, even in paved sidewalks, a drop of a few inches in the surface. In fact the drop from the curb or outer edge of almost every sidewalk is from 3 to 4 inches, or several inches, and it is not usual for the surface to be on a level with the surface of the street. While a municipality is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, it is by no means an insurer against accidents, nor can it be expected to keep the surface of its sidewalks free from all irregularities.

In *Beltz v. City of Yonkers*, 148 N. Y. 67, 42 N. E. 401, the evidence was held insufficient to show a dangerous defect in a sidewalk where broken stone had been removed, leaving an uncovered depression in the sidewalk of 2½ inches in depth by 7½ inches in width, which had been there for several years. It was there said: "There are very few, if any, streets or highways that are or can be kept so absolutely safe and perfect as to preclude the possibility of accidents, and whether in any case the municipality has done its duty must be determined by the situation; what men knew about it before, and not after, an accident. When the defect is of such a character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, then the case is generally one for the jury; but when, as in this case, the defect is so slight that no careful or prudent man could reasonably anticipate any danger from its existence, but still an accident happens which could have been guarded against by the exercise of extraordinary care and foresight, the question of the defendant's responsibility is one of law." To the same effect are the following: *Lane v. Town of Hancock*, 142 N. Y. 511, 37 N. E. 473; *Waller v. Town of Hebron*, 5 App. Div. 577, 39 N. Y. Supp. 381; *Grant v. Town of Enfield*, 11 App. Div. 358, 42 N. Y. Supp. 107; *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 104; *Burns v. Bradford City*, 137 Pa. 361, 20 Atl. 997, 11 L. R. A. 726; *Kornetzski v. Detroit City*, 94 Mich. 343, 53 N. W. 1106; *Cushing v. Boston*, 124 Mass. 434; *Witham v. Portland*, 72 Me. 439.

The court also refused the following instruction asked by defendants: "I instruct you that, if you find from the evidence that

plaintiff was not injured by reason of any sidewalk being out of repair, you are to find for the defendants." This instruction should have been given. As before stated, the jury might very logically have concluded that the injury to plaintiff was caused by his falling off the curbing of the sidewalk into the street.

What we have said is not in conflict with what is necessarily decided in *Heath v. Manson et al.*, 147 Cal. 694, 82 Pac. 331. In that case the injury was caused by plaintiff stepping into a hole in a planked sidewalk, from which a plank had been removed. It appears to have been undisputed that the board of public works had not sought an appropriation for the repair of streets, and that there were abutting property owners. It was admitted that the board had not served proper notices upon such owners. What is there said as to compelling the property owners to make the repairs, or as to getting money by having them arrested and fined, was not necessary to the decision of the case on the main points.

The judgment and order are reversed.

I concur: KERRIGAN, J.

I concur in the judgment: HALL, J.

9 Cal. App. 380

KEITH v. RECORDER'S COURT OF CITY OF SANTA ANA et al. (Civ. 541.)

(Court of Appeal, Second District, California. Nov. 23, 1908.)

1. PROHIBITION (§ 3*)—ADEQUACY OF REMEDY BY APPEAL.

As a general rule, prohibition will not lie against a court acting without jurisdiction; the remedy by appeal being adequate.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

2. PROHIBITION (§ 3*)—ADEQUACY OF REMEDY BY APPEAL—PRIOR DETERMINATION.

That an appeal would lie only to a court which had once decided the matter adversely to petitioner would not render the remedy by appeal inadequate, so as to warrant prohibition.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 3.*]

3. HABEAS CORPUS (§ 26*) — CONVICTION WITHOUT LEGAL WARRANT.

Habeas corpus will lie to relieve one convicted without legal warrant.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 21; Dec. Dig. § 26.*]

4. HABEAS CORPUS (§ 95*)—SCOPE OF INQUIRY—SUFFICIENCY OF COMPLAINT IN CRIMINAL CASE.

In criminal proceedings instituted before an inferior court, the sufficiency of the complaint may be considered upon application for habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 87; Dec. Dig. § 95.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Prohibition by J. J. Keith against the Recorder's Court of the City of Santa Ana and another. From an order and judgment deny-

ing a peremptory writ, and discharging an alternative writ theretofore issued, petitioner appeals. Affirmed.

Clyde Bishop and F. O. Daniel, for appellant. W. F. Heathman and Victor Montgomery, for respondent.

ALLEN, P. J. Appeal by petitioner from an order and judgment denying a peremptory writ of prohibition, and discharging an alternative writ theretofore issued.

The petition for the writ of prohibition alleges that upon a complaint filed petitioner was arrested for the violation of an ordinance of the city of Santa Ana, and respondent court, after denying petitioner's motion to dismiss, and overruling a demurrer to the complaint, had set the cause down for trial. It is alleged that the complaint under which the arrest was made did not set forth facts constituting a public, or any, offense, and was defective in many other specified particulars; that the prosecution was barred by the provisions of section 801 of the Penal Code for which reasons the court was without jurisdiction to hear and determine the cause. Conceding that the complaint upon which the criminal proceedings against petitioner were based was defective in all of the respects claimed, and on account thereof, or for any other reason, the jurisdiction of the recorder's court was wanting, and by reason whereof a conviction thereunder could not be sustained, nevertheless, under the rule laid down in *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765, the remedy by appeal from an adverse judgment is a plain, speedy, and adequate one in the ordinary course of law, by reason of which prohibition will not lie. There are no features presented in this record which should take the case out of the general rule, as was the case in *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70. The mere fact that the appeal would lie only to the superior court of Orange county, which court had once determined the questions presented adversely to petitioner, presents no reason for taking the case out of the rule. If, as claimed, that court erred when the case was before it on application for this writ, we may not assume that, upon an appeal from the judgment, and after more mature consideration, it will continue in such error. In addition the writ of habeas corpus is always available to one convicted without legal warrant; and, in criminal proceedings instituted before an inferior court, the sufficiency of the complaint can be considered upon an application for such writ. *Ex parte Greenall* (Cal.) 96 Pac. 804.

We see no error in the record, and the judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

155 Cal. 46

PAYNE et al. v. NEUVAL et al. (L. A. 2,172.)

(Supreme Court of California. Dec. 31, 1908.

Rehearing Denied Jan. 28, 1909.)

1. MINES AND MINERALS (§ 83*)—CONTRACTS
—NATURE.

A contract recited that, in consideration of \$1 and of a royalty, grantor granted to decedent all the bituminous rock and other minerals he might choose to mine, quarry, and take from certain land; that in case the land failed to produce minerals in paying quantities or of good quality, decedent might, upon 30 days' notice in writing, relinquish his rights, and that decedent should pay royalty on 300 tons annually, whether taken or not. After the contract was executed, decedent quarried and took away 27 tons of rock, after which he removed his machinery, and never conducted further operations up to his death, 15 years later, though he paid royalty for 2 years. *Held*, that the contract was not a grant of land nor a lease, but a grant of a right in the nature of an incorporeal hereditament, and that all the rights of decedent's heirs were extinguished by the abandonment of the privileges.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 214; Dec. Dig. § 83.*]

2. CONTRACTS (§ 169*) — CONSTRUCTION — EXPLANATION BY CIRCUMSTANCES.

Under Civ. Code, § 1647, providing that a contract may be explained by reference to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

circumstances in which it was made, and the matter to which it relates, a contract having some of the features of a grant and some of a lease may be so explained.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

3. CONTRACTS (§ 155*) — CONSTRUCTION AGAINST PARTY DRAFTING CONTRACT.

Uncertainties in a contract are to be interpreted more strongly against the party who prepared the agreement, and caused the uncertainties to be present.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. § 155.*]

4. MINES AND MINERALS (§ 83*)—CONTRACTS — ABANDONMENT OF RIGHTS — NOTICE — WAIVER.

Under a contract allowing decedent to mine specified minerals, and allowing him to relinquish his rights thereunder upon 30 days' written notice, the landowner could waive such notice.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 214; Dec. Dig. § 83.*]

5. DESCENT AND DISTRIBUTION (§ 90*)—CONTRACTS OF DECEDENT—ENFORCEMENT—CONDITIONS PRECEDENT.

Under a contract allowing decedent to mine minerals, and requiring him to pay a specified royalty annually whether minerals were taken or not, his heirs could not enforce the contract without tendering payment of accrued royalties, where he abandoned operations for several years.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 351; Dec. Dig. § 90.*]

6. VENDOR AND PURCHASER (§ 174*)—ADVERSE CONTRACTS—VALIDITY NOT RECOGNIZED.

Plaintiffs, by accepting a deduction in the price of property purchased by them, because of the existence of a recorded contract granting mining privileges, did not recognize the validity of the contract, since they may have demanded a deduction in anticipation of the expense of litigation.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 358; Dec. Dig. § 174.*]

7. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action to quiet title to land against a contract allowing defendants' decedent to mine minerals, it was not prejudicial error to receive testimony concerning a conversation between the grantor and decedent's superintendent respecting an abandonment of the privileges, where there was abundant other evidence of an abandonment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

8. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action to quiet title to land against a contract granting mining privileges to decedent, it was not prejudicial error to allow plaintiffs to ask grantor what right decedent told him he desired to secure, where he answered, "I suppose getting out rock to lay down the sidewalks and streets," nor to allow a question as to what interest decedent said he wanted, where grantor answered, "He did not tell me he wanted any interest. He pay me so much a ton working out the rock, bituminous rock, what he called it asphaltum," nor to allow a question as to what decedent told grantor he wanted, when he came with the instrument, where grantor answered, "He wanted to open a mine and get out bituminous rock."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

9. CONTRACTS (§ 175*)—CONSTRUCTION — AMBIGUITY—EVIDENCE.

In an action to quiet title to land against an ambiguous contract granting mining privileges to decedent, grantor could testify that decedent told him that he wanted a lease, when he presented the instrument for execution.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 766; Dec. Dig. § 175.*]

10. QUIETING TITLE (§ 44*)—MINES AND MINERALS—EVIDENCE.

In an action to quiet title to land against a contract allowing decedent to mine minerals, evidence showing that oil was not discovered in the vicinity of the land until after the contract was executed was admissible, under allegations that when the contract was signed, the only known minerals were on the surface, and that by reason of the subsequent discovery of oil in the neighborhood plaintiffs' land became more valuable.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 90; Dec. Dig. § 44.*]

Department 2. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by N. M. Payne and others against Victorine Nivard Neuval and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

Sullivan & Sullivan, Theo. J. Roche, and Thos. A. Norton, for appellants. C. P. Kaetzel and Wm. Shipsey (Frank P. Deering, of counsel), for respondents.

MELVIN, J. This is an appeal from a judgment for plaintiffs, and from an order denying the motion of defendants for a new trial. The action was one to quiet title, and around a certain document set forth in the complaint cluster all of the problems presented by this appeal. The instrument in question was executed by the grantors of plaintiffs in favor of defendants' decedent. It is in substantially the following language: "In consideration of one dollar to me paid by F. Nivard Neuval, the receipt of which is hereby acknowledged, and the further sum of twenty cents per ton, I, the undersigned, grant to said F. Nivard Neuval all the bituminous rock, petroleum, asphaltum and other mineral which he may choose to mine, quarry and take from my land in San Luis Obispo county, state of California. [Here follows a description of the property.] Together with the right of free ingress and egress and also the right to erect and maintain on said land stables, shed, house, side track and other structures necessary to the business of mining and transferring such mineral to market. In case said land fails to produce such mineral in paying quantities or of good quality said F. Nivard Neuval may upon thirty days' notice given to me in writing, abandon and relinquish to me all right hereby conferred and granted, and whereas I have a portion of my land culti-

vated and have planted vine and an orchard such portion now improved will be free from any mining and quarrying. F. N. Neuval agrees to take at least three hundred tons a year or to pay the royalty on that amount whether taken or not." This instrument was duly acknowledged and recorded on April 12, 1890. Immediately thereafter F. Nivard Neuval entered upon Bickmore's land, quarried and took away 27 tons of bituminous rock, after which he removed his machinery, both from that and from an adjoining tract of land, and never pursued any further mining or other operations in that vicinity. However, he paid the royalty mentioned in the agreement up to April, 1892. After that no more royalty was paid by or for Mr. Neuval. It was admitted by the parties that on the 17th day of October, 1905, Neuval died testate, being at the time of his death a resident of the city and county of San Francisco; also that by decree of distribution, given, made, and entered in the superior court of said city and county, all of the property belonging to said deceased at the time of his death was distributed to the appellants. Appellants' counsel contend that the instrument in question constituted a grant of all minerals, including petroleum and asphaltum, contained in the premises involved in this action; that no adverse possession has been shown; that if we regard the instrument as one which created an easement, title by adverse possession could not be acquired; and that, assuming an abandonment, plaintiffs waived it by demanding and obtaining a deduction in the purchase price of the property after learning of the existence of the agreement.

Great stress is placed by counsel for appellant upon the word "grant" used in the agreement here considered. With great force and ingenuity they argue that, although no words of inheritance or succession are used, none are necessary (section 1072, Civ. Code), and that, as "a transfer invests in the transferee all the actual title to the thing transferred which the transferor then has, unless a different intention is expressed, or is necessarily implied" (section 1083, Civ. Code), therefore the use of the word "grant" with no immediately connected qualifications transferred to the predecessor of appellants the title in fee to all the minerals located upon the property in question. But an examination of the instrument reveals the fact that it possesses other characteristics not usually accompanying absolute grants of minerals and mines. There is a provision for abandonment by Neuval of the property and of the mineral wealth therein contained, upon the giving of notice in writing. There is also a provision for the payment of royalty for the amount of mineral removed. It will thus be seen that the instrument in question has some of the characteristics of a lease. It has been held that the word "royalty" is

"perhaps the most appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from the mine." *Raynolds v. Hanna* (C. C.) 55 Fed. 800. In the same case the agreement considered was declared to be a lease, although it did contain the word "grant." It will also be noted that the words relied upon as constituting a grant do not convey the minerals in situ, but only such as Neuval "may choose to mine, quarry and take from" the land. Perhaps it will not be necessary to classify with technical accuracy the agreement before us. We may employ the language used by the Supreme Court of Indiana in *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 493: "We do not regard the contract in suit as a grant of land, or as a lease properly so called, but do regard it as a grant of a right in the nature of an incorporeal hereditament * * * under whatever technical common-law term it may most properly be classed." Having some of the features of a grant and some of a lease, this is a contract which "may be explained by a reference to the circumstances under which it was made, and the matter to which it relates." Section 1647, Civ. Code. It was completely drawn up and was taken, thus prepared, by Neuval to Bickmore, an illiterate person, who signed by his mark. Bickmore testified that Neuval stated he wanted a lease. Bickmore supposed he was executing a lease. The existing uncertainties are to be interpreted most strongly against Neuval, who prepared the agreement and caused the uncertainties to be present. *Lassing v. James*, 107 Cal. 355, 40 Pac. 534; *Yoch v. Home Mutual Ins. Co.*, 111 Cal. 508, 44 Pac. 189, 34 L. R. A. 857; *Welch v. British American, etc., Co.*, 148 Cal. 227, 82 Pac. 964, 113 Am. St. Rep. 223. Considering the instrument in its entirety, the circumstances under which it was drafted and executed, and the conduct of the parties to the agreement, it cannot be reasonably contended that Neuval and his heirs were to have the right to preserve dominion over these deposits perpetually, and, after failure to work the mines or pay the royalty for 13 years, were to have the right to assert an adverse claim to the minerals upon Bickmore's land. Certainly their conduct exhibits great lack of diligence. The following language used by this court in *Acme Oil & Mining Co. v. Williams*, 140 Cal. 681-684, 74 Pac. 296, 297, is pertinent: "The sole consideration usually moving the lessor in extending oil leases is, and the only consideration for the particular lease involved here was, the royalties the lessor would receive from proper and continuous pumping of oil, after it had been developed in paying quantities. These leases are only valuable on development, and are then only valuable to both parties to the extent that the product may be secured and disposed of; and, when the only consideration for the lease

is the share which the lessor will obtain of what is produced, there is always an implied covenant that diligence will be used toward such production." See, also, *Petroleum Co. v. Coal & Coke Mfg. Co.*, 89 Tenn. 391, 18 S. W. 65. In *McIntosh v. Robb*, 4 Cal. App. 486, 88 Pac. 517, where the District Court of Appeal was considering a mining contract, the following language is used: "In contracts of this character there is an implied covenant for diligent search and operation, and under such a contract the lessee is bound to proceed with his mining operations with reasonable diligence." All of Neuval's acts, after his brief mining activity, indicated his failure at that time to find bituminous rock or other mineral in valuable quantities. That his intention was to abandon the project can scarcely be doubted. True he did not give notice in writing, but Bickmore could waive such notice, and would not a court properly find that he had waived it if, after 13 years of inactivity in the matter, he should sue the Neuval heirs for the annual royalty mentioned in the agreement? In *Calhoun v. Neely*, 201 Pa. 97, 50 Atl. 967, the court said, speaking of a lease for 15 years: "An unexplained cessation of operations for the period involved * * * [9 years] gives rise to a fair presumption of abandonment, and, standing alone and admitted, would justify the court in declaring an abandonment as matter of law." The conclusion is inevitable that all rights of the Neuval heirs were extinguished by abandonment of the privileges which existed under the contract. In view of this determination, it is necessary to comment but briefly upon respondents' point that the appellants failed to do equity because they did not tender payment of the royalty before asking for the enforcement of the contract. We think the point well taken. It has been held in this state that a mortgagor cannot maintain an action in ejectment against a mortgagee in possession, nor quiet title to the mortgaged premises, without paying the debt, even though it was outlawed. *Spect v. Spect*, 88 Cal. 443, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763. The principle announced in those cases would apply with equal force here. There is no merit in the point that the plaintiffs, by accepting a deduction in the purchase price of the property because of the existence of the recorded contract, recognized the validity of the claim of appellants. For aught that appears here the purchasers of this land may have demanded a reduction in the price asked by Mr. Bickmore because they anticipated the expense of litigation—a fear not altogether without foundation. In the case of *McConnell v. Pierce*, 210 Ill. 627, 71 N. E. 622, cited by appellants' counsel in this behalf, the deed under which plaintiff claimed title was made "subject to the F. H. Haley lease." In this case there was no such provision in

the deeds under which plaintiffs' claim of title is asserted.

We see no material error in the admission, over appellants' objection, of testimony regarding the conversation between Bickmore and Sisco, Neuval's superintendent, with reference to the abandonment. Without that conversation there was abundant evidence of abandonment, and we do not see how the result could have been changed by Sisco's testimony. The following questions, addressed to Bickmore, were permitted in spite of objection: (1) "What right did Mr. Neuval tell you he desired to secure by this instrument in these premises? (2) What interest in the minerals mentioned in there did he tell you he wanted? (3) When Neuval came there with that instrument, what did he tell you he wanted? (4) What kind of an instrument did he tell you he wanted when he came there?" To the first question the reply was, "Oh, I supposed getting out rock to lay down the sidewalks and streets." To the second he answered, "He didn't tell me he wanted any interest. He pay me so much a ton working out the rock, bituminous rock, what he called it asphaltum." To the third the witness replied, "He wanted to open up a mine and get out bituminous rock." And he tersely answered the fourth question with the single word "Lease." It will readily be seen that the answers to the first three questions were neither responsive nor injurious to defendant. No motion was made to strike them out on the ground of their irresponsible quality. In answer to the last question the witness did pertinently reply "Lease," and, as we have heretofore intimated, this was proper testimony in explanation of the ambiguous instrument. As was written by Mr. Justice Van Fleet, in *Balfour v. Fresno C. & I. Co.*, 109 Cal. 225, 41 Pac. 877: "This is not allowing parol evidence for the purpose of altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties."

Objection is also made to the evidence showing that oil was not discovered in the vicinity of the land until after the execution of the instrument. Such evidence was clearly in response to paragraphs 7 and 8 of the complaint, in which it is averred that on April 12, 1890, when the agreement was signed, the only known minerals were on the surface, and that by reason of the subsequent discovery of oil in the neighborhood plaintiffs' land became more valuable. While, perhaps, these allegations were not essential to the pleading, and might have been omitted, they were not attacked by special demurrer. These two paragraphs, taken with paragraph 6, in which the failure to pay royalty and the abandonment are set forth, tend to support, when proven, plaintiffs' assertion

that the claim of appellants is without equity.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(155 Cal. 53)

CURTIN v. INGLE. (S. F. 5,080.)

(Supreme Court of California. Dec. 31, 1908.)

1. EXCEPTIONS, BILL OF (§ 48*)—SETTLEMENT—TIME—NOTICE—STATUTES.

Code Civ. Proc. § 659, subd. 2, provides that if proposed amendments to a statement on appeal are served and not adopted, the proposed statement and amendments shall, within 10 days be presented to the judge on 5 days' notice, or be delivered to the clerk for the judge; that the same proceedings shall then be taken for the settlement of the statement as are required by section 650, which declares that the clerk must immediately deliver them to the judge, who must designate the time when he will settle the bill, and the clerk must immediately notify the parties. *Held*, that the requirement of 5 days' notice does not apply where the proposed statement and amendments are delivered to the clerk for the judge, the purpose of the provision being then effected by the requirement that the judge shall then designate a time for settlement, notice of which shall be given by the clerk.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 77; Dec. Dig. § 48.*]

2. APPEAL AND ERROR (§ 627*)—DISMISSAL—SETTLEMENT—LACHES—REMEDIES.

Supreme Court rule 2 (78 Pac. vii) requires appellant in a civil action to serve and file the printed transcript on appeal within 40 days after the appeal is perfected, provided that, when there is a proceeding pending for the settlement of a statement, the time for filing and serving the transcript shall not begin to run until the settled statement has been filed. *Held* that, where appellant has a proceeding pending for the settlement of a statement on appeal, and is guilty of laches, the better practice is a motion to dismiss the settlement proceedings below, or by objection to the settlement for laches, and appeal if the objections are overruled, and not an application to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3126; Dec. Dig. § 627.*]

3. APPEAL AND ERROR (§ 611*)—SUPREME COURT—DISMISSAL OF APPEAL—JURISDICTION.

The Supreme Court has power to dismiss an appeal on an application therefor, where there has been a failure to proceed with proper diligence to procure settlement of the statement amounting to a neglect equivalent to a failure to file the transcript within the time required by Supreme Court rule 2 (78 Pac. vii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3126; Dec. Dig. § 611.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by D. A. Curtin against J. W. Ingle. Judgment for defendant, and plaintiff appeals. On motion to dismiss. Denied.

See, also, 98 Pac. 868.

William M. Cannon and S. W. Molkenbuhr, for appellant. Wal. J. Tuska, for respondent.

LORIGAN, J. Respondent moves to dismiss the appeal in this action. On May 28, 1907, appellant served a notice of intention to move for a new trial in the above cause, the motion to be made on the minutes of the court and in due time. On October 14, 1907, the motion was heard and denied, and on December 12, 1907, appellant appealed from the order denying the motion. On December 17, 1907, appellant served on respondent his proposed statement on appeal, to which respondent, without waiving certain objections to the proposed statement, proposed amendments thereto, and served them on appellant on December 19, 1907. On January 6, 1908, appellant delivered the proposed statement, objections, and proposed amendments to the clerk of the superior court for delivery to the judge thereof who tried the cause, and the clerk thereupon delivered them to said judge. After their receipt by the judge no order was made by him fixing a time for the settlement of the statement prior to the filing of this motion to dismiss the appeal, nor was anything done prior thereto by the appellant with a view of causing a settlement of the statement to be made. After the making of this motion to dismiss the appellant applied to the judge to fix a date for the settlement of the statement, which he did, and which settlement is still pending.

It is insisted by the respondent that the appeal should be dismissed for two reasons: First. Because appellant failed to comply with the provisions of section 659, subd. 2, Code Civ. Proc., in the delivery of the proposed statement and amendments to the clerk for the judge; that therefore the latter acquired no jurisdiction whatever to settle the statement; that no settlement can be had which will be of any legal effect in support of the appeal of appellant, and hence it should be dismissed. Secondly. That the failure of appellant to file his printed transcript on appeal within 40 days after taking the appeal, or to do anything to procure the settlement of the statement on appeal within six months from January 6, 1908, is fatal to his appeal, is to be deemed an abandonment of it, and entitles respondent to a dismissal thereof.

The first proposition advanced by respondent is based upon what he insists is the proper construction to be given to section 659, subd. 2, Code Civ. Proc., with reference to notice to be given the adverse party on presentation of the proposed statement and amendments for settlement. That section provides that when proposed amendments are served on the moving party, "if not adopted, the proposed statement and amendments shall within ten days thereafter be presented by the moving party to the judge upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge." It then provides that the same proceedings

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shall be taken by the parties and clerk and judge for the settlement of the statement as are required by section 650, Code Civ. Proc., for the settlement of bills of exceptions. Section 650 provides that "when received by the clerk he must immediately deliver them to the judge * * * and when received from the clerk, the judge must designate the time when he will settle the bill and the clerk must immediately notify the parties of such designation." The claim of appellant is that the necessary and logical interpretation of this provision with reference to the five days' notice is that it applies equally whether the proposed statement and amendments are presented directly to the judge for settlement, or are delivered to the clerk for the judge; and, as the showing on this motion is that no notice of delivery to the clerk for the judge was given respondent by appellant, the judge acquired no jurisdiction to settle the statement, and that no effectual settlement of it, available to appellant for any purpose, can be made. Counsel for respondent has cited us to no authority in support of his interpretation of the section as to the giving of notice. On the other hand, this court many years ago construed the section expressly to the contrary. In *Mellor v. Crouch*, 76 Cal. 594, 596, 18 Pac. 685, this court was asked to interpret the section as respondent now urges it should be construed, but it was held in that case that the language used in the section was so plain as not to be susceptible to any such an interpretation. In that case, referring to sections 659, 650, as we have quoted them above, the court said: "The obvious purpose of these provisions is that the parties may have notice of the time when the statement will be settled. When the statement and amendments are presented directly to the judge, there is no provision for any notice of the time of settlement to be thereafter given by either the judge or clerk; and in such case, therefore, the five days' notice mentioned in section 659 must be given by the party himself. But when the papers are delivered to to the clerk for the judge, the purpose of the Code is effected through the requirement that then the judge must designate a time for the settlement, and the clerk must give notice of it. The provision about the five days' notice in section 659 qualifies, we think, only the preceding clause of the sentence, and is not applicable to the case when the statement and amendments are delivered to the clerk for the judge." The cases of *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599, and *Witter v. Andrews*, 122 Cal. 1, 54 Pac. 276, cited by respondent, decide nothing to the contrary. Both these cases involved the sufficiency of notice where the statement was presented directly to the judge upon notice served upon the adverse party. Where so presented the statute expressly requires notice. When the statement and amendments are, however, delivered to the clerk for the judge,

as held in *Mellor v. Crouch*, notice of such delivery is not required. So that, as far as the first point urged by the respondent is concerned, it is without merit.

As to the second point urged by him that the appeal should be dismissed on account of the failure of the appellant to take any steps to procure the settlement of his proposed statement within six months after the delivery of the proposed statement and amendments to the judge: Rule 2 of this court (78 Pac. vii) requires that the appellant in a civil action shall serve and file the printed transcript on appeal within 40 days after the appeal is perfected, "provided, that when there is a proceeding pending for the settlement of a bill of exceptions or a statement which may be used in support of such appeal, the time for filing and serving the transcript shall not begin to run until the settled and authenticated statement or bill of exceptions has been filed." It is urged by the respondent that this extension of time within which to file a transcript, after a settled or authenticated bill has been filed, is only available when the party has diligently proceeded with the settlement of such statement or bill, and where a party fails to use such diligence, this court should, upon a showing to that effect, dismiss the appeal. But whether a party has been guilty of laches in that respect or not is primarily a matter for the trial court before whom the proceedings for the settlement of the statement on appeal is pending, and this court should not be called upon originally to determine, on a motion to dismiss an appeal, whether an appellant has been derelict in securing with due expedition such settlement. If, as contended for by respondent, the appellant has been guilty of such laches in proceeding with the settlement as would justify this court in saying that it amounts practically to an abandonment of his appeal, the same point can be urged in the trial court. When the settlement of the statement comes up for hearing there, the respondent may move the court to dismiss the proceedings for a settlement on account of the failure of appellant to proceed with reasonable diligence in procuring a settlement, or may object to the settlement on account of his failure to have done so. If his motion is denied, or his objections are overruled, he can have them incorporated into the record on appeal, and have the action of the court reviewed here. *Henry v. Merguire*, 106 Cal. 142, 146, 39 Pac. 599; *Ryer v. Rio Land & Imp. Co.*, 147 Cal. 462, 464, 82 Pac. 62. And we think this is the course that should be pursued.

Almost all of the cases cited by respondent in support of the motion to dismiss for laches are cases where the action of the trial court in settling statements, over objection of the respondents against such settlement on account of laches, was before this court on appeals directly involving the correctness of the rulings of the superior court in that respect, or were cases where appeals were dismissed

for failure to present statements for settlement within the time allowed by law. While it must be conceded that this court has the power to dismiss, on application therefor, an appeal where there has been a failure to proceed with proper diligence to procure settlement of the statement—a neglect which is equivalent to a failure to file the transcript within the time limited by the rule—it is deemed the better practice to require a respondent to avail himself of that objection in the lower court when the proceeding for the settlement of the statement is pending, and where the disposition of it primarily belongs. In *Moultrie v. Tarpio*, 147 Cal. 376, 378, 81 Pac. 1112, 1113, referring to the purpose and object of rule 2 of this court above quoted, it is said: "The rule of this court quoted above contemplates a proceeding for a settlement that is alive, at least to the extent that it is being in some degree pressed by the applicant. Ordinarily this court would not undertake to determine, on a motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial judge, subject to review on appeal." Likewise in *Dernham v. Bagley*, 151 Cal. 216, 90 Pac. 543, it is said: "We are satisfied, however, that the words 'when there is a proceeding pending for the settlement of a bill of exceptions' etc., in the rule above referred to, must be held to include any proceeding looking to the settlement of such a bill actually inaugurated by a party, and pending undisposed of and not abandoned, regardless of all questions as to whether the proceeding can ultimately avail and the bill be legally settled. Those questions are primarily for the trial court to determine, subject to review by this court. * * * It will readily be seen that this must be the proper rule of practice to be followed wherever a proceeding for the settlement of a bill of exceptions has actually been inaugurated by a party, and is pending undisposed of in the trial court, and the moving party is actively engaged thereunder in attempting to procure the settlement of his bill. It is well settled that the adverse party, desiring to avail himself of such an objection, must interpose it in the trial court, or before the judge settling the bill, and that if no objection is there made, the bill may be settled, and thereafter used on the appeal. *Ryer v. Rio Land & Imp. Co.*, 147 Cal. 462, 464, 82 Pac. 62; *Henry v. Merguire*, 106 Cal. 142, 146, 39 Pac. 599."

Nor as regards the application of this rule is it of any moment whether the motion for a new trial is made on the minutes of the court and disposed of before the statement on appeal is settled, or, as is usually done,

the statement settled in advance of the hearing of the motion. In the latter case the failure of the party moving for a new trial to proceed diligently to settle his statement can be urged by his adversary and accepted by the court as a ground for dismissing or denying his motion for a new trial. In the former that ground cannot be availed of because the motion for a new trial is disposed of before the statement is settled. But this does not leave a respondent to a motion for a new trial on the minutes remediless. He can still avail himself of the motion in the trial court to dismiss the proceedings for the settlement of a statement on the ground of laches, or object to the settlement on that ground. If his motion is denied, or his objection overruled, he can have the ruling of the court in doing so reviewed here on appeal, and we think this the proper practice to pursue.

The motion to dismiss is denied.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.

7 Cal. Unrep. 358

SOMERS v. McMORDIE et al. (L. A. 2,151.) (Supreme Court of California. Jan. 7, 1909.)

BOUNDARIES (§ 3*)—GOVERNMENT PLAT—CONCLUSIVENESS.

There is no provision in Rev. St. U. S. §§ 2395, 2396, 2397 (U. S. Comp. St. 1901, pp. 1471-1473) relating to the rules to be followed where corners have been lost, or in the circular of instructions approved by the Secretary of the Interior October 16, 1896 (23 Land Dec. Dep. Int. 361), relating to lost or obliterated corners, for a proportionate measurement based on the deficiency in acreage of adjoining parcels of land, and, where there is no question as to the establishment of a lost corner, the exact boundaries as shown on the government plat must prevail, and they will control a further description by quantity.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 41; Dec. Dig. § 3*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by William F. Somers against J. G. McMordie and others. From an order denying a motion for a new trial, plaintiff appeals. Remanded, with instructions to grant the motion.

H. W. Duncan and Wm. T. Blakely, for appellant. Shankland & Chandler, for respondents.

MELVIN, J. Suit was commenced by William F. Somers to quiet his title to the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 27, township 3 S., range 14 W., San Bernardino meridian, containing, according to the allegations of the complaint, 40 acres. Mrs. McMordie, the respondent here, answered, admitting the title of Somers to all of said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land, except a small portion thereof, and asked to have her title quieted as against Somers to lot 1, section 27, township 3 S., range 14 W., San Bernardino meridian, which was described also in her pleadings by metes and bounds. Before trial plaintiff dismissed as to the fictitious defendants.

There is a statement of stipulated facts wherein, among other things, it is agreed by these litigants that both parties derive title to their respective lands through patents issued by the state of California under indemnity lists duly approved and certified by the secretary of the interior; that the government plat of the survey of said lands shows Somers' land as containing 40 acres and the McMordie lot as having an area of 21.38 acres; that there is a shortage of 4.44 acres in the two tracts; that this deficiency was imposed in the judgment upon the parties hereto according to their several proportions of the whole acreage embraced in the boundaries of the two tracts, the plaintiff Somers being given by this method 36.91 acres and the defendant McMordie 20.03 acres; and that the sole question on the appeal from the order denying the motion for a new trial is whether or not the court erred in apportioning said land as set forth in the judgment and decree. It is also agreed that the measurements of the exterior lines of the two tracts are as indicated upon a certain plat attached to the stipulation. Appellant asserts that the cause was decided by the learned judge of the superior court in an effort to comply with section 2395, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1471), and the rule of "proportionate measurement" as used in the circular of instructions in relation to lost or obliterated corners, approved by the Secretary of the Interior October 16, 1896 (23 Land Dec. Dep. Int. 361), and respondent's brief contains an assertion that the court was governed by sections 2395, 2396, 2397, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1471-1473), and the circular of the Secretary of the Interior mentioned above. These sections have reference to the rules to be followed where the corners have been lost and in originally locating corners and lines. The term "proportionate measurement" as used in the circular, is for the guidance of surveyors who follow the field notes in the Surveyor General's office in relocating lines and corners and refers to a measurement "having the same ratio to that recorded in the original field notes as the length of chain used in the new measurement has to the length of chain used in the original survey, assuming the original and new measurements have been correctly made." There is no provision, either in the cited sections or in the circular, for a "proportionate measurement" based upon the deficiency in acreage of adjoining parcels of land. It has been

held that a deficiency in the contents of the section must as between a quarter-quarter section and a residuary fraction fall entirely upon the latter, and cannot be apportioned between them. *Wharton v. Littlefield*, 30 Ala. 245. But, whether we conform to that doctrine or not, we find no warrant for the application of the principle here sought to be invoked, that the deficiency in acreage must be apportioned between the lands of Somers and McMordie. Here, there is no question as to the establishment of a lost corner. The section corner is shown on the plat, as is also the south line of plaintiff's property. The exact boundaries must prevail as shown on the government plat, and they will control a further description by quantity. *Wadhams v. Swan*, 109 Ill. 46.

The cause is remanded, with instructions that appellant's motion be granted.

We concur: LORIGAN, J.; HENSHAW, J.

(155 Cal. 140)

GRACIOSA OIL CO. v. SANTA BARBARA COUNTY. (L. A. 2,070.)

(Supreme Court of California. Jan. 8, 1909.)

1. TAXATION (§ 80*) — ASSESSMENT — LAND HELD UNDER LEASE.

As a general rule, land held under an ordinary lease for years, giving the right to hold the land for usufructuary purposes only, in the absence of contrary statutory provisions, is to be assessed as a whole, the assessment including both the value of the estate for years and of the remainder or reversion; the owner of the fee being deemed the owner of the whole estate for purposes of taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 168; Dec. Dig. § 80.*]

2. PROPERTY (§ 7*)—REAL PROPERTY—HORIZONTAL DIVISION OF LAND.

For purposes of separate ownership, land may be divided horizontally, as well as superficially and vertically.

[Ed. Note.—For other cases, see *Property*, Dec Dig. § 7.*]

3. MINES AND MINERALS (§ 73*)—CONVEYANCES—CONSTRUCTION OF OIL LEASE.

By lease landowners granted a lessee the exclusive right to enter on the premises, to bore wells, mine, or to do whatever might be necessary and proper for the development and extraction of petroleum, etc., with the privilege of conveying over the land any of such substances produced therefrom and of maintaining on the premises structures necessary for the objects of the lease, to hold the premises and privileges with the appurtenances for the enumerated purposes for 20 years unless terminated for failure to comply with the terms of the lease, the lessee to have the right to abandon the lease at any time that it deemed it unprofitable to hold or operate, and, if oil were found the lessee to pay the lessor a royalty of one-tenth part of that produced. *Held*, that the contract vested no present title in the lessee to a stratum of the land in place, but left the title to the oil in the landowner until it was brought to the surface, vesting in the lessee an estate for years so far as necessary for the purpose of taking oil therefrom, carrying with it the right to extract the oil and remove it from the premises, which con-

stitutes for the term prescribed a servitude on the land under the express provisions of Civ. Code, § 801, subd. 5, and a chattel real at common law.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 73.*]

4. TAXATION (§ 537*)—RECOVERY OF TAX PAID—STATUTORY PROVISIONS.

Under Pol. Code, § 3804, providing that taxes erroneously or illegally collected shall be refunded, which gives a right of recovery only when the assessment is absolutely void, mere irregularities in procedure, which do not invalidate the assessment, do not absolve the taxpayer from his obligation to pay the taxes, nor give him any right to recover taxes already paid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 996; Dec. Dig. § 537.*]

5. TAXATION (§ 63*) — ASSESSMENT — OIL LEASEHOLDS—"REAL ESTATE."

Rights of a company under a lease to take from its place a stratum of oil or oil-bearing sand, and convert it to its own use, with the right to possession of the surface of the ground so far as necessary to enable it to bore for and extract the oil, constitute a claim to the possession of land, and hence are "real estate" within Pol. Code, § 3617, subd. 2, cl. 1, providing that the term "real estate," as used in connection with taxation, shall include a claim to the possession of land, so that they can be assessed separately from the ownership of the other parts of the land when held separately.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 147; Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5937, 5939-5951; vol. 8, pp. 7778, 7779.]

6. TAXATION (§ 63*) — ASSESSMENT — RIGHTS AND PRIVILEGES APPERTAINING TO MINERALS—OIL LEASEHOLDS—"REAL ESTATE."

The oil stratum also constituting "minerals in and under the land," the rights of the lessee are "rights and privileges appertaining" to such minerals, and hence "real estate" within Pol. Code, § 3617, subd. 2, cl. 2, providing that the term "real estate," as used in connection with taxation, shall include all rights and privileges appertaining to mines, minerals, etc., in and under the land, all timber belonging to individuals or corporations growing or being on the lands of the United States, and all rights and privileges appertaining thereto.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 147; Dec. Dig. § 63.*]

7. TAXATION (§ 576*) — COLLECTION — STATUTORY PROVISIONS.

Pol. Code, § 3820, provides that taxes on all assessments of possession of, claim to, or right to the possession of land shall be immediately due and payable upon assessment, and shall be collected by the assessor as provided in the chapter. Section 3821 declares that, in cases provided for in section 3820, the assessor shall, when making the assessment or before a certain time thereafter, collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed, or, if no personal property can be found, the assessor may collect the tax by seizure and sale of the right to the possession of, claim to, or right to the possession of the land. By section 3822, sections 3791 to 3796, providing for a sale at public auction with immediate delivery of possession to the purchaser, are made applicable to such seizure and sale. *Held*, that the rights of an oil lessee to extract oil from land being a claim to the possession of land within section 3820, if the taxes thereon are not paid and no personal property of the owner can be found, the assessor can forthwith proceed to sell the

rights under the lease, and give immediate possession to the purchaser.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 576.*]

8. TAXATION (§ 63*) — PROPERTY LIABLE — CONSTRUCTION OF STATUTE—"REAL ESTATE."

Pol. Code, § 3617, subd. 2, cl. 2, providing that the term "real estate," as used in connection with taxation, includes all mines, minerals, etc., in and under the land, all timber belonging to individuals or corporations growing or being on the lands of the United States and all rights and privileges appertaining thereto includes within its terms, mines, minerals, etc., in and under state lands and lands held in private ownership, and rights and privileges appertaining thereto, and authorizes the separate assessment of such property when held separately from the ownership of the other parts of the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 147; Dec. Dig. § 63.*]

In Bank. Appeal from Superior Court, Santa Barbara County; J. W. Taggart, Judge.

Action by the Graciosa Oil Company against the County of Santa Barbara. Judgment for plaintiff, and defendant appeals. Reversed.

U. S. Webb, Atty Gen., W. S. Day, Dist. Atty. (R. B. Canfield, of counsel), for appellant. H. C. Booth, for respondent.

SHAW, J. This is an action to recover taxes assessed against plaintiff by defendant and paid under protest, claiming that the assessment is void.

For the year 1904 plaintiff was assessed for taxes as the owner of property described on the assessment roll as "Mining rights and privileges under lease made by L. Harris et al., to Graciosa Oil Co. dated December 15, 1900, and recorded in [referring to the record] in and to the following described lands [describing about 7000 acres of land situated in Santa Barbara county]." The property rights thus described were assessed at the value of \$14,950, and on this assessment the taxes in question were levied and paid. For the same year the same land was assessed to the lessors Harris et al., who were the owners of the fee, at the value of \$66,150. In this assessment the land was described by sections and subdivisions, precisely as in the assessment to plaintiff, without mention of any deduction from the valuation thereof or of any exception arising out of any qualification, limitation, or burden upon the fee, by reason of the separate ownership of the mining rights and privileges referred to in the assessment to plaintiff. It was found by the court, however, "that the mining rights and privileges assessed to plaintiff was not included, and no part of them was included, for assessment in or with any of the property as assessed to" Harris et al., and that "the said assessment of said mining rights and privileges was not included in and did not include the assessment of any property assessed" to said Harris et al. We under-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stand this finding to mean that there was no double assessment or double taxation upon the same property or interest therein, and we assume therefrom that the valuation of the entire estate and property in the land, as made by the assessor, including the plaintiff's rights and privileges, would exactly equal the aggregate amount of all the assessments involved. The court below in its conclusions of law held the assessment to plaintiff void solely on the ground that the mining rights and privileges granted by the lease were not taxable or assessable separately from the land upon which they were operated, and that the lease did not create a separate taxable interest in the land, or justify a separate assessment of the right granted, although the value of said right was not included in the valuation of the land in the assessment to the landowners. The question presented and argued is whether or not, under the provisions of the Constitution and of the Political Code providing for taxation, an assessment of the mining rights and privileges of plaintiff under the lease referred to can be made against the plaintiff, separately from, and in addition to, the assessment to the owners of the fee covering the land itself but not including said rights and privileges, or, in other words, whether or not the respective rights of the plaintiff and of Harris et al., under the contract, are separately assessable to each.

The contract of lease was dated December 15, 1900. The parties of the first part, named as lessors, were Lawrence Harris, Eleanor Kate Harris, and Harry H. Harris, the owners of the land. By this contract the landowners granted to the plaintiff, party of the second part, "the sole and exclusive right to enter upon the premises (described) for the purpose and to mine or bore wells, or to do whatever things may be necessary and proper for the development and extraction upon said premises of petroleum, and other hydrocarbon substances, by whatever name known and natural gas (asphaltum included)," together with the privilege of conveying over said land any of said substances produced therefrom, the right to use the water of the streams thereon so far as needed in said business, and of placing and maintaining on the premises "all structures and appliances necessary and useful for the objects of the lease; * * * to have and to hold the said premises and privileges with the appurtenances for the said purposes unto the said party of the second part, its successors or assigns, from and after the date hereof * * * for and during the whole period of twenty years, unless otherwise terminated by the party of the second part [plaintiff?], for failure to comply with the terms of this lease," provided that, if any wells on the premises were then producing oil, such wells might be retained by the plaintiff and deepened and operated thereafter so long as they continued to produce. It further provided that the lessee should begin development work within

six months from the date of the lease and prosecute the same continuously in good faith to success or abandonment, but that it should have the right at its option to abandon the lease at any time that it deemed it unprofitable to hold or operate and that the lease should thereupon become void. And further that, "in the event that oil is found, the lessee agrees to deliver or pay as rent or royalty to the said lessor * * * the one-tenth part or share of so much of all the crude oil of petroleum, naptha, or maltha which may be produced and saved by the lessor from said wells and operations on said premises," not including that required by the plaintiff for fuel in the mining operations.

The contention of the respondent is that there can be but one assessment of these lands, that the assessment to the Harrises covers and includes all other interests, and that, after having made that assessment, excluding the value of plaintiff's rights, it is not lawful to separately assess to the plaintiff the value of its property rights under the oil lease. It is no doubt the general rule, regarding land held under an ordinary lease for years giving the right to hold the land for usufructuary purposes only, that, in the absence of contrary statutory provisions, there is to be but one assessment of the entire estate in the land, and that this assessment should include the value of both the estate for years and of the remainder or reversion. 27 Am. & Eng. Ency. of Law, 678; *Chicago v. People*, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69; *State v. Mississippi B. Co.*, 109 Mo. 253, 19 S. W. 421. Section 3887 of the Political Code recognized this rule, and provided that "the mortgagor or lessor of real estate is liable for the taxes thereon." This section was repealed in 1880, but, so far as we are advised, the practice of making but one assessment of such land and covering therein the entire value of all interests and estates has been uniformly followed in this state, since its repeal as well as before. With respect to ordinary leases for usufructuary purposes there are good reasons for this practice. Except when held for speculative purposes, the value of land usually depends on the value of the use and occupation, and consists of a sum equivalent to a principal which, at the rate of interest usual upon safe investments, will bring a net annual income equal to that which the land will produce. The lessor or landowner annually receives a sum as rent which he deems the equivalent of this annual income, or of the value of the use of the land to him, and therefore he enjoys the entire beneficial interest in the premises, including the value of the leasehold as well as of the fee. There are exceptional cases, due to the sudden rise in rental values, where this is not the case. But general rules in regard to taxation must be made to fit the usual conditions and not the exceptional ones, and statutes are to be

construed with this fact in view. Since 1880 there has been no express statutory provision on the subject, but we think that, as to such leasehold estates, the owner of the fee may fairly be deemed to be the owner of the whole estate for purposes of taxation.

There are material differences between such estates for years and the right and privilege to bore for and extract oil held by the plaintiff under its oil lease. See *Thornton on Oil*, §§ 47, 48. The plaintiff, it is true, does not own an absolute present title to the oil strata in place. Such an absolute estate in an underlying stratum may be created and the estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of respective owners of two adjoining tracts of land. For purposes of separate ownership, land may be divided horizontally as well as superficially and vertically. *Jones on Real Prop.* § 537; *State v. Moore*, 12 Cal. 70. But the contract in question vests no present title in a stratum in place. It leaves the title to the oil in the landowner until it is brought to the surface. The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and a chattel real at common law. *Civ. Code*, § 801, subd. 5; section 802, subd. 6; *Harvey C. & C. Co. v. Dillon*, 59 W. Va. 605, 53 S. E. 928-937, and cases there cited; *Thornton on Oil Leases*, § 51. The royalty is frequently fixed before the discovery of oil, usually at a time when the existence of oil in profitable quantities is a matter of conjecture, and without regard to the adjustment between the parties of the burden of taxation upon the respective interests. The value represented by the royalty is ordinarily very small, as compared to that of the right of the lessee. After the discovery of oil in such leased ground, the value of the lessor's real interest and right is much less than it would be if he had the whole estate, including all the oil thus discovered. There is no real parallel between such a case and that of a lessor under an ordinary lease for occupation and use. It is well known that such leasehold estates or interests in oil strata, after a discovery of oil, often command large prices in the market, out of all proportion to the value of the interest of the landowner receiving only the royalty and enjoying the use only for other purposes. The right of the lessee under this contract is more than that of the ordinary lessee. It is of a different character and for a different purpose. He has no right at all to the usufruct of the soil. His right extends to the extraction of a certain part of the substance of the land itself, to its permanent separation and removal and its conversion to his own use. The whole object of the contract is to effect, if not tech-

nically a sale and conveyance of a substantial and specific part of the land, at least a disposition and transfer thereof to another. It can be easily seen that the reasons for the rule applicable to ordinary leases for the use only that the entire estate should be assessed to the lessor are entirely lacking here, and that it would be a more just and reasonable adjustment of the burden of taxation of such oil leases to assess each party separately with the value of his right or estate in the land. There is no statute forbidding it. On the contrary, we think the statute at least permits it, if it does not require it. If it is permitted, the respondent cannot complain. The suit is based on the provisions of section 3804 of the Political Code which give a right of recovery only when the assessment is absolutely void. Mere irregularities in procedure which do not invalidate the assessment do not absolve the taxpayer from his obligation to pay the taxes nor give him any right to recover taxes already paid.

The Political Code declares that all property must be assessed to the owner thereof. Section 3628. It must be conceded that the rights and privileges of the plaintiff under this lease are private property and are taxable in some form. *Const.* art. 13, § 1. The property rights thus vested in plaintiff belong to it, and not to its lessor. It cannot with good reason be contended that the value of the lessor's estate, including the value of the right to the royalty in the oil produced, embraces, covers or represents the value of the plaintiff's rights and privileges in the land, as in the case of the lessor in an ordinary lease. It would seem to follow necessarily that the mining rights and privileges of the plaintiff should be separately assessed to it as the owner. The Code recognizes such rights and privileges as a species of property in real estate, and makes sufficient provision for the effective enforcement of payment of taxes thereon. Section 3617 provides as follows: "The term 'real estate' includes: (1) The possession of, claim to, ownership of, or right to the possession of land. (2) All mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations, growing or being on the lands of the United States, and all rights and privileges appertaining thereto." The strata of oil or oil-bearing sand constitute, as we have seen, a part of the land which may be the subject of separate ownership. There may be a separate "claim to" this part of the land, as well as a separate "claim to" a portion of the surface. A "claim to" take this stratum from its place and then convert it to one's own use may well be termed a claim to land, although not accompanied by actual physical possession of the subterranean deposit. The lease also gives plaintiff the right to possession of the surface of the ground, so far as may be necessary to enable it to bore for and extract oil and as an incident to the main purpose of

the contract. The plaintiff's rights may therefore in these aspects be classed as real estate within the first clause of section 3617. The oil strata also constitute "minerals in and under the land," and the rights and privileges of plaintiff under the lease are clearly "rights and privileges appertaining" to such minerals, and consequently are real estate within the meaning of the second subdivision aforesaid. With respect to enforcing payment of the taxes, section 3820 provides that "the taxes on all assessments of possession of, claim to, or right to the possession of land, shall be immediately due and payable upon assessment, and shall be collected by the assessor as provided in this chapter." Section 3821 declares that in the cases provided for in section 3820 the assessor shall at the time of making the assessment, or at any time before the first Monday of August following, collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed, or if no personal property can be found, then the assessor may collect the taxes by seizure and sale of the right to the possession of, claim to, or right to the possession of, the land. By section 3822 the provisions of sections 3791 to 3796, inclusive, are made applicable to such seizure and sale. These sections provide for a sale at public auction with immediate delivery of possession to the purchaser. The interests of plaintiff, therefore, come within the precise terms of section 3820, and, if no personal property can be found belonging to the owner, the assessor could forthwith proceed to sell the rights of the plaintiff in the land and in the oil strata and give immediate possession thereof to the purchaser. Such being the reasonable construction of the statute, it is to be presumed that it was intended to have that effect by the Legislature. In *Bakersfield, etc., Co. v. Kern Co.*, 144 Cal. 154, 77 Pac. 892, it was held that taxes on a mining claim were collectible immediately under these sections. There is a statement in the opinion in that case that payment of taxes could not be enforced by a sale of the mining claim. But, in the view of the facts there involved and stated, this evidently means no more than that such sale could not be made as there threatened; that is, without previous search for personal property and a seizure and sale thereof if found.

It may be urged that the second clause of section 3617, above quoted, refers only to mines, minerals, quarries and timber "growing or being on lands of the United States," and to rights and privileges in such lands only, and has no application at all to lands held in private ownership. We can perceive no necessity for so narrow a construction. It is a matter of common knowledge, and a thing recognized by legislative enactments, that such mining rights and privileges may

exist on lands belonging to the state of California. St. 1897, p. 438, c. 270, § 3; St. 1880, p. 130, c. 117; St. 1873-4, p. 766, c. 531. The lands of the state are not taxable. If the rights and privileges of the miner upon such lands are not taxable to the person in possession, they would entirely escape taxation. There is no doubt that the section does include such private possessory interests and rights in lands of the United States and authorizes the assessment thereof as private property, but it may also reasonably be held to include mines, minerals, and quarries in and under state lands and lands held in private ownership, and rights and privileges appertaining thereto, and to authorize the separate assessment of such property, when held separately from the ownership of the other parts of the land, the first part of the clause referring to absolute titles to such minerals, and the latter part to mining rights and privileges, such as those of the plaintiff in this case. In view of the manifest propriety and justice of such separate assessments, a broader construction should be adopted.

The court below erred in holding that the mining rights and privileges of the plaintiff under the lease could not be lawfully taxed to plaintiff separately from the interest or estate assessed to the landowners. Upon the findings made judgment should have been given for the defendant.

The judgment is reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

155 Cal. 96

KEIR v. KEIR. (L. A. 2,168.)

(Supreme Court of California. Jan. 4, 1909.)

WILLS (§ 733*)—CHARGE ON PROPERTY BEQUEATHED—ACCRUAL OF RIGHT.

A will provided that testator's widow should receive all his property "in trust" for his heirs, that the widow should use the rents and issues of the property for her support during her life, that "on the death" of the widow the property should be divided among testator's children, and that testator's son on receiving specific parcels of property should pay a certain sum to testator's grandson. *Held*, that the grandson's cause of action against the son for such sum accrued on the death of the widow, rather than on the death of testator, though after the death of testator the widow conveyed to the son her life estate in his portion of the property, thus merging the two estates and giving the son an estate in fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1843; Dec. Dig. § 733.*]

In Bank. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Alexander S. Keir against Alexander Keir. From a judgment for defendant, and from an order denying a new trial plaintiff appeals. Reversed.

Charles L. Allison and F. B. Daley, for appellant. R. E. Bledsoe, for respondent.

SHAW, J. This was an action against the defendant to recover the sum of \$1,100 and to have the same adjudged a lien upon certain real estate and to foreclose the said lien.

The question presented is whether or not the action is barred by the statute of limitations. The defendant was the son, and the plaintiff the grandson, of Alexander Keir, Sr., who died on March 31, 1897. Plaintiff was a nephew of the defendant. On September 29, 1892, Alexander Keir, Sr., executed a will making certain dispositions of his property from which this action arose. The fourth clause of the will is as follows: "I bequeath to my said wife, Marian, in trust for my heirs, all my real and personal property; the rents and issues therefrom to be used for the support of my said wife during her lifetime, on condition, however, that she receive the same in lieu of her dower or other claims upon my estate." The testator left one son and four daughters as his heirs, besides the plaintiff, who was his grandson. The provision for the defendant, Alexander Keir, Jr., was as follows: "Fifth. I bequeath and devise, upon the death of my wife, Marian, all my real and personal property to my children as follows: Sixth. I give to my son, Alexander Keir, Jr., all that certain real property known and designated (describing three lots containing thirty-six acres), together with all improvements, stock, farming implements and other personal property thereon, not hereinbefore disposed of; also all that other certain real property" (describing a certain parcel of land). To each of his daughters he gave an estate in remainder after the death of his wife, in certain other tracts of land. The only provision for his grandson, the plaintiff herein, was as follows: "Twelfth. I further direct that my son, Alexander Keir, Jr., pay to my grandson, Alexander S. Keir, the sum of eleven hundred (\$1,100.00) dollars gold coin out of the property hereinbefore bequeathed to my son, Alexander Keir, Jr. If my son, Alexander Keir, Jr., fails, refuses or neglects to pay my grandson, Alexander S. Keir, the sum herein named, viz., eleven hundred (\$1,100.00) dollars, then I hereby direct and empower my heirs at law to pay Alexander S. Keir, my grandson, the sum of eleven hundred (\$1,100.00) dollars and to deduct the amount from that portion of my estate herein bequeathed and devised to my son, Alexander Keir, Jr."

The will was duly admitted to probate on April 26, 1897, and on April 2, 1898, the estate was distributed in accordance with the will to the five children, subject to the provision in favor of the plaintiff herein, as provided in the will. On March 27, 1904, Marian Keir, wife of the said testator, departed this life. This action was begun on April 21, 1905. It will be observed from the dates

above given that if the plaintiff's cause of action accrued at the time of the death of the testator, when the estate in remainder devised to Alexander Keir, Jr., vested in him, or if it accrued at the expiration of one year after the testator's death, as provided in section 1368 of the Civil Code, in either event the action would be barred by the statute of limitations. If, however, it did not accrue until the defendant came into possession of his estate in remainder, upon the death of the life tenant, Marian Keir, on March 27, 1904, then the action was brought within the time and is not barred. The plaintiff claims that, even if the action accrued at the death of the testator, nevertheless, the defendant received the property in trust for the payment of the plaintiff upon a voluntary trust, against the enforcement of which the statute does not begin to run until there is a repudiation thereof. In view of the conclusion which we have reached as to the time when the action accrued, we do not think it necessary to determine whether the trust imposed upon the defendant was a voluntary express trust which he must repudiate in order to start the statute of limitations, or a constructive trust, against which the statute began to run immediately upon the death of the testator. The acceptance of the property given to him by the will, charged with the payment provided for the plaintiff, imposed upon the defendant a personal liability to the plaintiff for the payment of the money as directed by the will. As soon as the liability accrued, if it was not performed within a reasonable time, the plaintiff was entitled to begin an action to recover the money of the defendant, and to have the claim declared a lien upon the property given to the defendant by the will. *Dunne v. Dunne*, 63 Cal. 157, 4 Pac. 441, 1152. The important question therefore is: At what time did the defendant become liable for the payment of the money as a present matured obligation? This question must be determined upon a consideration of the intention of the testator. Considering all the provisions of the will, at what time did the testator intend that the plaintiff should receive the \$1,100 directed to be paid to him by the defendant?

We think the most reasonable interpretation of the provisions of the will is that this payment was to be made upon the death of his wife, the time when the estate in remainder devised to the defendant became an estate in possession. Prior to that period the defendant could receive no benefit whatever from the property given to him by the will. He would, it is true, be vested with an estate in remainder; but the rents, profits, use, and enjoyment thereof would not accrue to him until the death of the life tenant. The language of the will in this regard is somewhat peculiar. It does not in terms give to his wife, Marian, a bare life estate in the property. The language is: "I be-

queath to my said wife Marian, in trust for my heirs, all my real and personal property." He further provides that the rents and issues thereof shall be used for her support during her lifetime. A subsequent provision is: "I bequeath and devise, upon the death of my wife, Marian, all my real and personal property to my children as follows." The technical effect of these provisions is that during the lifetime of the wife the title to the land was vested in the wife in trust. The provision purporting to give the remainder to the children does not purport to vest a present remainder, but declares that upon the "death of my wife, Marian," all the real and personal property shall go to the children. The provision in favor of the plaintiff was in the form of a direction that his son should pay to the plaintiff \$1,100 "out of the property" bequeathed to the son. The language of the provision for the vesting of the estates in remainder shows that in the contemplation of the testator his children would receive no estate or title until the death of the wife. The provision in favor of the plaintiff shows that he required the plaintiff's portion to be paid out of the property given to his son. It is not reasonable to believe that the testator would require his son to pay to the plaintiff the sum of \$1,100 out of the property at a time when he had received no beneficial interest therein, and was not yet entitled to possession thereof. The reasonable conclusion is that the payment to Alexander S. Keir, the plaintiff, became due upon the death of the wife. At that time the defendant became vested with the actual possession of the property out of which, that is to say, a part of which, he was to pay to the plaintiff. In this view of the case the obligation did not mature until the death of the wife, somewhat more than one year before the action was begun, and the bar of the statute of limitations did not apply. The court below was of the opinion that the action was barred, and gave judgment in favor of the defendant. For the reasons above given we think this conclusion was erroneous.

Immediately after the decree of distribution was made, the widow conveyed to the defendant herein her life estate in the real property given to him in remainder by the will. The court found that the defendant thereupon entered upon, and has ever since held, the possession of said real property. It seems to have been supposed that this transaction in some manner hastened the maturity of the obligation of the defendant to plaintiff and caused it to become then immediately due. Manifestly this could not be so. It did not accelerate, as it is expressed, the estate in remainder, so as to make it vest at once in possession. 16 Cyc. 651. It is true that in law there was, technically, a merger of the two estates, and the son became seised

of the estate in fee; the life estate being considered as extinguished for that purpose. But in equity a merger is allowed or denied as will best subserve the purposes of justice and the actual and just intent of the parties. 16 Cyc. 665; *Jameson v. Hayward*, 106 Cal. 688, 39 Pac. 1078, 46 Am. St. Rep. 268. If the plaintiff had then demanded payment, the defendant could well have answered that, in the absence of any expression of intention to the contrary in the will or elsewhere, his interest would be best subserved by refusing to allow a merger for the purpose of declaring the money then due and payable. *Jameson v. Hayward*, supra. The obligation to the plaintiff, as we have said, arose from the provisions of the will, which became final by the probate and decree of distribution. The consideration for the obligation was the estate given to the son by the will "out of which" he was required to pay the grandson, and it was the actual receipt of that estate by the son which was to enable him to make the payment. This was the event upon which it was to become due. These were rights of the parties as fixed by the decree of distribution. The subsequent acquisition by the son of the life estate of the widow, whether by purchase for value or by gift from her, was a matter of adventitious origin, wholly collateral to the obligation and formed no part of its consideration. Hence it could not operate to increase the burden of the son or enlarge the rights of the grandson.

The appeals are taken by plaintiff both from the judgment and from an order denying a motion for a new trial.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(155 Cal. 106)

HANSON v. FOX. (L. A. 2,099.)

(Supreme Court of California. Jan. 5, 1909.)

1. VENDOR AND PURCHASER (§ 170*)—EXECUTORY CONTRACT—PAYMENT IN INSTALLMENTS—OFFER OF LUMP SUM.

Under an executory contract for the sale of land to be paid for in installments, an offer by the purchaser of a lump sum is not a legal tender operating to place the vendor in default.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 345; Dec. Dig. § 170.*]

2. VENDOR AND PURCHASER (§ 116*)—EXECUTORY CONTRACT—RESCISSION—TITLE OF VENDOR.

The fact that a vendor in an executory contract has no title to convey affords no ground for rescission before the purchaser has performed the contract on his part, and is entitled to demand a deed.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 206; Dec. Dig. § 116.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Gotfred Hanson against E. R. Fox. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

L. M. Fall, for appellant. Conkling & Bretherton, for respondent.

HENSHAW, J. Defendant entered into separate contracts for the sale of two lots of land. The contracts were similar in terms. One was made with plaintiff, the other with plaintiff's assignor. In each case a part of the purchase price was paid at the execution of the contract, and the remainder of the purchase price was to be paid at the rate of \$10 per month. The unpaid part of the purchase price was evidenced by 35 promissory notes, each for \$10, bearing interest at 7 per cent. after the dates when respectively they became due. Plaintiff made a tender of the total sum due under these contracts, and, upon defendant's refusal to accept the tender, he brought this action, treating the refusal as a breach and asking for a rescission. In addition to the matters above set forth, he charged that defendant does not and never has owned the lots which he contracted to sell, and has no title to them other than that evidenced by a tax title, which he charges to be void. The findings of the trial court adopted plaintiff's view, and gave judgment accordingly, from which judgment and from the order denying his motion for a new trial, defendant appeals.

It is shown by the contracts that plaintiff was not entitled to demand his deed until final payment. In other words, defendant had contracted to convey title to plaintiff 35 months after the execution of the contract. The plaintiff's offer of a lump sum, under conditions at variance with the terms of the contract, was not a legal tender under the contract, and could not operate to place defendant in default. In strictness plaintiff had no more right to offer the total sum, and claim rescission because of defendant's refusal to accept it, than defendant would have had to have demanded the lump sum and claim a rescission because of plaintiff's refusal to pay it. The rights of each are prescribed by the contract, and neither party can be put in default by insisting upon a compliance with the terms of the contract, or by refusing to accede to a demand not contemplated by those terms.

Nor does the fact which the court found, namely, that defendant had no title to the lots, afford any reason for the interposition of equity. In a case such as this it is perfectly legal for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. Such is,

and always has been, the settled rule in this state. Thus in *Joyce v. Shaffer*, 97 Cal. 335, 32 Pac. 320, the vendors, under contract of sale, had actually conveyed the land to a third person, and rescission was sought. This court said: "The conveyance by the vendors was not a breach of the contract. One may sell land which he does not own, and yet be able when the time of performance arrives to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent on him to offer to perform, or to show that at the time of performance the vendor could not furnish the title."

So in *Shively v. Semi-Tropic Land & Water Co.*, 99 Cal. 259, 33 Pac. 848, this court, declaring that a transfer of land to third parties during the existence of an executory contract of sale does not constitute abandonment or rescission of the executory contract, said: "Defendant as yet has not defaulted, and might not suffer default when the balance of the purchase price was tendered and a deed demanded, and the plaintiff is not entitled to recover the money paid until he shows the default of the defendant." The same principle is announced and rule laid down in *Garberino v. Roberts*, 109 Cal. 126, 41 Pac. 857, and it is further said: "In order to put the defendant (vendor) in the wrong, it is incumbent upon him (the vendee) to await the time of performance provided in the contract, and thereupon make his tender of performance and demand his deed." So here, whatever may have been the condition of defendant's title, under the contract he had 35 months in which to perfect it, and could not be placed in default until at the expiration of 35 months, payments having been duly made by the vendee and demand by the vendee made for the deed, defendant was unable to comply with such demand. The effort to place defendant in default by a tender made in advance of the time, and under circumstances not contemplated by the contract, and to claim the right of rescission because then the vendor could not convey merchantable title, was unavailing and nugatory.

The judgment and order appealed from are reversed and the cause remanded.

We concur: **LORIGAN, J.; MELVIN, J.**

155 Cal. 112

Ex parte HALLAWELL. (Cr. 1,485.)

(Supreme Court of California. Jan. 5, 1909.)

1. POISONS (§ 2*)—SALE—REGULATION—STATUTES—VALIDITY.

The act regulating the sale of poisons (St. 1907, p. 124, c. 102), and prohibiting in section 8 (page 126) the sale of certain poisons unless on a physician's prescription, is not unreason-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

able for failing to prohibit the giving away of such poisons.

[Ed. Note.—For other cases, see Poisons, Dec. Dig. § 2.*]

2. STATUTES (§ 110½*)—SUBJECT AND TITLES OF ACTS—CONSTITUTIONAL REQUIREMENTS—EXPRESSION IN TITLE OF SUBJECT OF ACT.

The act entitled "An act regulating the sale of poisons * * * and providing a penalty for the violation thereof" (St. 1907, p. 124, c. 102) section 8 (page 126) whereof prohibits the sale of certain poisons excepting on a physician's prescription, does not violate Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 110½.*]

3. STATUTES (§ 109*)—SUBJECT AND TITLE OF ACTS—CONSTITUTIONAL REQUIREMENTS—EXPRESSION IN TITLE OF SUBJECT OF ACT.

Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title, does not require that the title to an act should be an index to all of its provisions, and so long as the provisions themselves are cognate and germane to the subject-matter of the title the Constitution is not violated.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. § 109.*]

In Bank. Application by J. L. Hallawell for writ of habeas corpus. Writ discharged, and petitioner remanded.

See, also, 97 Pac. 320.

L. E. Dadmun, for petitioner. Wright Schoonover & Winnek and Lewis R. Kirby, Dist. Atty., for respondent.

HENSHAW, J. Petitioner was convicted of a violation of section 8 of an act entitled "An act regulating the sale of poisons in the state of California, and providing a penalty for the violation thereof." St. 1907, p. 124, c. 102. His contention is that the act is void. He had made previous application for his discharge to the Court of Appeal for the Second Appellate District, and was remanded to custody. The opinion and conclusion of the Court of Appeal is reported in 97 Pac. 320. With what is there said we are in full accord. Petitioner urges other considerations not discussed by the Court of Appeal, which he insists show the invalidity of the law in question. These may be briefly considered.

Thus, he urges that, while the sale or disposition of poisons may be subject to reasonable regulation by the state, the act in question is not reasonable, since it regulates merely the sale of poisons, declaring that they shall be sold only upon physicians' certificates, and does not at all prohibit the giving of them away. To this it may be answered that the Legislature doubtless had not perceived that the extravagant generosity of pharmacutists in giving away their poisonous drugs had reached an evil calling for prohibitory legislation. Only when such a time arrives will there be need for laws to meet the peril.

As illustrating the hardship and injustice of the existing law, petitioner points out that, "if a party comes to the druggist who has his little store in a little hamlet, where no doctor resides, and, perhaps, there is no local physician within miles, and his child is suffering with the toothache or earache, or his wife may be suffering with intense pain, or his horse may have an acute attack of colic, and he comes to this druggist and he calls for laudanum, the druggist who sells it to him has violated the law"; but, if he gives it to him, he has not violated the law. In the very harrowing picture which is thus portrayed may be found another reason why the Legislature did not see fit to prohibit the giving away of the pain-soothing poison. Recognizing that no druggist could resist such an appeal, and that, to alleviate such suffering, he would certainly dispense his anodyne, it empowered him to do so without violating the law by giving it away, trusting to his commercial sense to see that this practice of gift giving did not grow into a state evil.

Finally, it is contended that section 8 is void, as being a subject-matter not embraced within the title of the act, as required by article 4, § 24, of the Constitution. The title of the act has been quoted above. Section 8 is quoted in the opinion of the Court of Appeal above referred to and adopted. Petitioner's argument is that, by its title, the act is one to regulate the sale of poisons, while, by section 8, the sale of certain poisons is prohibited. Clearly, such is not the case. The sale is regulated by requiring a physician's certificate as an authority to the druggist for vending the poisons, or, phrased differently, the sale is prohibited excepting upon a physician's prescription; but here it may be proper to say that the constitutional provision invoked was not designed as a loophole of escape from, or a means for the destruction of, legitimate legislation. In times past an abuse had grown up, which consisted in attaching to a bill dealing with one matter of legislation a clause entirely foreign to that subject-matter, to the end that, hidden under the cloak of the meritorious legislation, the obnoxious measure might "ride through." Such "riders," as they came to be designated, not infrequently embraced ill-digested and pernicious legislation, relief bills, private appropriation measures, and the like, which would not have carried if the legislative mind had been directed to them. It was to cure this evil that the Constitution made it mandatory that a bill should embrace but one subject-matter, and, to meet the case of such a "rider" actually slipping through, declared that any matter foreign to the title of the bill should be held void; but it was never expected that the title to an act should be an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

index to all of its provisions, and so long as the provisions themselves are cognate, attinent, and germane to the subject-matter of the title, no violence is done to the Constitution.

For these reasons, the writ is discharged, and the prisoner remanded.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; SHAW, J.; MELVIN, J.

(155 Cal. 109)

DE GOTTARDI v. DONATI. (L. A. 2,164.)
(Supreme Court of California. Jan. 5, 1909.)

1. HUSBAND AND WIFE (§ 133*)—SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY

Evidence, in an action to recover the proceeds of an unauthorized sale of land by an agent, held to show that the land was originally purchased with money which was plaintiff's separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 487; Dec. Dig. § 133.*]

2. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICT—CONCLUSIVENESS.

The Supreme Court will not disturb a verdict supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

3. TRIAL (§ 357*)—IMMATERIAL SPECIAL ISSUES—EFFECT.

A finding on an immaterial special issue may be ignored.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 855; Dec. Dig. § 357.*]

4. APPEAL AND ERROR (§ 1070*)—HARMLESS ERROR—SPECIAL FINDINGS.

An erroneous finding on an immaterial issue is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231, 4232; Dec. Dig. § 1070.*]

5. TRIAL (§ 251*)—INSTRUCTIONS INAPPLICABLE TO PLEADINGS—REFUSAL PROPER.

An instruction not responsive to the pleadings is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.*]

6. TRIAL (§ 252*)—INSTRUCTIONS INAPPLICABLE TO PROOF—REFUSAL PROPER.

An instruction not responsive to the proof is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.*]

Department 2. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Olimpia De Gottardi against V. L. Donati. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Spencer and Wm. Shipsey, for appellant. S. V. Wright and Louis Lamy, for respondent.

MELVIN, J. Olimpia De Gottardi brought suit against appellant for rent collected and for money received as the proceeds of the sale of land made, according to the allegations of the complaint, by appellant in viola-

tion of his duty as plaintiff's agent. We consider only the first cause of action set forth in the complaint, as judgment was adverse to plaintiff on the second. It is alleged in that complaint: That from the 12th day of December, 1900, to the 8th day of December, 1902, Olimpia De Gottardi owned in fee an undivided one-half interest in a certain lot situated in the town of Cayucos; that Donati, the appellant, about June 1, 1902, fraudulently represented to Mrs. De Gottardi, the respondent, who was his sister-in-law, that she was in danger of having her property taken from her by the trustee in bankruptcy of her husband's estate; that said Donati offered to manage her property without cost to her so that she would be able to save it; and that she consented to such agency, having full belief in the integrity of her brother-in-law. It is further set forth in the complaint that Mrs. De Gottardi's deed to the property had not been recorded, and that appellant, knowing this fact, procured a conveyance to himself from one Pronzini, her grantor, of the same interest in the property which he knew she owned. Then follow allegations of the sale of this interest for \$1,300 and the collection of \$200 in rents; judgment being demanded in the sum of \$1,500. The jury by a general verdict found for the plaintiff \$1,132.75 actual damages, and also made a number of special findings in response to certain interrogatories. One of these special verdicts was as follows: "If said Pronzini delivered said deed to plaintiff, how was the consideration for the deed paid, whose money paid it, and when was it paid? Answer: Paid by draft, Mrs. De Gottardi's money; when deed was delivered."

Counsel for the appellant question the sufficiency of the evidence to support this special verdict, while the contentions of respondent's counsel are, first, that there was sufficient evidence to justify this finding, and, second, it was at any rate an immaterial issue improperly submitted to the jury. Plaintiff testified: "I bought the property, and I was waiting for the deed. For this deed I never myself paid Pronzini one cent. My husband bought the property for me. I had nothing whatever to do with the purchase of this property." She also said while on the witness stand: "I did not know for four years after I saw the deed in March, 1901, where it was, but during these four years I thought I owned a half interest in the property. * * * Q. Do you know anything about what money was sent to Pronzini to pay for this lot? A. I think they were nine or part of mine. I know that Pronzini was paid \$250 for making this deed to me, but the only way I know it is that my husband told me so." It also appeared from the testimony of plaintiff that at the time of her marriage she had \$200 which was given to her husband. Two or three years after the

marriage the husband paid an antenuptial debt of \$150 which she owed to an uncle in Switzerland. During these years the husband and wife had been working for Mr. Muscio at Los Alamos on a large dairy farm and had been receiving half the profits. It might well be the fact that the husband used a portion of his later earnings to pay the wife's debt contracted before she left Switzerland. Nothing to the contrary appears. It is also true that the testimony upon which was based the special finding that plaintiff's money paid for the interest derived from Pronzini is neither very striking nor particularly emphatic. However, there is some evidence upon that point. Plaintiff testified that she thought part of the money paid was hers, and her husband told her of the payment of \$250 for the deed. Under our rule that a verdict based on some evidence will not be disturbed, this one will stand. We are also of the opinion that the special issue here considered was not material, and it therefore may be ignored. The complaint alleged her ownership in fee of the property and the deed of her interest in which her name appeared as grantee was received in evidence. There was no allegation in the answer that she participated in any fraud to defeat the creditors of her husband. There was testimony to the effect that her husband had bought the property from Pronzini for her. This sufficiently established her ownership of the half interest, and according to her testimony defendant admitted that she was the owner thereof. There was ample evidence to justify the jury's conclusion that this was her separate property without regard to the use made by her husband of the \$200 received by him from her at the time of the marriage. Even if we were to hold the special finding unsupported by the evidence, such conclusion would not indicate error upon which we would be justified in reversing the judgment, because an erroneous finding which is not material cannot be the basis of such reversal. *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883; *White v. Douglass*, 71 Cal. 119, 11 Pac. 860.

There was no error in the refusal to give certain proffered instructions. These all referred to the possible fraudulent intent of plaintiff's husband, but they did not respond to the pleadings nor the proof.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

155 Cal. 103

CASS v. HUTTON et al. (L. A. 2,193.)
(Supreme Court of California. Jan. 5, 1909.)

1. JUDGMENT (§ 390*)—VACATING—MERITORIOUS DEFENSE.

On motion by persons as heirs at law of decedent to have set aside a judgment against decedent's administrator in an action to quiet

title to land under Code Civ. Proc. § 473, providing that the court may, in furtherance of justice, when summons has not been personally served on defendant, allow him or his legal representative within a certain time after judgment to answer to the merits, where the petition alleged on information and belief that decedent's estate owned the property, and that plaintiff's only claim of title was based upon certain pretended tax deeds invalid because no valid assessment notice of sale, etc., was made or given, but did not state why the steps necessary to a good tax title had not been properly pursued, and alleged that affiant and her associates were advised by counsel that they have a complete defense upon the merits, but did not allege that affiant had fully stated the facts to counsel nor sufficiently allege the merits of the proposed defense, and alleged no fraud of the administrator, and the proposed answer added nothing material to the administrator's answer formerly interposed, the court acted in its discretion in denying the motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 751; Dec. Dig. § 390.*]

2. APPEAL AND ERROR (§ 982*)—REVIEW—DISCRETION OF COURT.

An order denying a motion to vacate a judgment and permit an answer to be filed will not be disturbed on appeal, unless an abuse of discretion is clearly shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3879; Dec. Dig. § 982.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by F. O. Cass against F. S. Hutton, administrator of Mary A. Bragg and others. From an order denying a motion to set aside a judgment for plaintiff and permit the filing of an answer, certain defendants appeal. Affirmed.

Charles Lantz, for appellants. William Chambers, for respondent.

MELVIN, J. On July 17, 1906, F. S. Hutton was duly appointed by the superior court of Los Angeles county administrator of the estate of Mary A. Bragg, deceased. He duly qualified as such administrator, and thereafter a suit was brought against him in his capacity of administrator of the estate of Mary A. Bragg, deceased, by F. O. Cass to quiet title to certain lots in the town of Broadacres, county of Los Angeles. The said administrator filed an answer in this suit. The cause was duly tried, and a decree quieting the title of plaintiff in and to said lots was duly made and entered on August 16, 1906. Almost a year later, on August 2, 1907, appellants Eugenia H. Bragg, Marlon B. Laws, and Caleb S. Bragg presented their motion to said superior court praying that the judgment of August 16, 1906, be set aside, and that they, as heirs at law and next of kin of Mary A. Bragg, deceased, be permitted to file an answer, a copy of which was annexed to their petition. Their notice of motion states the basis of their application as follows: "Said motion is made upon the grounds that the said moving parties are the only real parties in interest in the said suit,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that they have their residence without the state of California, and that no service of summons in the said action has been made upon them, and upon the further ground that no real defense to the action was made by said Hutton as administrator of said estate, but that the judgment which appears made and entered in this cause was permissive, and upon the ground that a good and meritorious defense exists to the action upon the merits." The form of answer annexed to the petition traverses the allegations of the complaint, alleges ownership in fee of the said lots in the estate of Mary A. Bragg, deceased, and prays a judgment in favor of said estate quieting its title. The petition of Marion B. Laws affirms that Mary A. Bragg died in Ohio in the year 1902, leaving two sons, C. C. Bragg and C. F. Bragg (both since deceased); that Eugenia H. Bragg is the widow of C. C. Bragg; that Caleb S. Bragg and Marion B. Laws are his children; that Eugenia H. Bragg has acquired by conveyance the interests of the two surviving children of C. F. Bragg, deceased; and that these five persons are the only heirs at law of Mary A. Bragg, deceased. The petition further alleges that Hutton's appointment was without the knowledge or consent of any of these heirs at law of Mary A. Bragg, deceased; that said Hutton's application for letters of administration was made for the purpose of allowing suits to be commenced against the estate; that he had not contested any of the suits brought against him in his capacity as administrator; and that she and her co-heirs being nonresidents of this state had no knowledge of the suit to quiet title until May, 1907. Upon information and belief, it is stated that the estate of Mary A. Bragg owns the property in question, and that plaintiff's only claim of title is "based upon certain pretended tax deeds, and that said deeds are invalid for the reason that no valid assessment, notice of sale, sale, certificate of sale, notice to redeem or deed of said property was made or given." The affidavit concludes with the statement that affiant and her associates are advised by counsel that they have a good and complete defense to the action upon the merits. This application is made under section 473 of the Code of Civil Procedure. Respondent's contentions are, first, that the petitioners were not, strictly speaking, heirs at law of the estate of Mary A. Bragg because the sons of Mary A. Bragg were living at the time of her decease; second, that there was no motion for a new trial, and that such motion was the only available remedy (section 656, Code Civ. Proc.; *Welsh v. Koch*, 4 Cal. App. 571, 88 Pac. 604); third, that, not being "parties," appellants do not come under the provisions of section 473, Code Civ. Proc.; fourth, that by lapse of time the appellants are deprived

of the benefits of section 473, Code Civ. Proc.; and, fifth, that, even if they are entitled to the aid of such section, there is no sufficient affidavit of merits.

Waiving all the others, let us first consider this final contention. The proposed answer does not add anything material to the answer formerly interposed by Hutton. The affidavit of merits does not charge that Hutton was guilty of fraud, and there was no sufficient allegation of the merits of the proposed defense, nor why the various steps necessary to procure a good tax title had not been properly and lawfully pursued. Neither was there a statement that affiant had fully and fairly stated the facts of the case to her attorney. *Morgan v. McDonald*, 70 Cal. 32, 11 Pac. 350. It is true that the affidavit charges the administrator with neglecting a defense to the action, but the transcript shows that he did appear with his attorney at the trial. It is true that it also appears that he offered no testimony, but that in itself is no evidence of fraud. The judge who heard plaintiff's testimony at that trial denied this motion after a hearing that we are bound to assume was full and fair; and there is nothing in the affidavit or the proposed amended or substituted answer which shows an abuse of discretion on the part of the court. Therefore, conceding that the provisions of section 473, Code Civ. Proc., are available to appellants, which we seriously doubt, they do not show that the court's denial of their motion was not "in the furtherance of justice." It does not need the citation of authorities to remind us of the well-established rule that an order denying such a motion as the one here discussed will not be disturbed unless an abuse of discretion is clearly shown. In view of our conclusions upon this question, it will not be necessary to discuss respondent's other points.

The order from which this appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J

155 Cal. 121

BLACK et al. v. HARRISON HOME CO.
(HOOKSTRATTEN et al., Interveners).
(L. A. 2,153.)

(Supreme Court of California. Jan. 7, 1909.
Rehearing Denied Feb. 5, 1909.)

1. CORPORATIONS (§ 406*)—CONTRACTS—POWERS OF OFFICERS.

The president of a corporation has no power to contract, except such as is given him by the by-laws and by the board of directors, or such powers as he may assume and exercise with the apparent consent and acquiescence of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1612; Dec. Dig. § 406.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CORPORATIONS (§ 410*)—CONTRACTS—SALES OF LAND—AUTHORITY OF OFFICERS—IMPLIED POWERS.

Where the resolution of the board of directors of a corporation authorized contracts for the sale of real estate only when executed by the president and secretary jointly, the president had no power to alone execute the contracts, though he was invested with general direction of the company's affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1629-1634; Dec. Dig. § 410.*]

3. EXECUTORS AND ADMINISTRATORS (§ 3*)—NECESSITY OF ADMINISTRATION.

Where a daughter who owned practically half the stock of a corporation died intestate, leaving her mother, who owned nearly all the balance of the stock, as her sole heir, the mother did not thereupon become such an owner of the daughter's stock that her acts in contracting to sell land of the corporation could affect the stock; there being no presumption that the daughter did not leave creditors, or that it was not necessary to sell the stock to pay debts and expenses of administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 3, 12; Dec. Dig. § 3.*]

4. CORPORATIONS (§ 397*)—ACTS OF AGENTS WITHIN APPARENT SCOPE OF AUTHORITY.

A corporation is bound as to third persons by acts of an agent within the apparent scope of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1586; Dec. Dig. § 397.*]

5. CORPORATIONS (§ 425*)—CONTRACTS—AUTHORITY OF OFFICERS—IMPLIED AUTHORITY.

The authority of an officer of a corporation to make certain contracts on its behalf may arise as to third persons from his having assumed and exercised that authority in the past with the acquiescence of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1700; Dec. Dig. § 425.*]

6. CORPORATIONS (§ 426*)—CONTRACTS—ACTS OF OFFICERS—RATIFICATION.

A corporation may ratify and render binding a contract made by one of its officers in excess of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1707; Dec. Dig. § 426.*]

7. CORPORATIONS (§ 410*)—AGENTS—UNAUTHORIZED ACTS.

Where the president of a corporation had no authority to make contracts of sale of land on its behalf, an agent appointed by such president to make such sales had no authority, and the deposit of a sum in escrow under a contract of sale made by the agent did not bind the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1629; Dec. Dig. § 410.*]

8. NEW TRIAL (§ 61*)—GROUNDS—ABSENCE OF FINDING OF FACT ON MATERIAL ISSUE.

The failure of the trial court to make a finding of fact on a material issue renders the decision one against law, and a motion for a new trial will lie on that ground.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 127; Dec. Dig. § 61.*]

9. APPEAL AND ERROR (§ 1027*)—REVIEW—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

Where certain findings wholly dispose of a case and necessitate judgment regardless of other issues made by the pleadings, it is immaterial on appeal whether other findings are supported by the evidence, whether there are findings on

other issues, and whether findings regarding still other issues are conflicting or unintelligible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.*]

10. NEW TRIAL (§ 24*)—GROUNDS—FAILURE OF FINDINGS TO SUPPORT JUDGMENT.

The claim that the findings do not support the judgment is not available on motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 35; Dec. Dig. § 24.*]

Department 1. Appeal from Superior Court, Los Angeles County; Waldo M. York, Judge.

Action by Julius R. Black and others against the Harrison Home Company, wherein Ed. G. Hookstratten and others intervened. From the judgment and from an order denying a new trial, plaintiffs appeal. Interveners appeal only from the order denying their motion for new trial. Judgment and orders denying a new trial affirmed.

Lawler, Allen & Van Dyke, for appellants Black and others. Calvert Wilson and Sidney J. Parsons, for appellants Hookstratten and others. Chas. L. Batcheller and Thos. C. Ridgway, for respondent.

ANGELLOTTI, J. This action is one originally brought by plaintiffs to compel specific performance of an alleged contract for the sale by defendant corporation to plaintiffs of lots 1 and 2 in block J of the Morris Vineyard tract, in the city of Los Angeles. The interveners sought specific performance of another alleged contract for the sale by said defendant to them of the same property. The trial court found that defendant corporation never entered into either of said contracts, and gave judgment for defendant against both plaintiffs and interveners. Plaintiffs appeal from such judgment and from an order denying their motion for a new trial. Interveners appeal only from the order denying their motion for a new trial.

The evidence is practically without conflict. Defendant corporation was organized by C. G. Harrison in the year 1889, its purposes, as stated in the articles of incorporation, being generally to acquire by gift, purchase, and otherwise, real and personal property, to manage the same, and to sell and dispose of the same. Its original assets consisted entirely of the community property conveyed to it by C. G. Harrison and his wife, Sarah J. Harrison. Its stock was divided into 1,000 shares of the par value of \$100 each, and this stock was subscribed for and issued as follows: C. G. Harrison, 1 share; Sarah J. Harrison, 499 shares; Olive M. Harrison, a daughter, 498 shares; Lewis G. Harrison, a son, 1 share; F. H. Pieper, a brother-in-law of Mr. Harrison, 1 share. At the first meeting of the directors, being the above-named persons, C. G. Harrison was elected president, Mrs. Harrison vice president, and Olive M. Harrison secretary and

treasurer. The by-laws of the corporation made it the duty of the president to sign all contracts which had first been approved by the directors, authorized him to draw checks of the corporation on banks where the funds thereof were deposited, and gave him direction of the affairs of the corporation, subject to the advice of the directors. It further provided that, in the event of his inability to act, the vice president should take his place and perform his duties. At the first meeting of the board of directors, held in September, 1899, the following resolution was adopted: "Resolved that the president and secretary of the Harrison Home Company be and the same are hereby authorized, empowered and directed to sell, contract to sell, mortgage, lease and convey any and all property of said corporation, on such terms as they may deem best and advisable, and the said president and secretary are hereby authorized, empowered and directed to execute all deeds, mortgages, releases, leases or other instruments necessary to carry into effect the sales, mortgages, leases as otherwise herein provided." At the second meeting, held in November, 1899, a resolution was adopted authorizing the president and secretary to purchase, receive, and accept such property as the president or secretary deemed advisable, and authorizing the president and secretary to exchange property of the corporation for other property, and to execute the necessary papers. The minutes of the board of directors show that meetings of that body were frequently had up to December 27, 1902. At these meetings reports were received from the president, C. G. Harrison, and "accepted" by the directors, showing the business transacted, including sales of many parcels of the property of the corporation; but there is nothing therein, or in any other evidence submitted, tending to show that any contract of sale or conveyance was ever executed by the president alone, or in any other manner than as authorized by the resolution relative thereto, viz., by the president and secretary jointly. No meeting of the stockholders was held after the first meeting until July 5, 1905, and no meeting of the directors from December 27, 1902, until July 11, 1905. No new officers of the corporation were elected until July, 1905.

C. G. Harrison died intestate September 7, 1904, and no administration had been commenced in the matter of his estate at the time of the transactions in question or the time of the trial of this case. Until his death he acted as president of the corporation, but it does not appear that the course of business in regard to the transfer of real estate owned by the corporation ever differed from the method prescribed by the resolution hereinbefore set forth. From the time of his death Mrs. Harrison acted as president, as she was entitled to do under the by-laws; but the very few conveyances of real estate made prior to the transaction in question were ex-

ecuted by her and the secretary jointly, and no departure from the prior course of business in that regard is shown. She signed checks alone as her husband had previously done, but that was expressly authorized by the by-laws. The funds of the corporation were drawn upon in many instances for the private use of the widow, daughter, and son; but we do not regard that as material in determining the question before us. On May 31, 1905, Olive M. Harrison, the secretary, died. It was stipulated by the parties that she died intestate, never having been married and being without issue. She was then a woman of about 35 years of age. She died the owner of the 498 shares issued to her at the time of the formation of the corporation. No administration in the matter of her estate had been commenced at the time of the trial of this action. There is nothing to show that she did not leave debts which must be paid out of her estate, sufficient in amount to entirely exhaust it.

Within 15 days after the death of Olive M. Harrison, namely, on June 15, 1905, the writing which serves as the basis of plaintiffs' claim was executed by Mrs. Harrison, purporting to bind the defendant corporation by her, as president. It read as follows: "Los Angeles, Cal., June 15, 1905. I hereby authorize Henry R. Higgins as exclusive agent to sell lots 1 and 2, in block J, Morris Vineyard tract, * * * at any time within fifteen days from this date, to net me the sum of (12,000) twelve thousand dollars cash. Said Higgins must get his commission and pay for his services over and above said sum of \$12,000 such sum as he adds to \$12,000. I agree to convey or cause to be conveyed said property by deed, free and clear of all incumbrance on the payment to me of said sum of \$12,000 net cash. I also agree to furnish the purchaser a complete certificate of title to said premises. Harrison Home Company. Sarah J. Harrison, Pres. Witness: Hugh W. Harrison. In Duplicate." On June 17, 1905, said Higgins, purporting to act as agent of the Harrison Home Company, and signing the agreement "Harrison Home Company by Henry R. Higgins, Agt.," entered into a written agreement with plaintiffs to sell them this property for \$13,625, \$500 of which was deposited in escrow by Higgins and plaintiffs at the time of the agreement, with the Title Insurance & Trust Company, and the balance of which was tendered within the time specified in the agreement "on or before June 30, 1905." No part of the consideration was ever accepted by the defendant or by Mrs. Harrison. On June 16, 1905, C. C. Tatum & Co., as agents, accepted a deposit of \$500 on the same property from interveners, executing to them a written agreement reciting that it was received as a deposit on account of the purchase of such property for \$12,000, and that the sale was made by Tatum & Co. as agents for the Harrison Home Company, and subject to their approval. On the same day,

and prior to the execution of plaintiffs' agreement by Higgins, Mrs. Harrison was induced to sign a statement at the end of the agreement, reading as follows, "We hereby agree to all of the conditions herein contained"; the signature being "Harrison Home Company, owner, Sarah J. Harrison, Pres." The interveners also signed as purchasers. The deposit of \$500 was held by C. C. Tatum & Co., and no part thereof was ever accepted or received by the defendants, or Mrs. Harrison. It may be assumed that interveners duly tendered the remainder of the cash portion of the purchase price and a note and mortgage for the balance. According to the findings of the court, the property was reasonably worth \$11,500 on June 15, 1905, \$13,625 on June 17th and \$18,000, and more ever since July 1, 1905. On June 28, 1905, Mrs. Harrison, by a letter written by her attorney and approved by her, notified the Title Insurance & Trust Company that she declined to do anything further under either of the alleged contracts, "on account of misunderstanding and seeming misrepresentations" by which they were obtained, and also "by reason of the fact that Mrs. Harrison has not the requisite authority to enter into such a contract or to fulfill it on behalf of the Harrison Home Company." This refusal was duly communicated to the parties, and this action followed.

It is an elementary principle of corporation law that the president of a corporation has no power, merely because he is president, to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such power as has been given him by the by-laws and by the board of directors, and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation. The general rule in this regard is stated in 2 Cook on Corporations, § 716, as follows: "The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds, or management. This is a rule which prevails everywhere, excepting possibly in the state of Illinois. * * * It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director." See *Alta, etc., Co. v. Mining Co.*, 78 Cal. 629, 632, 21 Pac. 373; *Bliss v. Kaweah, etc., Co.*, 65 Cal. 502, 4 Pac. 507; *Salfeld v. Sutter, etc., Co.*, 94 Cal. 546, 29 Pac. 1105; *Blood v. La Serena, etc., Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; *Barney v. Pforr*, 117 Cal. 56, 58, 48 Pac. 987; *Northwestern, etc., Co. v. Whitney*, 5 Cal. App. 105, 108, 89 Pac. 981. It is clear that

the president of defendant corporation was never expressly authorized by by-laws or resolution of the board of directors to execute on behalf of the corporation a contract for the sale of real estate. So far as the by-laws are concerned, his power in regard to contracts for the sale of real estate was to sign such contracts as had first been approved by the directors, and the provision that he should have direction of the affairs of the corporation, subject to the advice of the directors, did not limit the effect of the prior provision so far as such contracts were concerned. The resolution of the board of directors authorized such contracts only when jointly executed by the president and secretary. The president's want of express authority to make either of these contracts on behalf of the corporation is thus affirmatively made to appear. It is also clear that the power to execute a binding contract of sale of real estate owned by the corporation could not be implied from the mere fact that he was the principal executive officer of the corporation invested with general direction of its affairs. It was not within the apparent scope of the business intrusted to him that he should have any such power.

The principal claim of plaintiffs and interveners is that defendant corporation is estopped to deny the binding effect of the acts of Mrs. Harrison. In the discussion of this branch of the case, much is made by appellants of the asserted fact that Mrs. Harrison is the owner of all the stock of the defendant corporation and is really the only person interested therein, and that she is here using the corporation simply to protect herself against her contract for the conveyance of what is practically her own property. If we assume that her ownership of all the stock would be a material factor, the trouble with appellants' position is that the record does not warrant the conclusion that the stock is so owned. Olive M. Harrison, the daughter, upon the record before us, must be held to have been the absolute owner, at the time of her death, only two weeks before the transactions in question, of 498 shares, practically one-half of the entire stock of the corporation. Giving the utmost force to the stipulation of the parties as to her dying intestate, never having been married and without issue, the property left by her is subject to administration and the payment of her debts, and Mrs. Harrison will have only what is left after administration. It cannot be assumed that Olive M. Harrison did not leave creditors, or that it will not be necessary to sell in due course of administration all or some portion of her stock to pay debts and expenses of the administration. Under these circumstances, Mrs. Harrison did not have absolute control of such stock at the time of the transactions in question, or at any time prior to the trial of this action, and cannot be held to have been such an owner thereof that her acts could affect the stock

owned by her daughter at the time of her death.

There is nothing in the record warranting the assumption of learned counsel for plaintiffs and interveners that prior to the transaction in question the president of defendant corporation had ever assumed and exercised any power to bind the corporation by his own contract for the disposition of its real estate. So far as appears, the course of business of the corporation in relation to sales of real property had always been in strict accord with the method prescribed by the by-laws and the resolution of the board of directors, and the transactions in question were the first instances of any different course. The conveyances introduced in evidence were all executed by the president and secretary jointly, and, for aught that appears here, contracts for sale had been similarly executed. The minutes of the corporation do not show anything inconsistent with this view. We have not therefore a case where the corporation can be held estopped from denying the power of the president by a course of dealing on the part of that officer acquiesced in by the corporation through its board of directors. The authorities cited by counsel in support of the well-settled rule that a corporation may be so estopped cannot be held applicable. In *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855, a contract of partnership for the purchase and sale of lands entered into by the president and general manager of a corporation on behalf of the corporation was upheld on the ground that "it fully appeared from the evidence that he had assumed the management and control of the general business of the appellant with full knowledge and acquiescence of its officers, and that at a meeting of its stockholders held subsequent to the making of this contract all of his acts were ratified and confirmed by them." In *Pettibone v. Lake View Town Co.*, 134 Cal. 227, 66 Pac. 218, a contract of employment entered into by the president of a corporation engaged in the business of selling lands on behalf of such corporation with one engaged by him to sell land for the corporation was upheld. It was held that the finding that he was authorized to execute such a contract was supported by evidence that there was a general resolution authorizing him to make conveyances, and that ever since the business was commenced he had executed deeds, made land contracts, and collected the money thereon, all with the acquiescence of the directors and all others interested in the corporation. The case of *Crowley v. Genesee Mining Co.*, 55 Cal. 273, involved a contract of employment made on behalf of a mining company for work on its mine, made by one who was both president of the company and superintendent and managing agent of such mine. The action was the money due an employé under such contract. Such a contract was clearly within the apparent scope of the business

intrusted to the officer, a contract for work and labor in and about the mine of which he was the superintendent. It was held that authority to make such a contract could be inferred from the relations of the agent to the corporation, and the court approvingly quoted from an Illinois case as follows: "A corporation which suffers appearances to exist, and its officers and agents to so act, as to give one employed by such officers and agents reason to believe that he is employed by the company, becomes liable to such person as his employer to pay for the services rendered." A Michigan case much relied on by appellants, that of *Whitaker v. Kilroy*, 70 Mich. 635, 38 N. W. 606, was an action by the receiver of a corporation engaged in the business of selling steam engines against the purchaser of an engine for an alleged balance due on account thereof. The engine had been furnished under a written contract entered into by the superintendent at the agreed price of \$500 which had been paid, and the contract was upheld; the court saying: "We think that persons dealing with such a corporation for work have a right to get their information from the person whom the corporation has put in charge, and cannot be required to go elsewhere, and that contracts so made are valid contracts when relating to the ordinary concerns of such business." The case was clearly one where the act done was within the apparent scope of the authority of the officer intrusted with the general management of a going manufacturing concern. The cases we have referred to are examples of the general line of cases relied on by appellants. They simply affirm what are well-settled rules, viz., that a corporation will be bound so far as third persons are concerned by the acts of its agent which are within the apparent scope of his authority, and that the authority of an officer to make certain contracts on behalf of the corporation may arise as to third persons from his having assumed and exercised that authority in the past with the acquiescence of the corporation, and that a corporation may ratify and render binding a contract entered into by one of its officers in excess of his authority. None of these rules has, in our judgment, any application upon the record before us.

There was no acceptance by defendant of any benefit of either of these transactions, and consequently no estoppel on that ground. In the closing brief of plaintiffs, it is urged that by the escrow deposit of \$500 made at the time of the attempted agreement between Higgins and plaintiffs, the defendant corporation was absolutely bound. We do not see how this could be so. If Mrs. Harrison was not authorized to make the contracts of sale on behalf of the corporation, Higgins' action in entering into the contract with plaintiffs was without warrant. He had no authority from the corporation to accept on its behalf any deposit, or to agree

that such a deposit should be made in escrow for its benefit. The rule that the acceptance by an authorized agent is the acceptance of the principal has no application.

Upon plaintiffs' appeal, in view of our conclusion that the findings to the effect that defendant never made either of the alleged agreements for sale are supported by the evidence, there is no other matter discussed in the briefs that requires notice.

On their appeal from the order denying their motion for a new trial, interveners urge as additional grounds for reversal that other findings than those above discussed are not supported by the evidence, that there was a failure to find on several material issues, and that several material findings are absolutely conflicting and irreconcilable. Objection is made by respondent to the consideration of the last of these claims because there is no appeal by interveners from the judgment, and it is urged that such a claim cannot be made on an appeal from an order denying a motion for a new trial. It is well settled that the failure of the trial court to make a finding of fact upon a material issue renders the decision one against law, and that a motion for a new trial will lie on that ground. See *Great Western Gold Co. v. Chambers* (Cal.) 95 Pac. 152, and cases there cited. As said in *Swift v. Occidental, etc., Co.*, 141 Cal. 166, 74 Pac. 701, "the omitted fact being essential to the judgment, a new trial for the purpose of determining the issue is the appropriate remedy, and the refusal to grant it is reviewable on appeal from the order." It may be that, where there are hopelessly conflicting findings upon a material issue, the situation is the same as if there were no finding at all thereon. Take for instance a suit on a promissory note where the trial court finds upon the material issue of payment that the note had been fully paid, and also that no part thereof has been paid. It might well be said, in the face of such irreconcilable findings, that the court had not determined the issue of payment at all, and that the decision was therefore against law in the same sense as it would have been had neither finding been made. The answer to interveners' claim as to conflicting findings lies in the fact that there is no conflict in the findings as to the execution of the contract. It is positively and unequivocally found that defendant never entered into either of these contracts, and the other findings contain nothing inconsistent with this. In view of the condition of the pleadings and the issues made thereby, these findings wholly dispose of interveners' case, and necessitate judgment against them regardless of the other issues made by the pleadings. It is therefore immaterial here whether other findings are sufficiently supported by the evidence, whether there are findings upon other

issues, and whether findings in regard to some other issues are conflicting or unintelligible. *Great Western, etc., Co. v. Chambers*, supra. The claim that the findings do not support the judgment is, of course, not available on motion for a new trial. *Swift v. Occidental Mining Co.*, 141 Cal. 165, 74 Pac. 700.

The judgment and orders denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

155 Cal. 132

BRYAN v. GROSSE et al. (L. A. 2,158.)

(Supreme Court of California. Jan. 8, 1909.)

1. COVENANTS (§ 84*)—COVENANTS CREATING EASEMENTS—ENFORCEMENT.

A covenant, in a mutual agreement of adjoining lot owners, for an easement, made for the benefit of one of the lots, is enforceable in equity against the purchaser with notice of the other lot, whether or not it in law runs with the land.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 91; Dec. Dig. § 84.*]

2. EASEMENTS (§ 13*)—CREATION BY COVENANT.

An easement of light and air need not be created by a grant in a deed of conveyance, but may be created by covenant.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 39; Dec. Dig. § 13.*]

3. PLEADING (§ 68*)—COMPLAINT—ALLEGATIONS ON INFORMATION AND BELIEF—FRAUD OR MISTAKE.

The complaint does not show fraud or mistake, for which a covenant for light and air, in an agreement between T. and K., adjoining lot owners, will be declared void, by the statement, on information and belief, that T. would not have assented to such covenant but for K.'s representation that T.'s building encroached on K.'s land, especially where the averment that it was wholly on T.'s land is only on information and belief.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 140; Dec. Dig. § 68.*]

4. EASEMENTS (§ 13*)—CREATION BY COVENANT—FAILURE OF CONSIDERATION.

Though the agreement, by which T. and K., owners of adjoining lots, created by covenants reciprocal easements in favor of their lots, provided that neither should claim damages against the other for any portion of his lot which might be taken for a public alley, cause for declaring the covenant, creating an easement of light and air in favor of K.'s lot over that of T., void, on the ground of failure of consideration, is not shown by the fact that on the opening of the alley T. paid a sum as damages for the benefit of K.; it not appearing that K., in accepting the sum awarded him, knew a part of the assessment had been paid by T.

[Ed. Note.—For other cases, see *Easements*, Dec. Dig. § 13.*]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by E. P. Bryan against John Grosse and another. Judgment for defendants. Plaintiff appeals. Affirmed.

Valentine & Newby, for appellant. O'Melveny, Stevens & Millikin and Cochran, Williams, Goudge & Chandler, for respondents.

MELVIN, J. In 1894 Mrs. M. J. Turner and Abbott Kinney entered into an agreement, whereby certain reciprocal easements were sought to be created with reference to their adjoining parcels of land in the city of Los Angeles. Appellant, Bryan, and respondent Grosse became possessed, through mesne conveyances, of the respective interests of Mrs. Turner and Kinney; Grosse's title being subject, however, to a 30-year leasehold interest of the other respondent, the Development Building Company. A complaint was filed by Bryan, in which he asked to have his title quieted to the property formerly owned by Mrs. Turner, and prayed that the second paragraph of the agreement between Mrs. Turner and Kinney be declared null and void. A demurrer to this complaint was sustained, and, plaintiff failing to amend, judgment was entered for defendants. From that judgment this appeal is taken.

In the agreement mentioned in and annexed to the complaint as an exhibit, Mrs. Turner is designated as the party of the first part, and Abbott Kinney as the party of the second part. They adopt the north line of the building owned by the first party on the east side of Spring street, about 80 feet south of the south line of Sixth street, as the line between the 80 feet owned by the second party at the southeast corner of Spring and Sixth streets and the 40-foot lot of the first party immediately south of the second party's property; such line running a distance of 80 feet to the rear of the building and thence straight to the true northeast corner of the first party's lot. The second paragraph of the agreement is as follows: "Said first party agrees that the second party may erect a building on said premises with openings for light and air in the south wall thereof above the second floor from the rear of the building of said first party as it now exists, and also over the roof of the present building of said first party; and if hereafter said first party shall extend her building farther back than her present building, or erect a new building extending farther back than her present building, she agrees to leave a space of fifteen feet in width next to the premises of the said second party for a light and air well from the second floor being the floor next above the grade floor upward from the rear of the present building of said first party to the east end of her said lot, but if said party shall hereafter raise her present building higher, or erect a new building extending upwards higher than her present building, she shall have the right to close up the windows in the south wall of said second party's building where the same are over the roof of the present building of said first party." The third paragraph provides that, in consideration of the first party's agreements, the second party

promises to give ingress and egress from and to Sixth street over a 10-foot strip at the eastern end of his property, and that, when a public alley shall have been opened, "the parties to this agreement shall not claim damages, one against the other, or compensation as against each other for any portion of their said lots which may be taken for said alley." The concluding paragraph is as follows: "The covenants herein contained are to run with the land and be binding upon the parties and all persons claiming thereunder." It is alleged in the complaint on information and belief that the second paragraph was inserted because of the mistaken belief of Mrs. Turner, based on Kinney's representations that her building encroached upon his land. It is also alleged that the consideration mentioned in the contract has failed, because at the opening of the public alley Mrs. Turner paid \$247 as damages for the benefit of Kinney. In sustaining the demurrer, the learned judge of the superior court filed a written opinion, quoted by appellant in his opening brief, in which it is held that the mutual agreement of the adjacent owners creates reciprocal easements in each other's lands, enforceable in equity, no matter whether there is privity of estate or express grant; and that it is the duty of the plaintiff in his pleading to overcome such equities. There were numerous special grounds of demurrer, but they were not considered in the court below, and by reason of the conclusions we have reached they need not be reviewed here.

Appellant cites sections 1460, 1461, 1462, and 1465 of the Civil Code. The first of these defines covenants running with the land as those contained in grants of estates in real property. Section 1462 is as follows: "Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land." Section 1465 provides that a covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the real property. From these sections and numerous citations he adduces the rule that only those covenants run with the land which are contained in grants, where there is privity of tenure or estate between grantor and grantee, and that these covenants must be made for the direct benefit of the grantor's property. Whether or not the agreement here under discussion fulfills these requisites it is unnecessary to determine. Evidently, from the last paragraph of the contract it was the intention of the parties thereto that such should be its force. This covenant for an easement is one which equity will enforce. It is one made for the benefit of respondent Grosse's property, and appellant having acquired the land formerly owned by Mrs. Turner, and being charged with notice of the equities, his conscience is bound, by the covenant, whether in law it runs with the land or not. As was said by this court

in *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686, quoting *Whitney v. Union Railway Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715: "The precise form of the nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who makes the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform." The same principle is announced in *First National Bank of Portsmouth v. Portsmouth Savings Bank*, 71 N. H. 549, 53 Atl. 1018, where Mr. Justice Bingham, delivering the opinion of the court, uses this language: "The mutual covenants contained in the agreement of February 8, 1870, in which it was provided 'that no change in the front of said building or in the principal entrance thereto shall be made by either party without the consent of the other,' are to be construed as grants of negative easements for the benefit of the respective properties; and as the parties to this action and the agreement are the same, it is unnecessary to determine whether the covenants run with the land and would be obligatory upon the successors and assigns of the contracting parties, though not named."

Appellant lays great stress upon an expression contained in a part of the syllabus in the case of *Kennedy v. Burnap*, 120 Cal. 488, 52 Pac. 843, 40 L. R. A. 476, where the following language was employed: "An easement for light and air can only be acquired in this state by express grant, and cannot be acquired by user, nor by implied grant from the mere conveyance of a house with windows overlooking another lot of the grantor; and an injunction will not lie to prevent a vendee of such other lot from erecting a building on his lot so as to close up and darken such windows, and shut off the light and air therefrom." The words "express grant" do not mean, we take it, that such easement may only be acquired by a grant contained in a deed of conveyance. The court was discussing the former English rule that easements for light and air may pass by implication. It was held that in California no such rule obtained. In that very case the learned commissioner quotes, with approval, the following language from *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80: "The simplest rule, and that best suited to a country like ours, in which changes are taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed." And there is eminent authority supporting the doctrine that easements for light and

air may be created by words of covenant as well as by words of grant. See the opinion of the court delivered by Mr. Justice Holmes in *Ladd v. City of Boston*, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 484. There is nothing in the case of *Los Angeles, etc., v. Muir*, 136 Cal. 37, 68 Pac. 308, which conflicts with the views here expressed. In that case it was decided that the contract in question was purely a personal one creating no easement nor *jus in rem*, and that therefore no enforceable equity arose in favor of the plaintiff.

There are no allegations in the complaint here considered which negative the equities established by the contract, a copy of which is thereto attached. The statement, upon information or belief, that Mrs. Turner would not have assented to the second paragraph of the contract but for Kinney's representation that the north wall of her building encroached upon his land is not sufficient, particularly as the averment that it was wholly on her own land is only upon information or belief. Neither a cause of action for fraud nor for mistake is properly set forth, and it does not appear that in accepting the \$1,290 awarded to him upon the establishment of the public alley Mr. Kinney knew that a part of the assessment had been paid by Mrs. Turner.

It follows that the demurrer was properly sustained,* and the judgment of the lower court is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

155 Cal. 137

TEBBETS v. FIDELITY & CASUALTY
CO. OF NEW YORK. (Sac. 1,521.)

(Supreme Court of California. Jan. 8, 1909.
Rehearing Denied Feb. 5, 1909.)

1. INSURANCE (§ 622*)—ACTIONS ON POLICIES
—LIMITATIONS—STIPULATIONS IN POLICY—
VALIDITY.

The condition in a policy, providing that no recovery shall be had thereon unless suit is brought within a given time, is valid if the time limited is in itself not unreasonable.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1545; Dec. Dig. § 622.*]

2. LIMITATION OF ACTIONS (§ 175*)—STATUTES
—WAIVER.

Statutes of limitations give a mere personal right for the benefit of the individual, which may be waived under Civ. Code, § 3513, and one may waive the plea of limitations as a defense to an action or waive a portion of the time granted by the statutes of limitations for the commencement of an action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 662; Dec. Dig. § 175.*]

3. INSURANCE (§ 622*)—ACTIONS ON POLICIES
—LIMITATIONS—VALIDITY.

A condition in a policy that legal proceedings thereunder must be begun within six months from the time of the death of insured is not in itself unreasonable.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1545; Dec. Dig. § 622.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. INSURANCE (§ 622*)—ACTIONS ON POLICIES—LIMITATIONS—VALIDITY.

The time to sue on a policy, stipulating that proof of death of insured must be furnished within two months after its occurrence, and that legal proceedings thereunder may not be brought before the expiration of three months from the date of filing proofs, nor after six months from time of death, begins to run from the date of the death of insured, and is not affected by the provision that legal proceedings cannot be brought before the expiration of three months from the date of filing proof.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1546, 1547; Dec. Dig. § 622.*]

Department 2. Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Mary C. Tebbets against the Fidelity & Casualty Company of New York. From a judgment for defendant after sustaining a general demurrer to the complaint, plaintiff appeals. Affirmed.

A. A. De Ligne and D. H. Jones, for appellant. Chickering & Gregory, for respondent.

HENSHAW, J. This action was brought to recover insurance, upon the death of F. F. Tebbets, under the terms of an accident life insurance policy. Insured died September 4, 1904. Action was not commenced until April 5, 1905. The policy provided that affirmative proof of the death of the insured must be furnished the company within two months after its occurrence, and that "legal proceedings for recovery hereunder may not be brought before the expiry of three months from the date of filing proofs at the company's home office, nor brought at all unless begun within six months from time of death." A general demurrer interposed to the complaint was sustained. From the judgment which followed, plaintiff appeals.

The demurrer was properly sustained. The general rule, supported by the great weight of authority, is that a condition in a policy of insurance, providing that no recovery shall be had thereon unless suit be brought within a given time, is valid, if the time limited be in itself not unreasonable. In the following citations to text-books a vast number of authorities to this effect will be found collated and cited: 4 Cooley on Insurance, p. 3964; May on Insurance, 478; 2 Beach on Insurance, § 1259; 4 Joyce on Insurance, § 3181; 1 Am. & Eng. Ency. of Law, p. 325; 1 Cyc. 281. This rule, it will be found, is that of the Supreme Court of the United States (*Riddlesbarger v. Hartford Ins. Co.*, 74 U. S. 386, 19 L. Ed. 257), and most of the states of the Union. In this state the principle is recognized and declared in *Case v. Sun Ins. Co.*, 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48. Appellant places his reliance upon the case of *Union Central Life Ins. Co. v. Spinks*, 119 Ky. 261, 83 S. W. 615, 84 S. W. 1160, 69 L. R. A. 264. That case holds, upon grounds of public policy, that the statute of limitations may not thus be shortened or

waived. Such is not the rule in this state, where such statutes are regarded as statutes of repose, carrying with them, not a right protected under the rule of public policy, but a merely personal right for the benefit of the individual, which may be waived. *Ellis v. Ins. Co.*, 113 Cal. 612, 45 Pac. 988, 54 Am. St. Rep. 373; Civ. Code, § 3513; *Bliss v. Sneath*, 119 Cal. 526, 51 Pac. 848; *Wells Fargo Co. v. Enright*, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; *State Loan Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600. We are unable to perceive that any distinction can be made upon the ground of public policy between the right of a party to waive the plea of the statute of limitations as a defense to an action, and his right to waive a portion of the time granted by the statute for the commencement of an action. The Supreme Court of Kentucky seems to be at variance with the consensus of judicial opinion upon this question. In discussing the general question this court said, in *State Loan Co. v. Cochran*, supra, declaring that the authorities uphold the validity of an agreement shortening for a definite or limited period the statute of limitations: "Nor has any case to the contrary been brought to our attention excepting that of *Wright v. Gardner*, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116, which does not commend itself to our consideration." We are compelled to express the same view as to the case of *Union Central Ins. Co. v. Spinks*, supra, relied upon by appellant. The six months' period was not in itself unreasonable. It began to run from the date of the death, and was not affected by the provision that legal proceedings could not be brought before the expiration of three months from the date of filing proofs. *Appel v. Cooper Ins. Co.*, 76 Ohio St. 52, 80 N. E. 955, 10 L. R. A. (N. S.) 674.

The judgment appealed from is therefore affirmed.

We concur: **LORIGAN, J.; MELVIN, J.**

155 Cal. 59.

MILLER & LUX v. MADERA CANAL & IRRIGATION CO. (Sac. 1411.)

(Supreme Court of California. Oct. 2, 1907.
On Rehearing, Jan. 2, 1909.)

1. WATERS AND WATER COURSES (§ 143*)—PRESCRIPTION—QUANTITY OF WATER.

Where, in a suit to restrain the diversion of water of a stream, defendant claimed a prescriptive right to divert 400 cubic feet of water per second, and the evidence showed that the capacity of its canal for diverting water did not exceed 175 cubic feet, and that the amount of water applied to beneficial uses did not exceed 100 cubic feet, the court, in granting a preliminary injunction restraining defendant from diverting water in excess of 220 cubic feet, did not abuse its discretion.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 143.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

2. INJUNCTION (§ 177*)—MODIFICATION.

Where the court granted a preliminary injunction in a suit to restrain the diversion of water of a stream while a suit to quiet title to the water was pending in another county, the court must modify the injunction so as to conform to any determination of the court in the suit to quiet title.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 177.*]

3. VENUE (§ 5*)—INJURIES TO LAND—DIVERSION OF WATERS—INJUNCTION—DAMAGES.

The venue of a suit for damages for injuries to real estate through the diversion of water of a stream, and for an injunction to restrain the diversion thereof, is not controlled by Const. art. 6, § 5, requiring actions to quiet title to real estate to be commenced within the county in which the realty is situated, but is controlled by Code Civ. Proc. § 392, subd. 1, requiring an action for injuries to real property to be tried in the county where the real estate is situated, and the suit may be brought in a county though property injured is situated elsewhere.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 5.*]

4. WATERS AND WATER COURSES (§ 38*)—RIPARIAN RIGHTS.

During the winter and spring months, on account of rainfalls and the melting snows in the watershed of a stream, it carried a large volume of water, which at all stages flowed in a continuous body, though the channel of the stream and its branches were overflowed so that the water spread over adjacent land. The overflow might be anticipated in every season of ordinary rainfall, and failed to occur only in seasons of drouth. *Held*, that the waters constituted but a single water course, and riparian rights pertained to the whole thereof.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 30; Dec. Dig. § 38.*]

5. WATERS AND WATER COURSES (§ 38*)—"ORDINARY RAINFALL."

Ordinary rainfalls are such as are not extraordinary, and floods which habitually occur, though at irregular intervals, are not extraordinary.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 6, p. 5049.]

6. WATERS AND WATER COURSES (§ 33*) — WHAT ARE.

Where a stream flows in a continuous current, the fact that the water thereof, on account of the level character of the lands, spreads over a large area, without apparent banks, does not affect its character as a water course.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 30; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7410-7413, 7833.]

7. WATERS AND WATER COURSES (§ 85*)—INJUNCTION—GROUNDS.

An injunction restraining the diversion of flood waters will not be granted at the instance of a riparian owner not injured thereby.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 84, 85; Dec. Dig. § 85.*]

8. WATERS AND WATER COURSES (§ 85*)—RIPARIAN RIGHTS—INJUNCTION.

The flow of the water in a stream was often insufficient to irrigate the land of a riparian owner. The annual rainfall was slight, and, unless irrigated, the land was unfit for cultivation. Overflow water, occasioned by floods,

yearly deposited on the land fertilizing materials, increasing its productiveness and enhancing its value. The water overflowing the land was of great benefit to the riparian owner, and, if the flow of the waters was taken away, the land would become arid. *Held* to show that irreparable injury would result to the riparian owner if the diversion of such waters was accomplished, and authorized equity to interfere by injunction restraining such diversion.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 85.*]

9. ESTOPPEL (§ 93*)—PERMITTING EXPENDITURES.

A riparian owner who knowingly stands by while a public service corporation constructs and completes at great expense a system of works designed for public use is estopped from invoking the aid of equity to restrain the diversion of water necessary for the works, and his remedy is at law for damages.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. § 93.*]

10. ESTOPPEL (§ 93*)—PERMITTING EXPENDITURES.

A riparian owner learned that a canal company intended to divert larger quantities of water of a stream than it had theretofore claimed. During the same month he filed a supplemental complaint in a suit to prevent the proposed increased diversion. On being stricken, he commenced a suit for that purpose. No appropriation of the waters had been made by the company prior to the commencement of the action. *Held*, that the riparian owner was not estopped from invoking the aid of equity to restrain the company from diverting additional water from the stream.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 264-275; Dec. Dig. § 93.*]

11. APPEAL AND ERROR (§ 954*)—DISCRETION OF TRIAL COURT — PRELIMINARY INJUNCTION.

Whether a preliminary injunction shall be granted is within the discretion of the trial court, and its decision thereon will not be disturbed in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

On Rehearing.**12. INJUNCTION (§ 135*)—PRELIMINARY INJUNCTION—NATURE OF REMEDY.**

The granting of a preliminary injunction is a matter resting largely in the discretion of the trial court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

13. INJUNCTION (§ 132*)—PRELIMINARY INJUNCTION—NATURE OF REMEDY

The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy, but it merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, defendant should or should not be restrained from exercising rights claimed by him.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 302; Dec. Dig. § 132.*]

14. WATERS AND WATER COURSES (§ 51*)—RIPARIAN RIGHTS.

What a riparian proprietor is entitled to as against nonriparian takers, is the ordinary flow of the stream, and the greatly increased flow following the annually recurring fall of rain and melting of snow in the region about the head of the stream is not any less usual or ordinary than the much diminished flow com-

ing after the rains and the melted snow have run off.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 42, 43; Dec. Dig. § 51.*]

15. WATERS AND WATER COURSES (§ 85*)—DIVERSION—PRELIMINARY INJUNCTION.

The doctrine that a riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors, and, as against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his land, and he is not limited to any measure of reasonableness.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 84, 85; Dec. Dig. § 85.*]

16. WATERS AND WATER COURSES (§ 51*)—RIPARIAN RIGHTS—NATURE.

Riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land, is a right of property and a parcel of the land itself, and such right may not be taken away except under the power of eminent domain.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 42, 43; Dec. Dig. § 51.*]

Beatty, C. J., dissenting.

Department 2. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Miller & Lux against the Madera Canal & Irrigation Company. From a preliminary injunction restraining defendant from diverting the waters of a river, it appeals. Affirmed.

M. B. Kellogg (T. J. Savage, of counsel), for appellant. Frank H. Short, J. K. Law, and Frohman & Jacobs, for respondent.

LORIGAN, J. This is an appeal from an order of the superior court of Merced county granting a preliminary injunction against defendant restraining it from diverting, pending the trial of the action, into its reservoirs by means of its ditches and canals, any of the waters of Fresno river exceeding 220 cubic feet per second. Before proceeding to a consideration of the pleadings in this suit in Merced county, and the merits of this particular appeal from the order granting a preliminary injunction made in it, it will be necessary to refer to the pleadings in another action instituted in the superior court of Madera county and which appear in the record of the present appeal, and are involved in its consideration. On November 28, 1900, the plaintiff herein, together with the California Pastoral & Agricultural Company and others, brought an action against the defendant (appellant herein) in the superior court of Madera county. When we have occasion hereafter to refer to this action, it will be designated for convenience as the Madera county suit. The object of that action was to quiet the title of plaintiffs, as riparian owners on the Fresno river, to the

waters thereof against the defendant, and in the complaint it was alleged that the defendant canal company was diverting waters from said river to nonriparian lands by means of a canal known as the Main canal and a ditch known as the Adobe Ranch ditch connecting with the Main canal below; that at the time the action was commenced the canal company was attempting to enlarge its canal and ditch and increase its diversions from the river; that it claimed the right by prescription to divert portions of said waters of the river; that the plaintiffs were ignorant of the extent of such rights, if they existed, and prayed that the extent of the right of the canal company to divert the waters of said river be determined, and that it be enjoined from taking any quantity of water in excess of the amount which it should be determined it was then entitled to divert.

In its answer in that suit the defendant alleged, among other things, that it had acquired the right by prescription to divert the waters of said river, and that a large quantity of the water which it diverted was water it had artificially contributed to the stream, and which was turned into it from other and different sources than the natural sources of said river; that such contributed waters were in amount largely in excess of the capacity of the Adobe Ranch ditch and equal to 10,000 miners' inches (or 200 cubic feet of water flowing per second) of water measured under a four-inch pressure; that it was not attempting to enlarge its canal and increase its diversions from said Fresno river, but at the commencement of the action was engaged in cleaning out its Adobe Ranch ditch so as to enable it to carry the 10,000 inches of water artificially contributed to the river; that it had a right by prescription to divert all the waters flowing in Fresno river at the points designated in the complaint, including the said contributed waters, "except at seasons of extraordinary flood caused by unusual rains or the melting of snows in the mountains above," when the capacity of the canals of said defendant is not sufficient to carry the whole thereof, and that at such seasons it diverted water to the full capacity of its main canal, which was alleged to be 400 cubic feet flowing per second. This Madera suit was tried in May, 1902, but before it was decided on motion of defendant an order was made on August 29, 1902, reopening the case for the submission on the part of defendant of additional evidence. Before the trial was resumed, plaintiffs by permission of the court, and on March 27, 1904, filed a supplemental complaint, setting up that since the order reopening the case was made the canal company had constructed certain reservoirs and ditches for diverting the waters of Fresno river into said reservoirs, and thereafter

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

drawing them off, and thereby preventing them from reaching the riparian lands of the plaintiff, and that the canal company without right was attempting to add these diversions to those which had been made prior to the commencement of the Madera county suit, and an injunction was asked to restrain the canal company from diverting any water in addition to that which it had diverted prior to the date of filing the complaint in the Madera county suit and a temporary restraining order was issued. On motion of the canal company the supplemental complaint was stricken out on the ground that the matters therein stated constituted, and related solely to, a new, independent, and additional cause of action, and were not proper to be brought into said action by supplemental complaint, and the restraining order was dissolved.

Immediately following the order striking out the supplemental complaint in the Madera county suit, and on April 24, 1904, the present action was commenced in the county of Merced, and will be hereafter referred to as the Merced county suit. The complaint consisted of two counts. The first was to obtain an injunction to prevent the continuance of the alleged trespasses upon the property of plaintiff described therein, and the second to recover damages for trespasses alleged to have been committed prior to the commencement of the action. The complaint is quite lengthy, and reference will be made only to the allegations therein common to both its counts and with respect to matters particularly germane to the questions raised on this appeal. It alleges that plaintiff is the owner of large tracts of land in Madera and Merced counties, those in Madera county being riparian to and irrigable from the Fresno river and its various channels and waterways, and those in Merced county riparian to and irrigable from the San Joaquin river, and adjacent to and bordering upon said river below its junction with the Fresno river; that the San Joaquin river is a natural stream arising in the Sierra Nevada Mountains, debouching therefrom into the plains of the San Joaquin Valley, and flowing thence in its natural course through its main channels and branches through the lands of the plaintiff described in the complaint; that the Fresno river is also a natural stream, having its source in the northeast portion of the county of Madera, and flowing thence in its natural course through other lands of the plaintiff described in the complaint; that the Fresno river is a tributary of said San Joaquin river; that the waters of said Fresno river flow into the San Joaquin river at two or more points, one of which is in the said county of Madera and the other in the county of Merced; that the waters of said Fresno river naturally flow into and mingle with the waters of said San Joaquin river

above nearly the whole of the riparian lands of the plaintiff described in the complaint situated in Merced county, and flow through, over, and upon the lands of plaintiff in said county; that the waters of the Fresno river flow through, over, and upon the lands of plaintiff in Madera county and the waters of said San Joaquin river, including the waters of said Fresno river tributary thereto, except when diverted by defendant, naturally flow through, over, and upon said lands thereby irrigating them and making them fit for cultivation and pasturage; that at large expense plaintiff has graded and leveled large portions of said land in both counties, and constructed canals and other works for utilizing the waters of said Fresno and San Joaquin rivers, and has irrigated large portions of said land, and has produced large crops of grass, feed, and cereals thereon; that the climate of that portion of the San Joaquin valley where said lands are situated is very dry and the annual rainfall very slight, and that said lands unless irrigated otherwise than by the natural rainfall are unfit for cultivation and pasturage; that during the spring and summer months of every year, and occasionally in the winter months, there is a large increase of the volume of water flowing down said Fresno and San Joaquin rivers caused by rainfall and melting of the snow in the Sierra Nevada Mountains, such increased flow occurring sometimes in one of said rivers, sometimes in the other, and sometimes in both at the same time; that the annual increased flow of water coming down said rivers at said times has from time immemorial, except when diverted by defendant, caused said rivers to overflow and to cover with said overflow a large portion of the lands previously described for a limited period of time each year; that the water causing and constituting such overflow has in each year brought down large quantities of material to said lands from the mountains and valleys through which said rivers flow in their course to said lands, deposited said material on them, and thereby fertilized and enriched said lands; that such annual overflowing of said lands has so irrigated them that a portion thereof, as the water receded therefrom, could be cultivated and crops raised thereon without further irrigation, and but for such overflowing could not have been cultivated or crops raised thereon except said lands were artificially irrigated; that during the lower stages of the waters of the Fresno river the waters thereof are confined to and flow within the lower banks of the same; that, when the waters of said rivers increase each year, such increased flow thereof naturally flows over and covers the low-lying meadow lands within and near the banks of said Fresno river; that said waters are at all times confined within the banks of said river and by such increased flow the said

meadow lands are naturally watered, irrigated, and fertilized, and made more valuable thereby. It is then alleged that, within one year prior to the commencement of the action, the defendant constructed near the banks of said Fresno river on lands belonging to it situated in Madera county certain reservoirs and also certain dams and levees in connection with said reservoirs; that said reservoirs cover several hundred acres of land, and are capable of retaining and holding quantities of water to a depth of from 1 to 20 feet over the whole area of said reservoirs; that for the purpose of diverting the waters of the Fresno river from the natural channel thereof into said reservoirs the defendant within 60 days prior to the commencement of this action excavated and enlarged ditches and channels leading out of said river into said reservoirs, which ditches and channels were intended to convey, and have been and will be used by defendant to convey, the waters of said river from the natural channel into said reservoirs, and defendant intends to use said waters on lands not riparian to either said Fresno or San Joaquin rivers; that the waters thus diverted and intended to be diverted from said river by defendant are the natural flow of said Fresno river, and are waters which, but for such diversion, would naturally flow down said river and the channels and waterways thereof and of said San Joaquin river through and over the lands of plaintiff; that by such wrongful diversions plaintiff will be deprived of the natural flow of the waters of said Fresno and San Joaquin rivers through and over its lands, and of the annual wetting, irrigation, and fertilization thereof by said waters, and will be deprived of the valuable and increased pasturage, feed, and crops which it has annually received from said lands as the benefit of such natural annual overflowing, irrigation, and fertilization, and said lands will thereby deteriorate in quality and largely depreciate in value. The prayer is for a temporary injunction pending the trial of the action restraining the defendant from diverting from said Fresno river by means of said canals to said reservoirs any of the waters naturally flowing therein and that upon a final hearing the injunction be made perpetual; also for damages in the sum of \$5,000 for injuries already sustained.

It will be observed that the complaint in the action does not touch the ancient and prescriptive right which was asserted by defendant and involved in the Madera suit, and under which it claimed the right to divert, by means of its main canal and general canal system, waters from the Fresno river to the extent of 400 cubic feet flowing per second. It does not affect this prescriptive right at all. It relates solely to reservoirs constructed by defendant long after the commencement of the Madera county suit, in which

such prescriptive rights were involved, applies only to new diversions of the waters of the Fresno river made or being made by the defendant within a year prior to the commencement of the present action in Merced county. When the matter of granting the preliminary injunction came up for hearing, an elaborate showing was made on both sides, and the injunction was granted, and from the order granting it this appeal is taken.

Before approaching a consideration of the main question on this appeal, it will be necessary to dispose of some preliminary objections urged by appellant.

It is insisted that the court had no jurisdiction to grant—as appellant claims it did—an injunction affecting its ancient and prescriptive diversion of the waters of the Fresno river to the extent of 400 cubic feet of water per second, which it is insisted was not involved in the present action at all. But, as we understand the terms of the preliminary injunction in question in this suit, it did not adjudicate definitely as to such rights. It was, of course, necessary for the court to investigate, to some extent, the claim to such rights by defendant for the purpose of protecting them, while at the same time it was considering to what extent a preliminary injunction should be granted against a diversion of the water of the river in excess of them. The conclusion of the court as to the extent such prescriptive rights should be protected, or at least be unaffected by the preliminary injunction in the present suit, was not in the nature of a final judgment in the matter upon the ancient and prescriptive rights of the defendant. That was a subject for determination in the Madera county suit, and was involved in the Merced county suit only to the extent of ascertaining in a general way what this right might be for the purpose of fixing the terms of the preliminary injunction. While the claim of the defendant was that its main canal had a capacity for diverting 400 cubic feet of water from the Fresno river flowing per second, there was evidence that its capacity did not exceed 175 cubic feet of water so flowing, and that the amount of water applied to beneficial uses by the defendant from the water of said river, including that added by the defendant thereto from other sources or streams, did not exceed 100 cubic feet of water flowing per second. As the court allowed the defendant, in the preliminary injunction involved here, to divert pending the suit 220 cubic feet of water flowing per second, besides all water which it claimed to have added to the river from other sources, it cannot be said that the discretion of the court was abused in making the preliminary injunction. It allowed a continued diversion of the water by the defendant to the extent that the evidence in the matter of the preliminary injunction showed that it had a prescriptive right to divert it.

Of course, as we have said, this conclusion is not final, and the order granting the preliminary injunction was made subject to the further order of the Merced court. If the court in the Madera county suit, where that question is directly involved, should determine that the defendant has a prescriptive right to divert more than 220 cubic feet flowing per second of the waters of the Fresno river, the court in the Merced county suit will undoubtedly, as it shall be its duty to do, modify the preliminary injunction so as to conform to any determination of the superior court of Madera county in that respect.

It is next insisted that the superior court of Merced county had no jurisdiction in the case, and no jurisdiction to issue an injunction; that an action to determine an adverse claim to water is a real action and an action to quiet title, which must be brought where the subject-matter of the action is situated; that this action is of that character, being an action to quiet the title of plaintiff as a riparian owner of lands in Madera county to the waters of the Fresno river flowing through them in said county; that the addition in the complaint of the Merced county lands was for the purpose of simulating a case within the jurisdiction of the superior court of Merced county. It is unnecessary here to consider the allegations in the complaint further than to say that they are not addressed to an action to quiet title to real property. The quieting of title is not involved in the action at all, so that section 5, article 6, Const., requiring such an action to be commenced in the county in which the real estate, or some part thereof, affected by the action is situated, has no application. It is true that the right of a riparian proprietor to the flow of water through his land is inseparably annexed to the soil, not as an easement or appurtenance thereto, but as a part or parcel of the land (*Lux v. Haggin*, 69 Cal. 255, 391, 10 Pac. 674), and that an action to quiet his title to such water must, under the constitutional provision referred to, be commenced in the county where the land or some part of it is situated. But this is not such an action. This is not an action to quiet the title of plaintiff to such flow of water, but to recover damages for injuries to the real property of plaintiff through the diversion of such water therefrom, and for an injunction against the continuance of such diversion, and so does not come within the constitutional provision. There is no provision of law, either statutory or constitutional, requiring actions for damages to real property to be commenced in the county where the real property injured is situated. The statute (section 392, subd. 1, Code Civ. Proc.) only requires that such action must be tried in the county where the real estate injured is situated. It is not required to be commenced there, and, when it is commenced in a county other than the one

where the real property injured is located, the court acquires jurisdiction to try the cause unless the defendant applies for its transfer for trial to the county where the real property is situated. *Miller & Lux v. Kern Co. Land Co.*, 140 Cal. 132, 73 Pac. 836; *Grocers' Fruit Growers' Union v. Kern Co. Land Co.* (Cal.) 89 Pac. 120. Under this view, the jurisdiction of the Merced court would not be affected by the fact, even if it were as claimed by appellant, that the injuries complained of by plaintiff were really injuries to its real property situated in Madera county. The action under the authorities cited could still be properly commenced in Merced county subject to be transferred to Madera county for trial on application of the defendant.

We now proceed to a consideration of the main and controlling question presented in the complaint in this Merced county suit and arising under the showing made by the respective parties on the hearing for the preliminary injunction, which is as to the character of the waters which the plaintiff alleged the defendant was attempting to acquire by these new diversions. The claim of the defendant, asserted at the hearing and to which its showing was addressed, was that the waters it intended to divert did not constitute any part of the ordinary or usual flow of the Fresno river, but were waters occurring through unusual and extraordinary freshets, or, to state its position more fully, it was that in seasons of heavy rains in the mountains and on very rare occasions and for a few days only, and only in years when there has been an unusual precipitation in the watershed of said Fresno river, that river brings down to the plains an immense amount of storm, freshet, and flood waters which is in excess of the ordinary or usual flow of said river, and which is never carried down through the plains in its channel; that said river as it runs through the plains is not deep and is incapable of carrying said storm, freshet, or flood waters; that these waters form no part of the ordinary or usual flow of the Fresno river, but overflow and pass over the plains and never return to the channel of said river, and that such waters are wholly lost and wasted; that it is to conserve and save these storm, freshet, and flood waters—which had in the past and otherwise would still continue to be wasted and lost, and in which plaintiff had no right, either riparian or otherwise—and for no other purpose, that defendant had constructed the reservoirs and works referred to in the complaint so that said storm, freshet, and flood waters might be used to supply the deficiency in the quantity of water in the channel of said river at its usual and normal flow; that the purpose of defendant is to use said flood waters which do not constitute the usual or ordinary and normal flow of water in the channel of said river, or which would flow therein along or through

the land of plaintiff, and which if not saved would become wasted or lost. On the part of the plaintiff it was claimed, and its showing was made to support that claim, that the rise in the flow of the waters of said Fresno river claimed by defendant to be extraordinary and occurring on very rare occasions, was not such in point of fact; that such overflow occurred in all years of ordinary rain and snowfall, and constituted the regular annual and usual flow of said river; and that every year when there is a continuous rainfall in the watershed of the Fresno river a large volume of water flows in that water course and is carried in the channel of said river through and over lands of plaintiff in Madera county, and is emptied into the San Joaquin at a point below them, and thence flows therein over the lands of plaintiff in Merced county. The court on the hearing found that this claim of plaintiff relative to such waters was correct, and, while the accuracy of this conclusion is questioned by appellant, we think that the showing made on the part of plaintiff clearly warranted it.

The matter was practically heard upon affidavits, a large number of which were filed on either side, and those upon the part of plaintiff, made by persons who had observed conditions on said Fresno river for 20 and 30 years, show that practically in every year during the winter, and early spring months, on account of rainfall and the melting of the snows in the watershed of the stream, the Fresno river carries a large volume of water; that this entire volume of water, if not interfered with, is carried in the channel of the river past the point where the water is diverted from the river into the reservoirs of appellant complained of, and for some distance west of the town of Madera, when the river divides into two or more channels which diverge and flow in the same general direction as the main channel of the river and further on unite with it; that, when the volume of water flowing in the river reaches the higher stages, a portion of the water flows into these branch channels; that at the highest stages of the flow the water overflows the main and branch channels of the river at various points and spreads over the low-lying lands adjacent thereto; that the main and branch channels of the river and the lands subject to overflow lie in a trough or basin running parallel with the river for a distance of about 18 miles; that all of the water which so overflows flows on with the water confined in the lower banks of the main and branch channels of the river in a westerly direction and in a continuous body down to Lone Willow slough, and finally into the main channel of the San Joaquin river; that none of the water which overflows is vagrant or becomes lost or wasted, but flows in a continuous body as above stated within a clearly defined channel, and so continues

until the volume of water coming down the stream commences to lower, when the overflow waters recede back into the main channel of the river and flow on with the rest of the water; that this overflow is practically of annual occurrence, and may be and is anticipated in every season of ordinary rainfall within the watershed of the Fresno river and fails to occur only in seasons of drouth or exceptionally light rainfall.

Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year, and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur. They are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno river has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary—when a season of drouth prevails. As to such waters, it is said in Gould on Waters, § 211: "Ordinary rainfalls are such as are not unprecedented or extraordinary; and hence floods and freshets which habitually occur and recur again, though at irregular and infrequent intervals, are not extraordinary and unprecedented. It has been well said that 'freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years though at no regular intervals.'" *Heilbron v. Canal Co.*, 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; *Cairo Railway Co. v. Brevoort (C. C.)* 62 Fed. 129, 25 L. R. A. 527; *Cal. T. & A. Co. v. Enterprise C. & L. Co. (C. C.)* 127 Fed. 741. And when such usually recurring floods or freshets are accustomed to swell the banks of a river beyond the low-water mark of dry seasons and overflow them, but such waters flow in a continuous body with the rest of the water in the stream and along well defined boundaries, they constitute a single natural water course. It is immaterial that the boundaries of such stream vary with the seasons, or that they do not consist of visible banks. It is only necessary that there be natural and accustomed limits to the channel. If within these limits or boundaries nature has devised an accustomed channel for the limited flow of the waters therein during the dry season, and an accustomed but extended channel for their flow when the volume is increased by annual flood waters, and all flow in one continuous stream between these boundaries and are naturally confined thereto, and when the waters lower the overflow recedes into the main channel, this

constitutes one natural water course for all such waters, and the rights of a riparian owner thereto cannot be invaded or interfered with to his injury. This is the character of the waters of the Fresno river, the flow of which it is shown the defendant intends to divert. These overflow waters, occasioned through such usually recurring floods and freshets, are not waters which flow beyond the natural channel boundaries of the stream which nature has designed to confine their flow; they are not waters which depart from the stream or are lost or wasted. They flow in a well-defined channel in a continuous body and in a definite course to the San Joaquin river, and, while they spread over the bottom lands, or low places bordering on the main channel of the Fresno river as it carries its stream during the dry season, still this is the usual, ordinary, and natural channel in which they flow at all periods of overflow, the waters receding to the main channel as the overflow ceases.

It is well determined by the authorities that waters flowing under circumstances such as these, notwithstanding they may consist of a large expanse of water on either side of the main channel, constitute but a single water course, and that riparian rights pertain to the whole of it. As is said in *Lux v. Haggin*, 69 Cal. 418, 10 Pac. 770, "it is not essential to a water course that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and banks. * * * We can conceive that in the course of a stream there may be shallow places where the water spreads and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on either side. In such case if water flowed periodically at the portion of the depression it flowed in a channel. * * *" In *Crawford v. Rambo*, 44 Ohio St. 279, 282, 7 N. E. 429, 431, the court says: "It is difficult to see upon what principle the flood waters of a river can be likened to surface waters. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its channel; so that when, swollen by rains and melting snows, it extends and flows over the bottom in its course, that is its flood channel, and, when by drouths it is reduced to its minimum, that is its low water channel." So in *O'Connell v. Ry. Co.*, 87 Ga. 246, 13 S. E. 489, 491, 13 L. R. A. 394, 27 Am. St. Rep. 246: "If the flood water forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, as by the recession of the

waters, it is to be regarded as still a part of the river. * * * The surplus waters do not cease to be a part of the river when they spread over the adjacent low grounds without well-defined banks or channels, so long as they form with it one body of water eventually to be discharged through the proper channel." To the same effect are *Chicago, etc., Ry. Co. v. Emmert*, 53 Neb. 237, 73 N. W. 540, 68 Am. St. Rep. 602; *Fordham v. N. P. Ry. Co.*, 30 Mont. 421, 76 Pac. 1040, 66 L. R. A. 556, 104 Am. St. Rep. 729; *Jones v. Seaboard, etc., Ry. Co.*, 67 S. C. 181, 45 S. E. 188; *New York, etc., Ry. Co. v. Hamlet Hay Co.*, 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; *Cairo, etc., Ry. Co. v. Brevoort, supra*. And, where the stream usually flows in a continuous current, the fact that the water of the stream, on account of the level character of the land, spreads over a large area without apparent banks, does not affect its character as a water course. *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *West v. Taylor*, 16 Or. 165, 13 Pac. 665.

But counsel for appellants rely upon the cases of *Fifield v. Spring Valley W. Works*, 130 Cal. 552, 62 Pac. 1054, and *Coleman v. La Franc*, 137 Cal. 214, 69 Pac. 1011, in support of their claim that a riparian proprietor cannot restrain the diversion of the storm or freshet waters of a stream when such diversion will not prevent the flowing over his land of the ordinary waters of the stream, or in any way interfere with his right appurtenant thereto. We do not understand these authorities cited to sustain the proposition as broadly as appellant contends for, and an examination of them shows that they apply to conditions different from those involved in the matter at bar. In the present case the storm and freshet waters are not something distinct and separate from the ordinary waters of the Fresno river. As a fact, and under the authorities, being annually recurring floods and freshets, flowing in a clearly defined channel, they constitute a part of the ordinary flow of the waters of such river. But, as to the cases cited, all they decide is that an injunction restraining the diversion of storm or flood waters will not be granted at the instance of a riparian owner when it appears that he will not be injured in any way by such diversion. In the *Fifield Case*, which involved a flow of the water of a creek through lands of plaintiff, a riparian proprietor, his right to an injunction preventing a diversion of storm waters was denied because he was not injured thereby; the trial court finding that the diversion of the storm or flood waters of said creek would not damage his land in any way, nor in any way interfere with his right in the premises or with the right appurtenant to his land. In the *Coleman Case* the suit was between riparian proprietors on the stream, and we do not perceive that in that case

anything was decided relative to the diversion of flood waters as flood waters. The defendant in the case had built a dam in the stream for the purpose of utilizing the flood waters at times when there was abundant water for all riparian owners. It was decided that both parties as riparian owners were entitled to a reasonable quantity of the water of the stream for irrigation, and the defendant was proceeding within his rights in diverting the waters to that extent; that plaintiff could not enjoin the use of such water by defendant, unless he could show that such use was in excess of his riparian right and resulted in injury to plaintiff. The underlying principle in these cases is that there will be no injunction granted to prevent the diversion of storm or flood waters, unless such diversion will result in injury to the riparian proprietor invoking it. But this principle cannot be applied here because it is fully shown by the affidavits of plaintiff, as alleged in the complaint, that very often the flow of the water of said Fresno river is insufficient in quantity to irrigate the land of plaintiff riparian thereto; that the annual rainfall in that region is very slight, and that, unless irrigated otherwise than by the natural rainfall, such lands are unfit for cultivation and pasturage; that such overflow water occasioned by the floods and freshets has yearly brought down and deposited on such lands large quantities of fertilizing and enriching materials, increasing their productivity and enhancing their value; that the water overflowing said lands is of great benefit to them, allowing of their cultivation and production of valuable crops and feed thereon without further irrigation; that, if the flow of said waters is taken away, said lands will become arid and greatly depreciated in value. This showing presents a case of great and irreparable injury to result to plaintiff if the diversion of these waters is accomplished, and presents a condition to which the principle in the Fifield and Coleman Cases has no application whatever.

The last point made by appellant is in the nature of an estoppel invoked against the plaintiff. It is insisted that no relief by injunction should be granted the plaintiff, because it is claimed that plaintiff knowingly stood by while appellant as a public service corporation, and at great expense and notoriously and publicly, constructed a large and extensive system of works designed for the public use, and brought them to completion before the commencement of this action; that under this state of alleged facts plaintiff is precluded from all right to equitable relief and its only remedy is an action at law for damages. In support of this position the principle announced in that respect in *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, and *Newport v. Temescal Water Co.*, 149 Cal. 531, 87 Pac. 372, 6 L. R.

A. (N. S.) 1098, is invoked. The principle contended for and sustained by the cases cited and others is unquestionably correct. But the evidence produced at the hearing below did not warrant its application. The present length of this opinion precludes any detailed mention of the evidence on the point. It is sufficient to say that it appeared on the hearing below that the plaintiff never knew or heard of the proposed construction of appellant's reservoirs until the latter part of 1903 or early part of 1904; that it did not know or suppose, until it learned later to the contrary, that the reservoirs were being constructed for any other purpose than the storage of such waters as the canal company was asserting in the then pending Madera county suit it had acquired a right to divert by prescription; that in the month of March, 1904, it first heard that the canal company intended to divert larger quantities of water into the reservoirs than it had theretofore claimed the right to do, and on the 27th of that month the supplemental complaint in the Madera county suit to prevent such proposed increased diversions was filed; that immediately on said amended complaint being stricken out this action was commenced; that no appropriation or use of the so-called storm waters of Fresno river was made by the canal company prior to the filing of the supplemental complaint, or prior to the commencement of this present action, that the only diversion of any water to these reservoirs prior thereto was for the purpose of testing one of them, which, on the test, was found insufficient to hold it; that no waters were turned therein to be applied, or which were applied, to any beneficial use or purpose. Under these facts, the principle contended for in the cases cited has no application.

There are no other points which require mention or discussion, if we have omitted the consideration of any, which we think we have not. We perceive no reason for disturbing the order appealed from. It is purely a matter of discretion with a trial court whether a preliminary injunction applied for shall be granted or denied, and the exercise of such discretion will not be disturbed unless it clearly appears to have been abused. Nothing of the kind appears here, and the order appealed from is therefore affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

On Rehearing.

M. B. Kellogg, D. S. Dorn, T. J. Savage, and W. H. Davis (T. J. Savage, of counsel), for appellant. Frank H. Short, Frohman & Jacobs, and J. K. Law (Edward F. Treadwell, of counsel), for respondent. Leonard & Surr, amici curiæ.

SLOSS, J. This appeal was originally heard in department 2 of this court, and the order appealed from was there affirmed. Upon application of the appellant a rehearing was granted, and the cause ordered to be heard in bank.

The opinion filed by the department fully and satisfactorily disposes of all the points arising on the appeal, and is adopted as the opinion of the court in bank. A few words may, however, be added to what has heretofore been said.

The rehearing was ordered for the reason that the case was thought to involve the question of the right of a riparian owner to enjoin the diversion by an upper appropriator of water of a stream running at times of unusual and extraordinary flood in such quantities that the intended diversion could not appreciably affect or substantially injure the riparian rights of the plaintiff. This question has, to some extent, received consideration at the hands of this court in *Modoc Land Co. v. Booth*, 102 Cal. 151, 36 Pac. 431, and *Fifield v. Spring Valley Waterworks*, 130 Cal. 552, 62 Pac. 1054, and the appellant argues that the rule declared in those cases requires a reversal of the order now under consideration. It appears, however, that the record before us does not present the supposed problem.

This is an appeal from an order granting a temporary injunction. It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court. Where there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court in passing upon the application for such injunction, the order made will not on appeal be overthrown merely because there may be considerable, or even preponderating, evidence which, if believed, would have led to a contrary conclusion. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him. When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary application.

While the defendant claims, and at the hearing of the motion for an injunction offered evidence with the purpose of showing, that the waters sought to be diverted by it were the results of mere occasional freshets or floods, which, if not taken, would leave the bed of the stream and be wasted, the plaintiff introduced a quantity of evidence tending to prove that the waters which defendant was about to take formed a part of the usual and ordinary flow of the Fresno

river; that such flow was one which occurred in almost every season of normal rainfall, and that it passed the plaintiff's land in a continuous body of water, through a well-defined channel, and eventually emptied into the San Joaquin river and through it into the sea. That the owners of land bordering upon such a flow of water are riparian proprietors, entitled to all the rights pertaining to riparian ownership, is a proposition fully sustained by the authorities cited in the department opinion.

It is suggested that a different rule should apply in a semiarid climate like that of California, where the fall of rain and snow occurs during only a limited period of the year, and, consequently, streams carry in some months a flow of water greatly exceeding that flowing during the dry season, with the result that such increased flow is not at all points confined within the banks which mark the limits of the stream at low water. But no authority has been cited, and we see no sufficient ground in principle, for holding that the rights of riparian proprietors should be limited to the body of water which flows in the stream at the period of greatest scarcity. What the riparian proprietor is entitled to as against nonriparian takers is the ordinary and usual flow of the stream. There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting of snow in the region about the head of the stream is any less usual or ordinary than the much diminished flow which comes after the rains and the melted snows have run off.

Perhaps other considerations should apply where a river, in times of heavy flow, runs over its banks in such manner that large volumes of water leave the stream and spread over adjoining lands to an indefinite extent, there to stagnate until they evaporate or are absorbed by the soil. But the evidence of respondent—and this was the evidence on which the court below acted—fails to show that the water which defendant seeks to divert was such "vagrant water." The evidence of respondent was to the effect that at all seasons the water of the Fresno river, even though overflowing the banks of the channel in which it flowed during the dry season, formed a single and continuously flowing stream.

The argument that the method of irrigation adopted by plaintiff, i. e., that of having the annual increased flow of the river spread over its lands, was not a reasonable use of the water, can have no weight in this case. The doctrine that a riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his land. He is not limited by

any measure of reasonableness. If any doubt ever existed on this point, none can remain since the recent decision of this court in *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062. The cases relied on to show that the riparian owner is entitled to only a reasonable use of the water were all cases of controversies between owners of different parcels of land riparian to the same stream.

Virtually the same point is presented by the argument that plaintiff is not limiting itself to the most economical manner of using the water. This is not an objection which may be raised by an appropriator who seeks to divert water of the stream to nonriparian lands.

It is argued that, unless appropriators are permitted to divert and store for future use water which would otherwise run into the sea and be wasted, there will be a failure to make the most beneficial use of the natural resources of the state, and that riparian owners should not be permitted to obstruct the development of these resources. It may be that, if nonriparian owners are permitted to intercept the winter flow of streams, in order to irrigate nonriparian lands or to develop power, the water so taken will permit the cultivation of more land and benefit a greater number of people than will be served if the flow continues in its accustomed course. But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land, is, as we have frequently said, a right of property, "a parcel of the land itself." Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others.

On the other points raised by the appellant

we have nothing to add to what was said in the department opinion.

The order is affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; HALL, J. pro tem.; CHIPMAN, J. pro tem.

I dissent: BEATTY, C. J.

NOTE.—Justice HALL, one of the Justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, in place of the late Justice McFARLAND, who, at the time of the oral argument, was unable to act by reason of sickness; and Justice SHAW being disqualified, Justice CHIPMAN, one of the Justices of the District Court of Appeal for the Third Appellate District, participates herein pro tempore. Both justices participate herein pursuant to section 4 of article 6 of the Constitution, and an order filed August 4, 1908, pursuant thereto.

155 Cal. 148

STEVENS v. SUPERIOR COURT OF

PLACER COUNTY. (Sac. 1,668.)

(Supreme Court of California. Jan. 9, 1909.)
COURTS (§ 200½*)—JURISDICTION OF PROBATE COURT—OWNERSHIP OF PROPERTY.

Where the executor, on objections to his account, alleges that certain property omitted from the account was conveyed to him individually by testator in his lifetime, the superior court sitting in probate has jurisdiction to determine the ownership of such property.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 200½.*]

In Bank. Original action by Fred S. Stevens, executor of the estate of Adolph J. Weber, deceased, for a writ of prohibition to the superior court of the county of Placer. Alternative writ discharged, and proceedings dismissed.

The following is the opinion of Hart, J., of the District Court of Appeal, with whom Chipman, P. J., and Burnett, J., concur:

"As executor of the estate of Adolph J. Weber, deceased, the petitioner on the 2d day of May, 1908, presented and filed in the superior court of the county of Placer his first annual account, and the same was regularly set for hearing before said court. On the 19th day of May, 1908, one Mrs. W. P. Scott, the sole devisee of said decedent, filed in said superior court objections to said annual account and a contest to the settlement of the same. One of the grounds of objection upon which said contest was inaugurated was and is 'that said executor has failed, neglected, and refused to account for the sum of \$11,290.50, which said contestant alleges and avers is a part of the estate of said Adolph J. Weber, deceased, and should be included in the annual account of said executor.' The contestant charges that said executor as such has embezzled said sum and has converted the same to his own use in fraud of the right of said estate and those

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

interested therein. On the 11th day of June, 1908, the petitioner filed an answer to said contest, and therein, among other things, alleges, borrowing the language of the petition: 'That on the 26th day of September, 1906, Adolph J. Weber, said deceased, was the owner of and possessed of the sum of \$11,290.50, which said sum of money was on deposit in the Placer County Bank, at the city of Auburn, county of Placer, state of California. That on said 26th day of September, 1906, said Adolph J. Weber assigned, transferred, conveyed, and set over to said Fred S. Stevens, in his individual capacity, the whole of said sum as the sole and absolute and separate property of said Fred S. Stevens, and ever since said time Fred S. Stevens has been the owner, in his individual capacity, of said sum, and said Fred S. Stevens ever since said time has claimed, and now claims, to be the sole, absolute, and unconditional owner of said sum, in his individual capacity, and that the said estate of Adolph J. Weber, deceased, has, and never has had, any right, title, interest or claim in or to said sum, or any part thereof. That said Mrs. W. P. Scott claims that said assignment, conveyance, and transfer of said sum of money was and is invalid, and that the title to said property remained in said Adolph J. Weber at the time of his death.'

"On the 1st of June, 1908, the petitioner filed and presented to the respondent, judge of said superior court, 'objections to said superior court, sitting in probate, hearing and deciding the question of the ownership of said \$11,290.50, on the grounds and for the reason that said superior court had no jurisdiction while sitting as a court of probate and in the matter of said estate to hear or determine said question as to the ownership of said money.' The judge, after hearing these objections, overruled the same, and set the matter of the settlement of said annual account and the contest thereof for hearing for the 16th day of June, 1908. The purpose of this proceeding is, as must be readily apparent from the foregoing statement of the facts, to prohibit the respondents from hearing and determining the question of the title to and ownership of the said sum of \$11,290.50. The specific contention of the petitioner is that, having become the owner of the money in dispute before the death of Weber, he is, as to the question of the title to said money, as much a third party or stranger to the estate as if he were not the executor thereof, and that the superior court, sitting in probate, has no jurisdiction to determine the title to property where the same is claimed by a third party. In other words, it is the contention that because the petitioner received the money in controversy in his individual capacity, and before his appointment and qualification as executor of the estate, he is to be treated in a challenge to

the title to or ownership of said money as though he were a third party having no interest in or connection with said estate, and that the latter or the proper party or parties interested therein should proceed against him as a stranger to the estate in an action independent of the probate jurisdiction of the superior court for the purpose of trying and determining the title to said property. To sustain his position as thus stated, petitioner refers us to the cases of *Estate of Haas*, 97 Cal. 232, 31 Pac. 893, 32 Pac. 327; *Estate of Burdick*, 112 Cal. 387, 44 Pac. 734, and *Buckley v. Superior Court*, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135. The respondent has filed a demurrer and an answer to the petition herein. Said answer sets out in full the account of the executor, the grounds of objection to said account as filed in the court below, and the answer of the executor to said objections.

"The question submitted for determination here, however, is squarely presented by the demurrer, upon which, therefore, we may and shall dispose of the respective contentions of the parties. The contest to the account of the executor was manifestly inaugurated under section 1626 of the Code of Civil Procedure, and the object sought by the contest to remove the executor from his office. Said section reads: 'When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked.' It is thus to be observed that the court is expressly given the power, and, indeed, it is its duty, to hear and determine matters properly coming before it within the purview of the foregoing section. We are therefore of the opinion that the court has jurisdiction to proceed in the matter and to determine whether the sum of money involved in the controversy is being unlawfully withheld by the executor from the estate to which it is claimed that it lawfully belongs. The contest, it is true, as contended by the petitioner, involves a trial and determination of the title to the money. We have not overlooked the many cases which correctly hold that the rights of a third person not a party to a proceeding in probate cannot be adjudicated in such proceeding; that conflicting claims of title to property between the estate and third persons—strangers to the estate—must be made the subject of an independent suit, either at law or in equity, upon issues properly framed for the purpose of determining such title. *Estate of Vance*, 141 Cal. 626, 75 Pac. 323, and cases therein cited. But here the executor is charged with failure to account for certain personal property which it is alleged belongs

to the estate for which reason it is sought to remove him, and he, in reply, declares that the property came to his possession in his individual capacity and that he is the sole owner thereof. How is the question to be determined? Our attention has been called to no express rule of law by which the executor may be proceeded against in such a case otherwise than under section 1626 of the Code of Civil Procedure, *supra*. Certainly he cannot institute suit against himself, for no one can be both plaintiff and defendant in the same action. *Byrne v. Byrne*, 94 Cal. 579, 29 Pac. 1115, 30 Pac. 196; *Norton v. Walsh*, 94 Cal. 564, 29 Pac. 1109; *Emmons v. Barton*, 109 Cal. 668, 42 Pac. 303. There is to be found no authority in the law for an independent suit by the heirs or devisees against the executor. On the contrary, the right of heirs and devisees to institute an action at law or a suit in equity respecting the property of the estate is limited by the provisions of section 1452 of the Code of Civil Procedure to actions involving the real property only. No authority is given the heirs or devisees by said section or by any other section of the Codes to which our attention has been directed to bring suit with respect to the personal property. Besides, section 1452 expressly occludes any right in the heirs or devisees to institute an action even with respect to the real property against the executor or administrator. If, as the petitioner vigorously insists, the respondents, in the exercise of the probate functions of the court, are without jurisdiction to hear and determine the matter presented in this proceeding because the same involves the determination of the question of the title to the personal property which it is claimed should be accounted for by the executor as part of the assets of the estate, then it must be conceded, it seems to us, that there would be not only no legal method of removing the executor for any of the reasons specified in section 1626, *supra*, but that the law would afford absolutely no remedy by which personal property wrongfully withheld from the estate, or unaccounted for, by the executor or administrator, can be restored to such estate in those cases where the executor or administrator sets up the claim of title to it in his individual right. The law knows no wrong without a remedy, and, even if the courts were unable to sustain a proceeding of the nature of the one here upon the authority of the language of section 1626 of the Code of Civil Procedure, they would undoubtedly recognize and uphold any reasonable proceeding in which the rights of the conflicting claimants of title might be adjudicated upon issues properly framed for that purpose, where opportunity was afforded for a full and fair trial of such issues.

"No case has been cited in which it is directly held that the superior court, while sit-

ting in matters of probate, has not full power, in a proceeding authorized by section 1626 of the Code of Civil Procedure, upon issues properly framed, to hear and determine the question of title to property, the ownership of which is claimed by the executor or administrator adversely to the estate. Counsel for petitioner refer us to the following language in the case of *In re Burdick*, *supra*, as sustaining their contention that in the proceeding prescribed by section 1626 the court has no jurisdiction to try and determine the question of title under the circumstances of this case: 'Where there is in the hands of the executor money which the executor claims does not belong to the estate, he should himself take steps to test the right, if serious question exists,' and, further, that, 'if serious questions upon such claims arise (meaning the rights of those claiming adversely to the estate), the duty of the court might be to delay the final decree until such claims can be determined in another forum.' We perceive nothing in the quoted language which is authority for the position of petitioner here. Of course, those parties claiming adversely to the estate and having no connection with or interest in such estate would be entitled to be heard in 'another forum' for the determination of their rights. In such a case this would be the natural and necessary course to adopt. But, as to the proposition suggested in the opinion, if the same is susceptible of the interpretation given it by petitioner, that where the executor has money in his possession which is claimed both by the estate and by himself he 'should take steps to test the right,' the query naturally forces itself: How and by what means could he be compelled to make the test, if he should elect not to do so, assuming, for the sake of the suggestion, that there is an adequate legal way in which he could do so? Surely the court could not require him in his representative capacity to proceed against himself in his individual capacity, for the court has no such power, and, if it had such power, the anomalous and obviously unsatisfactory situation would present itself of a plaintiff as executor trying to assert a right which the same person as defendant in his individual right strenuously denies has any foundation or existence.

"The case of *In re Haas*, *supra*, is not in point here, although it may be admitted that the language of the opinion appears at first blush to be broad enough to justify petitioner in relying upon it in support of his contention. In that case a legatee objected to the settlement and allowance of the executor's annual account upon the ground that he had a large sum of money and certain other personal property in his possession belonging to the estate, and for which he had not accounted. His answer to the objections set out that he was the duly appointed, qualified,

and acting guardian of one Ella V. Haas, a minor, and that the money and other property referred to in the objections to his account belonged to said minor; that he returned said property to the court in his inventory and appraisal of said minor's estate. He objected to the court hearing and determining the matters involved in the contest upon the ground that the court while sitting in probate was without jurisdiction thereof. The court overruled his objection to its jurisdiction, heard the contest, and determined that the property belonged to the estate of the deceased. It will be observed that in the contest the executor held a peculiar position—he was the trustee in each of the estates which claimed the title to the disputed property adversely to each other. By the determination of the court sitting in probate he was charged with the property in controversy in the estate of the deceased Haas, and at the same time charged through his own inventory and appraisal with the same property in the estate of his ward. The court held that, as the executor was not in a position to represent his ward at the trial of the issue as to the title to said property, the minor, therefore, was not a party to said proceeding. The court below could not determine her rights because she had not had 'her day in court.' The opinion proceeds to say that 'there are many matters relating to the estates of deceased persons of which the probate court has no jurisdiction, and the determination of title to property is essentially one of them.' This declaration, petitioner here claims, is to be interpreted as applying to the case at bar. But we do not so understand it. That case is not one where the executor claimed property in his own individual right adversely to the estate. The minor, of whom he happened to be guardian, was a third party, and he assumed to represent her in the contest and not himself. In *Buckley v. Superior Court*, supra, it is merely held that partition of an estate under sections 1675 and 1676 of the Code of Civil Procedure after the estate has been finally distributed is beyond the jurisdiction of the court, unless the jurisdiction to make partition after the decree is saved by a petition filed and notice given before the decree of final distribution is made. The case is not an authority here. In the *Estate of Vance*, supra, the Supreme Court does not hold that the superior court, while exercising its probate jurisdiction, is without the power or right to try and determine the question of the title to property in a proceeding like the one here, where the executor or administrator claims, in his individual right, title to said property. What the court in that case does decide is that 'even if it be conceded that the superior court sitting in probate might be held to have such jurisdiction, yet it must be admitted, on the other hand, that no such inquiry can or should be entered upon either by the probate court or

any other court, unless the necessary allegations of fact upon which the legal title to the property depends is made in some pleading filed in the action or proceeding.' The judgment of the court below in this proceeding, if against the executor, might be, in addition to the judgment removing him from the office of executor, in the nature of a decree in equity declaring the disputed money to be a trust fund held by the executor for the benefit of the estate. The judgment of removal is confessedly within the jurisdiction of the court in the exercise of its probate functions, but obviously the court would be utterly powerless to perform its duty in probate in this particular instance without first exercising a power which, in its nature, appears to belong either to its equitable or some other branch of its jurisdiction. In other words, it would of necessity be compelled to decide the question of who owns the money. It has often been held in this state that the superior court, when in the exercise of its jurisdiction of matters in probate, may exercise powers which strictly belong to the equitable jurisdiction of the court, where the exercise of such powers becomes necessary to a complete and full exercise of its powers in probate. *Bath v. Valdez*, 70 Cal. 360, 11 Pac. 724; *In re Burton*, 93 Cal. 463, 29 Pac. 36; *Estate of Warner*, 6 Cal. App. 361, 92 Pac. 191. Why should this not be so, if it appears that, without the exercise of equitable or other ancillary functions to some extent, the court sitting in probate would be powerless to fully and completely achieve the ends of its probate jurisdiction? In the *Burton Case*, supra, the Supreme Court says: 'No distinct court of probate has been created or recognized by the present Constitution of this state. The Constitution has created superior courts and has given them original jurisdiction of the subject-matter of various classes of actions and special proceedings more or less distinct from each other, among which are "all actions at law which involve the title or possession of real property" and "all such special cases and proceedings as are not otherwise provided for" and "all matters of probate." * * *

The superior court while sitting in matters of probate is the same as it is while sitting in equity in cases at law, or in a special proceeding; and, when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine in the mode provided by law all questions of law and fact, the determination of which is ancillary to a proper judgment in such case. This is an incidental power pertaining to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them.'

"We conclude that there is no reason in principle why in the proceeding here, if the issue as to the title to the money in controversy is squarely presented by sufficient facts properly alleged, the superior court in the

necessary exercise of its probate jurisdiction should not try and determine the question, and particularly does this seem to be true since there can be found no other appropriate authorized proceeding by which the question can be tried and determined. We think the court below is acting within its jurisdiction, and it is therefore ordered that the demurrer be sustained and the order to show cause discharged."

L. L. Chamberlain, F. P. Tuttle, and H. C. Ross, for petitioner. James D. Meredith and J. B. Landis, for respondent.

ANGELLOTTI, J. This proceeding was instituted by plaintiff to obtain a writ of prohibition restraining the superior court of Placer county from trying and determining certain issues made by the objections presented to the first annual account of plaintiff as executor and the answer to said objections. The petition for the writ of prohibition shows the following facts: Plaintiff presented such account to said superior court on May 2, 1908. The same was regularly set for hearing. One Mrs. W. P. Scott, claiming to be the sole devisee under the will, filed objections to the account, one of her objections being that plaintiff had failed, neglected, and refused to account for the sum of \$11,290.50, alleged to be a part of the estate which said executor has embezzled and converted to his own use in fraud of the right of the estate and those interested therein. Plaintiff filed an answer to these objections, in which he alleged that Adolph J. Weber had transferred this money to him in his individual capacity on September 26, 1906, the day before his death; that ever since said last-named day he has been the owner thereof in his individual capacity, and said estate has had no interest therein; and that this claim of Fred S. Stevens, in his individual capacity, is made in good faith and with the honest belief that he is the owner of such money. As executor he objected to the superior court, sitting in probate, hearing and deciding the question of the ownership of the money, on the ground that it has no jurisdiction to so hear and decide, but the superior court overruled his objections. A demurrer has been interposed to this petition for prohibition.

In support of his claim that the superior court is without jurisdiction to try and determine the issues thus made, plaintiff invokes the well-settled rule that the superior court sitting in probate is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. He fails, however, to point out what other remedy is available to those interested in the estate where the so-called stranger is himself the executor or administrator holding possession of money or other personal property in fact belonging to the estate, but claimed by him in his individual capacity adversely to the estate. There

is no statutory authority for the maintenance of an independent action by them against him for the recovery of the property, he cannot be compelled to commence, nor could he maintain, an action against himself therefor, and the fact that he claims to be the owner of property which they claim belongs to the estate is no ground for his removal from the office of executor or administrator. Plaintiff suggests that a remedy might be found in the sections of the Code of Civil Procedure relative to the removal of the executor or administrator where it is made to appear that he has embezzled property of the estate, or has committed a fraud thereon, etc. This is practically a concession that the probate court under some circumstances has jurisdiction to determine the question of ownership between the executor and the estate, for manifestly any such proceeding would incidentally present similar issues as to ownership of the property, which would have to be determined by the court in probate against the contention of the executor or administrator before his removal could be adjudged. Doubtless, such an issue could be determined in a proceeding in the matter of the estate for the removal of the executor or administrator, based on alleged embezzlement by him of property of the estate. That court, having authority to remove him whenever it is made to appear that he is guilty of such an offense, must necessarily incidentally determine the question of the ownership of the property, for the purpose of determining whether he has been unfaithful to his trust. It would be a practical nullification of the statutory provision if the simple claim by the executor or administrator that he is the owner of the property in his individual capacity ousts the court of all jurisdiction to proceed in the matter of his removal.

It seems clear to us that the probate court must necessarily have the power to incidentally try and determine such an issue between the executor or administrator and the estate in the matter of the settlement of his exhibits and accounts. The amount of money belonging to the estate received by an executor or administrator is one of the matters he is necessarily required to state in his accounts, and the correctness of his accounts in that regard is one of the matters to be determined by the court as between him and the estate on the settlement thereof. It cannot make any difference in this connection that the executor or administrator claims that certain money received by him is his property, and not the property of the estate. If it is in fact the property of the estate, he will not be heard to deny that he received it otherwise than as a representative of the estate, and the determination of the question of ownership is essential to a determination of the main and ultimate issue on the settlement of the accounts, viz., the question of their correctness. As was suggested by the opinion in the Estate of Burdick, 112 Cal.

387, 391, 44 Pac. 734, the power to determine as against an executor what property in his hands belongs to the estate is implied in the power to settle the final account, and determine what remains in his hands to be distributed. In the case just cited there was an appeal from the decree of distribution; the executor claiming that certain money distributed did not belong to the estate, but belonged to two other persons as trustees. By the decree settling the accounts of the executors it had been determined that he had this money in his hands as executor, subject to distribution, and it was held that this decree was conclusive against the executor. Mr. Justice Temple said: "If he," the executor, "is improperly charged, his remedy is to appeal from the decree settling his final account. I know of no other way in which it can be reached. His counsel says the probate court exceeded its jurisdiction in determining that this money belonged to the estate. I do not think so." This statement was concurred in by six of the justices of this court. We think there can be no doubt that the superior court sitting in probate has jurisdiction to determine as against an executor the amount of money or property of the estate that has come into his hands, for the purpose of charging him therewith, and in determining that question to determine all issues necessarily incidental thereto. In such a case the rule invoked by plaintiff does not apply. See, also, *Estate of Hall* (filed Nov. 13, 1908) 93 Pac. 270.

The only case cited by plaintiff that tends to support his contention is *Estate of Haas*, 97 Cal. 232, 31 Pac. 893, 32 Pac. 327. There the executor claimed on the settlement of his accounts that certain money alleged to belong to the estate was held by him in his capacity as guardian of the minor, and the probate court, holding that it belonged to the estate, charged him with it in settling his account as executor. On appeal by the executor, the order settling the account was reversed; this court holding that the probate court could not determine the question of ownership of this money. The opinion is undoubtedly correct so far as it holds that the rights of the minor could not be affected by any adjudication of the probate court, but, in so far as it may hold that the probate court has not jurisdiction to determine as against an executor the amount of money belonging to the estate that has come into his possession, we are satisfied that it is at variance with what must be held to be the true rule. The case is a department case, and two of the three justices concurring therein also concurred in the views expressed by Justice Temple in the later case of *Burdick*, supra. It is essential to the proper administration of estates that, for the purpose of determining the extent of the liability of the executor or administrator to those interested

in the estate, the probate court should have the power to determine as against him what money or other property belonging to the estate has come into his hands, and, as said in the *Burdick* Case, such power is implied in the power to settle his accounts and determine what remains in his hands to be distributed.

The alternative writ of prohibition issued herein is discharged and the proceeding dismissed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(155 Cal. 114)

Ex parte HOFFMAN. (Cr. 1,462.)

(Supreme Court of California. Jan. 6, 1909.)

1. FOOD (§ 2*)—SALE OF MILK—ORDINANCE REGULATING—VALIDITY.

An ordinance regulating the sale of milk prescribed the standard as follows: "Total milk solids, 12.5 per centum by weight; butter fat 3.5 per centum by weight; water 87.5 per centum by weight." *Held*, that this obviously meant that of the 12.5 per centum milk solids, at least 3.5 per centum should be butter fat, and, so read, the ordinance was not objectionable on the ground that the required standard was a total of 103.5 per centum of ingredients, and was therefore vague, uncertain, and contradictory.

[Ed. Note.—For other cases, see *Food*, Dec. Dig. § 2.*]

2. MUNICIPAL CORPORATIONS (§ 592*)—EXERCISE OF POLICE POWER—STATE REGULATIONS ON SAME SUBJECT.

So long as there is no conflict between the regulations of the state and a municipality in respect to a subject within the police power of the state, and so long as the requirements of the municipal by-laws are not in themselves pernicious, as being unreasonable or discriminatory, both will stand.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1311, 1312; Dec. Dig. § 592.*]

3. MUNICIPAL CORPORATIONS (§ 592*)—POLICE POWER—REGULATING SALE OF MILK—CONFLICT WITH GENERAL LAWS.

Const. art. 11, § 11, empowers a city to make and enforce within its limits "all such local, police, sanitary, and other regulations as are not in conflict with general laws." *Held*, that there is no conflict between St. 1907, p. 265, c. 216, regulating the sale of milk, and a municipal ordinance imposing not fewer, but additional, qualifications on milk which may be vended to customers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1311; Dec. Dig. § 592.*]

4. FOOD (§ 2*)—SALE OF MILK—MUNICIPAL REGULATION—ORDINANCE—VALIDITY—DETERMINATION.

A mere averment that milk below the standard required by a city ordinance regulating the sale thereof may have come from Holstein cows is insufficient to tender an issue whether the ordinance is unreasonable and in restraint of trade in exacting too high a standard.

[Ed. Note.—For other cases, see *Food*, Dec. Dig. § 2.*]

5. MUNICIPAL CORPORATIONS (§ 592*)—EXERCISE OF POLICE POWER—VALIDITY OF ORDINANCE—CONFLICT WITH STATE LAW.

It is no objection to the validity of an ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law relating to the same subject, as, if a prosecution is had under the state law, the defendant is entitled to its protection, and if under the ordinance, the latter governs his rights and duties.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1311; Dec. Dig. § 592.*]

6. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—TIME OF TAKING EFFECT.

A city charter provided a limitation of time as to the going into effect of city ordinances, but excepted, among others, an ordinance for the immediate preservation of the public health, which contained a statement of its urgency, and was passed by a two-thirds vote. *Held*, that it could not be a matter for the immediate preservation of the public health that milk sold should contain 3.5 per centum of milk fat, instead of 3 per centum, and that the total amount of water should be 84.5, instead of 85, per centum.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 277; Dec. Dig. § 120.*]

7. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—TIME OF TAKING EFFECT.

A mere declaration of the council in such a case that the ordinance is passed for the immediate preservation of the public health is neither conclusive nor sufficient, but the nature of the ordinance itself will in most instances be determinative; and, where a certain emergency has arisen, a statement of the nature of the urgency finds proper place to support the declaration.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 277; Dec. Dig. § 120.*]

8. MUNICIPAL CORPORATIONS (§ 120*)—ORDINANCES—TIME OF TAKING EFFECT.

An emergency clause in an ordinance, inserted for the purpose of having it take immediate effect, where the subject thereof is not such as to bring it within the exceptions to the limitation of time in a city charter as to the going into effect of ordinances, does not invalidate the ordinance, but the date of its operation is postponed for the time limited.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 277; Dec. Dig. § 120.*]

In *Bank*. Application by George Hoffman for writ of habeas corpus, prayed to be directed against Edward Kern, chief of police, city of Los Angeles. Writ discharged, and prisoner remanded.

R. A. Ling, Powers & Holland, and John J. Flemming, for petitioner. Leslie R. Hewitt, City Atty., Lewis R. Works, Asst. City Atty., and Guy Eddie, Deputy City Atty., for respondent.

HENSHAW, J. Habeas corpus. The city of Los Angeles passed an ordinance (No. 13-171 [new series]), regulating the sale of milk and cream. The ordinance contained many regulatory provisions making for hygienic conditions, which are not necessary here to consider, for the petitioner was charged with and convicted of a violation of a single sec-

tion of the ordinance. That section is No. 9, and fixes the standard of milk sold in the city. It does this in the following language: "Sec. 9. The standard of milk * * * in and for the city of Los Angeles is hereby defined and prescribed as follows: For Milk: Total milk solids, 12.5 per centum by weight. Butter fat, 3.5 per centum by weight. Water, 87.5 per centum by weight." Against the validity of this section petitioner advances several arguments.

1. He insists that the section is void because its provisions are vague, uncertain, and contradictory. In this his argument is that the required standard is 87.5 per centum water, 12.5 per centum milk solids and 3.5 per centum butter fat, or a total of 103.5 per centum of ingredients, which, as is very justly argued, is a physical impossibility, since the component parts of a single article cannot constitute more than 100 per centum, else the whole would be greater than all its parts. The answer to this, however, obviously is that the ordinance means that of the 12.5 per centum milk solids, at least 3.5 per centum shall be butter fat. So read, the ordinance is not objectionable upon the ground urged.

2. Subsequent to the passage of this ordinance, the state, in 1907, placed upon its statute books "An act to prohibit adulteration and deception in the sale of dairy products, defining adulteration in dairy products, and to provide for enforcing its provisions." St. 1907, p. 265, c. 216. This statute declared that it shall be unlawful for any person to produce, manufacture, or prepare for sale, or to sell or offer for sale, or have on hand for sale, any milk that is adulterated within the meaning of the act. As to what should constitute adulteration, the act provided (section 2) that milk should be deemed adulterated that did not conform with the following definition and standard: "Milk is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows * * * and contains not less than three per cent. of milk fat, and not less than eight and five-tenths per cent. of solids—not fat. * * *" The Constitution (article 11, § 11), empowers a city to make and enforce within its limits "all such local, police, sanitary, and other regulations as are not in conflict with general laws." It is insisted that, the state having thus provided a standard for pure milk, the attempt of the city ordinance to vary that standard creates a conflict in the law, with the necessary result that the ordinance must fall. Undoubtedly if such a conflict exists, the ordinance must give way to the paramount law of the state. But does such a conflict exist? for, if it does not, then it is well settled that the mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there be no conflict

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

between the two, and so long as the requirements of the municipal by-law are not in themselves pernicious as being unreasonable or discriminatory, both will stand. *Ex parte Hong Shen*, 98 Cal. 681, 33 Pac. 799; *In re Murphy*, 128 Cal. 29, 60 Pac. 465; *Bellingham v. Cissna*, 44 Wash. 397, 87 Pac. 481. In the first case cited the principle is fully recognized and expounded, and assent is refused to the argument, there advanced, that an ordinance is in conflict with the general laws when it makes another and different regulation for the sale of an article of commerce than that provided by the statute of the state. In the last case cited the city of Bellingham had by ordinance declared it unlawful for an automobile to be driven on public streets at a greater rate of speed than six miles per hour. Subsequently the state passed an act prohibiting the driving of automobiles "within the thickly settled or business portion of any city at a greater speed than 12 miles an hour." There, as here, the state law was passed subsequent to the enactment of the municipal ordinance. There, as here, a conflict between the terms was urged, but it was held, upon the soundest principles, that there was no conflict, and that it was competent for the authorities of Bellingham to prescribe a rate of speed less than that which the state law permitted. The correctness of the principle may not be doubted. If the state should pass a law declaring it unlawful to erect a chimney of a height exceeding 150 feet, would any one seriously contend that a city of the state within the earthquake zone might not, by ordinance, in the clear exercise of the police power, for the benefit of its citizens, still further restrict the height of chimneys? Such, in principle, is the present case. The Legislature has, in effect, declared that it shall be unlawful to sell milk containing less than 11.5 per centum solids, 3 per centum of which solids shall be milk fat. An ordinance of a municipality requiring of the milk vended therein a larger percentage of solids, if not in its exactions unreasonable, does no violence to the law of the state. The state's declaration merely is that milk shall not be sold containing less than 11.5 per centum of solids, 3 per centum of which shall be milk fat. If the city of Los Angeles had provided that milk might be vended which contained less per centum of milk fats than that exacted by the state law, there would be presented a plain case of conflict. The municipality would be endeavoring to legalize that which the state had declared to be unlawful. But what the city has in fact done has been to impose not fewer, but additional, qualifications upon the milk which may be vended to its consumers. The state in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs) upon the people of the state, urban and rural, but it may often, and does often, happen that the requirements which the state sees fit to impose

may not be adequate to meet the demands of densely populated municipalities, so that it becomes proper, and even necessary, for municipalities to add to state regulations provisions adapted to their special requirements. Such is the nature of the legislation here questioned.

3. Petitioner charges that this particular ordinance is unreasonable and in restraint of trade in exacting too high a standard for the milk permitted to be sold. In his petition he avers "that milk may come direct and pure in its natural state from the cow, and especially from Holstein cows, and yet be below the standard fixed by the city ordinance; and, upon his best information and belief, the milk used in his restaurant, and upon which his conviction is based, could have been milk from Holstein cows." This averment stands unchallenged, and is therefore to be taken as true. *Ex parte Smith*, 143 Cal. 370, 77 Pac. 180. It may be that a municipality may pass an ordinance imposing a standard for milk which would be unreasonable, oppressive, in restraint of trade, and therefore void. It may even be, for aught that this court can judicially know, that this ordinance is of that character. But the mere averment that milk below standard might come from one or another cow is not sufficient to tender an issue of this character. Nor is it any objection to the validity of the ordinance that its regulatory provisions and the penalty for its violation differ from those of the state law. If prosecution is had under the state law, a defendant is entitled to the protection which the state law affords him; if under the ordinance, then his rights and duties are governed by that enactment.

4. Section 198b of the charter of the city of Los Angeles declares that no ordinance passed by the council "(* * * except an ordinance for the immediate preservation of the public peace, health or safety which contains a statement of its urgency and is passed by a two-thirds vote of the council) shall go into effect before thirty days from the time of its final passage and its approval by the mayor. If during said thirty days a petition, signed by the electors of the city equal in number to at least seven per cent. of the entire vote cast for all the candidates for mayor at the last preceding general election at which a mayor was elected, protesting against its passage be presented to the council, the same shall thereupon be suspended from going into operation," etc. This ordinance declared (section 18) that "it is urgently required for the immediate preservation of the public peace, health and safety." It is contended that the provision under consideration can by no possibility be one required for the immediate preservation of the public peace, health, or safety, that the declaration of the council to that effect is of no binding force, and that the ordinance therefore is a bold attempt to destroy the right to the referendum preserved to the peo-

ple in section 198b, above quoted. We agree that it cannot be a matter for the immediate preservation of the public health that milk vended must contain 3.5 per centum of milk fat instead of 3 per centum, and that the total amount of water shall be 84.5 instead of 85 per centum. Furthermore, we agree that the mere declaration of the council in such a case that the ordinance is passed for the immediate preservation of the public health is neither conclusive nor yet sufficient. The nature of the ordinance itself will, in most instances, be determinative, and where a sudden emergency has arisen, a statement of the nature of the urgency finds proper place to support the declaration. So says the Supreme Court in *Wheeler v. Chubbuck*, 16 Ill. 364, in discussing the effect of the emergency clause necessary to put a law into immediate force: "But such direction must be made in a clear, distinct, and unequivocal provision, and cannot be helped out by any sort of intendment or implication." But, conceding this, the effect of the concession is not to destroy the ordinance. By the very terms of the charter, if the ordinance be not one of emergency, the date of its operation is postponed for 30 days. So here, the utmost for which petitioner could contend was that the date when section 8 went into operation was 30 days from its passage. But as more than 30 days had elapsed before his arrest for a violation of its provisions, he is entitled to no relief.

For the foregoing reasons the writ is discharged, and the prisoner remanded.

We concur: BEATTY, C. J.; LORIGAN, J.; SHAW, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.

155 Cal. 82

TURNER et al. v. JAMES CANAL CO. et al.
(Sac. 1,635.)

(Supreme Court of California. Jan. 2, 1909.
Rehearing Denied Feb. 1, 1909.)

1. WATERS AND WATER COURSES (§ 109*)—RIPARIAN RIGHTS—IRRIGATION—SOURCE OF WATER.

With the limitation that the use of water for irrigation, so far as it affects the rights of others similarly situated, must be reasonable, the riparian right to use water on adjoining land for irrigation applies as well to the water of a lake, pond, or slough as to a flowing stream.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 119; Dec. Dig. § 109.*]

2. WATERS AND WATER COURSES (§ 44*)—IRRIGATION—RIPARIAN RIGHTS.

Where water flows from a river into a slough, or from the slough into the river, as the water in one may be higher than in the other at a particular season, a person owning land abutting on the slough has the equal right to take a reasonable share of water therefrom for

irrigation with another person who owns land abutting on the river.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 36; Dec. Dig. § 44.*]

3. WATERS AND WATER COURSES (§ 44*)—IRRIGATION—RIPARIAN RIGHTS.

A riparian owner having a right to take water for irrigation from a stream may do so from any convenient point on the stream, whether at a point on his own land or the land of another, so long as the taking does not injuriously affect the rights of riparian owners between the point of diversion and the land to be irrigated.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 36; Dec. Dig. § 44.*]

4. WATERS AND WATER COURSES (§ 44*)—IRRIGATION—POINT AND MODE OF DIVERSION.

So long as a riparian owner takes no more than his share of water from the stream and uses it on his land for irrigation without waste, it is immaterial to lower riparian owners at what point the water is diverted or by what means; whether at the point far above where the elevation of the stream will be sufficient to carry the water to the land by gravitation, or by a dam and headgate, or by pumps and buckets.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 36; Dec. Dig. § 44.*]

5. WATERS AND WATER COURSES (§ 44*)—IRRIGATION—RIPARIAN RIGHTS.

Each riparian owner has a right to a reasonable use of the water of a stream for the irrigation of his land, and the common-law right of each to have the stream flow by his land without diminution is subject to the right of all to a reasonable share of the water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 36; Dec. Dig. § 44.*]

6. WATERS AND WATER COURSES (§ 49*)—IRRIGATION—RIPARIAN RIGHTS.

The fact that plaintiff's low land would be greatly benefited by its overflow from an abutting stream during flood season does not entitle him to restrain diversion of a reasonable amount of water for irrigation by upper riparian owners, though such diversion would diminish such overflow.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 40; Dec. Dig. § 49.*]

7. WATERS AND WATER COURSES (§ 49*)—IRRIGATION—REASONABLE USE OF WATER.

The determination as to what is a reasonable share or use of water for irrigation by each riparian owner is a question of fact to be decided on the circumstances surrounding each case.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 39; Dec. Dig. § 49.*]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Elizabeth Turner, administratrix of the estate of William C. Turner, deceased, and the Merced Security Savings Bank, against the James Canal Company and others. From a judgment for plaintiffs and from an order denying their motion for a new trial, defendants appeal. Reversed.

N. C. Coldwell and W. C. Graves, for appellants. J. K. Law, J. W. Knox, Mastick, Van Fleet & Mastick, F. H. Short, Edward

F. Treadwell, and W. B. Treadwell, for respondents.

SHAW, J. The defendants have appealed from the judgment and from an order denying their motion for a new trial.

There is no substantial conflict in the evidence upon any important fact in issue. The questions presented relate to matters of law applicable to the facts found and to the legal effect of the evidence. The plaintiffs each own a tract of land in Merced county riparian to the San Joaquin river; their combined holdings aggregating some 6,000 acres. They sue to enjoin the defendants from diverting water from said river. The defendant the J. G. James Company owns something near 20,000 acres of land which is riparian to a body of water called "Fresno slough." The defendant the James Canal Company, as successor to the defendant Enterprise Canal & Land Company, is the owner of a large canal beginning at a point on said river 30 or 40 miles above the junction of the river with Fresno slough, and extending over intervening lands belonging to other parties and not riparian either to the river or to Fresno slough, to and upon the lands of the J. G. James Company. The remaining defendants are lessees of portions of said land of the J. G. James Company. The J. G. James Company claims the right, as riparian owner on Fresno slough, to take from it a reasonable quantity of its waters to irrigate its said lands. As such riparian owner of lands on the slough, it also claims the right to a reasonable quantity of the water of the San Joaquin river to be used in the irrigation of its said land situated upon Fresno slough, and the right to take such water for that purpose at the head of its canal on the river, and carry it through the canal over the intervening nonriparian land, to the land on the slough. The court below adjudged that the defendants had no right to divert any of the water of the San Joaquin river at the head of said canal, or at all, for use on said lands of the J. G. James Company. With respect to the water of Fresno slough, the judgment is that the defendants have no right to use the same on the lands of said J. G. James Company, except such water as should flow into said slough from Kings river. It appears from the findings that water often runs into Fresno slough from the San Joaquin river, but the court held that the defendants had no right to the use of that water by virtue of the ownership of lands riparian to the slough.

Both the San Joaquin and Kings rivers have their sources in the Sierra Nevada mountains. The San Joaquin flows out on the plain of the San Joaquin Valley in a westerly direction by the station of Herndon in Fresno county, to a point at or near its junction with Fresno slough, where it turns northerly and runs along the central part of the valley

to an arm of the San Francisco Bay near Stockton. Kings river emerges upon the plain of the San Joaquin Valley some 30 miles southerly from the San Joaquin, and runs westerly to about the center of the valley, from which point its flow, in times of high water, depends upon differing circumstances. If the rivers from points further south have not filled Tulare Lake, which lies to the south of Kings river, that river usually turns south and flows into the lake. If the lake is full, it turns northward, flowing along the center of the valley and into and along Fresno slough until it unites with the water of the San Joaquin river, and the two from thence form one stream to the bay. Sometimes, and especially at extremely high floods, Kings river divides, a part flowing into Tulare Lake and a part to the north through Fresno slough to the San Joaquin river. Except at times of high water, Kings river does not reach Fresno slough or Tulare Lake. Fresno slough is a somewhat crooked body of water about 14 miles long, extending from its connection with the San Joaquin river in a general southerly direction toward Kings river. Its width varies from 100 to 200 feet. The floods referred to come in the summer from the melting of the snows in the high mountains and, occasionally, during the winter season from heavy rains. These rains occur at uncertain intervals, generally when water is not required or used in great quantity, and the floods from this cause are of minor importance to the parties interested in this case. The summer floods come each year during the months of May, June, and July, and sometimes last as long as six or eight weeks. In some years they are not of sufficient volume to bring the water of Kings river to Fresno slough. The court finds that, at such times as the floods are sufficiently high to bring the Kings river water to Fresno slough, the waters of the two rivers often flow at different stages or elevations, and that, when the San Joaquin is the higher, a part of the water thereof flows or "backs up" into Fresno slough and runs southerly therein for some 14 miles to the south end thereof, until the slough is filled to the level of the river, or until it meets the rising water of Kings river coming into the slough from the south. Also, that the slough, when not fed from Kings river water, is kept filled by water from the San Joaquin, and rises and falls with that river. It necessarily follows that such current as there may be in the slough changes from time to time, flowing northerly when the San Joaquin river is falling and also when Kings river is the higher of the two, and southerly when the San Joaquin is rising, or when it is higher than Kings river. The court does not find the length of time of each season that it happens that the water of Kings river does not reach Fresno slough and when, consequently, the slough re-

ceives water from the San Joaquin river exclusively, nor does it find what proportion of the years this latter condition prevails during the entire year. It clearly appears from the evidence, however, that this is the usual and ordinary condition, that seldom, during the dry season of any year, does Kings river water flow into Fresno slough for more than six weeks, and that, during that season, in some years it does not flow into the slough at all. It also appears that, when there is a flood sufficient to bring Kings river water to the slough, the San Joaquin is also very high, and the combined waters are of such volume that they are probably a menace rather than a benefit, overflowing, to their damage, the lands of both parties to this action, and that generally, at such times, the diversion of all the water that defendant's canal would carry would have no perceptible or appreciable effect on the volume of the water in the stream reaching the lands of the plaintiffs.

It is clear from these conditions that the privilege of using water from Fresno slough upon their lands during the very considerable period of each year, when there is no water from Kings river flowing therein, is one of great value to the defendants. The judgment forbidding such use undoubtedly will cause the defendants substantial injury. The theory of the plaintiffs is that the law of riparian rights, when applied to land bordering upon Fresno slough, does not include the right to take water from the slough for use upon the land, if such taking will diminish the flow in the San Joaquin river to the lands below the junction of the slough. It appears that during a considerable part of the time the water in Fresno slough is stagnant, and the plaintiffs argue that riparian rights in a body of water do not attach to lands bordering thereon except when the water consists of a flowing stream. The right of a riparian owner to the use of water bordering upon his land does not, as plaintiffs contend, arise from the fact that the water is flowing, and that any part thereof taken from the stream is immediately replaced by water from the current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages, and benefits. *Duckworth v. Watsonville, etc.*, Co., 150 Cal. 526, 89 Pac. 338. Out of regard to the equal rights of others whose lands may abut upon the same water, the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the right of others similarly situated, must be reasonable, and must be confined to a reasonable share there-

of; but, with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream.

There is no decision in this state upon the subject of the riparian rights of the owner of land upon a body of water not flowing. Nor is there anything in any of our decisions intimating that such rights do not exist. In *Duckworth v. Watsonville, etc.*, Co., supra, the question was suggested whether the right existed to make an appropriation of the waters of a lake, under the Code which refers only to "running water" (Civ. Code, § 1410); but, as it was held that the finding that there was a running stream was sustained by the evidence, there was no decision further than to hold that it was not necessary to a right of appropriation under the Code that the stream should run to the sea or to a junction with some other water course. This point has no bearing on riparian rights. It was also held that one owning land upon an outlet of a lake, but not on the lake itself, which outlet was dry for a considerable part of each season, could not take water from the lake above, during such dry period, to use on his land upon the outlet below. This was not, as counsel suggests, based on the fact that there was no flowing water in the outlet at such times, but on the fact that it then contained no water at all. Upon the assumption that riparian rights do not exist, except to water in a "water course," counsel cite authorities to show that in order to constitute a water course there must be water flowing, that it must flow in a particular direction, and that it must have a source and a mouth. As we have concluded that riparian rights do exist in a body of water not flowing, it is unnecessary to discuss the question of the things essential to a water course.

No authority is cited in favor of the proposition that riparian rights exist only in flowing streams. After a somewhat exhaustive search, we have not succeeded in finding any decision to that effect. That such rights exist in any body of water, whether flowing or not, is shown by the following quotations from decisions of other states: "The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has, by nature, the advantage of being washed by streams." 1 *Farnham on Waters*, § 63, p. 280. "The principle upon which these rights are founded is equally applicable to all bodies of water, whether large or small, tidal or nontidal." *Id.* § 62, p. 278. "The character of the water is immaterial, and the rights attach to lakes and ponds, where there is no current, as well as to streams." *Id.* § 63, p. 282. "I regard it as immaterial whether a current flows through the bayou or not. Water may be navigable

without a current, and it might not be with. Neither is a current essential to the existence of riparian rights. They may exist in lakes or ponds where there is no current." *Turner v. Holland*, 65 Mich. 466, 33 N. W. 283. "The rules governing riparian rights on streams apply, mutatis mutandis, to grants of land bordering on lakes." *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541. "When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it; it constitutes one of the advantages of its situation, and a material part of its value." *Hardin v. Jordan*, 140 U. S. 391, 11 Sup. Ct. 815, 35 L. Ed. 428. "The defendant insists that plaintiff held no riparian rights on account of the fact that the natural character of the slough has been changed so as to become, at the place whereon the property of the parties abuts, a pond or body of water without a current. We have never heard that riparian rights depended upon the character of the current in the water upon which these rights extend. They exist if the water be an artificial pond made by a dam in a water course, as well as when it is an unobstructed running stream." *Finley v. Hershey*, 41 Iowa, 393. See, also, *Robinson v. Davis*, 47 App. Div. 405, 62 N. Y. Supp. 444; *Lembeck v. Nye*, 47 Ohio St. 354, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828; *Priewe v. Wisconsin*, 93 Wis. 546, 67 N. W. 918, 33 L. R. A. 645; *Cedar Lake H. Co. v. Cedar C., etc., Co.*, 79 Wis. 302, 48 N. W. 371; *Valparaiso, etc., Co. v. Dickover*, 17 Ind. App. 233, 46 N. E. 591; *Fernald v. Knox Woolen Co.*, 82 Me. 56, 19 Atl. 93, 7 L. R. A. 459; *Draper v. Brown*, 115 Wis. 366, 91 N. W. 1001; *Delaplaine v. Chicago, etc., Co.*, 42 Wis. 214, 24 Am. Rep. 386; *Bassett v. Salisbury Co.*, 43 N. H. 578, 82 Am. Dec. 179. Many of these decisions relate to rights in the water other than the use of it for irrigation, but the context shows that the principle was considered a general one applicable to riparian rights of every description. The plaintiffs seek to found a distinction upon the assumed fact that the waters of a pond or lake have no source of supply, and that if the riparian owner takes water therefrom the water of such lake or pond will ultimately become exhausted. It is a mistake to suppose that a permanent pond or lake has no source of supply. There is a constant drain upon such a body of water by evaporation into the air and sometimes by seepage into the surrounding soil. If there were no supply the lake or pond would soon cease to exist; but even in a case of a pond or lake caused by an overflow, which has no other source of supply, and which by reason of seepage and evaporation will soon disappear, we think it must be conceded that the riparian owners have a right to the reasonable use of the water both for domestic purposes and for irrigation of the adjacent land. If such right does not exist, the water would disappear without ad-

vantage to any one; whereas, by the use thereof it might be made of great benefit to the adjoining owners. We can see no reason why the law should declare that in such a case all of the adjacent owners of land must abstain from taking any of the water and thus allow it to remain uselessly in its position until the forces of nature remove it.

The court finds, however, that Fresno slough is always connected with the San Joaquin river so that water will flow from the river into the slough, or from the slough into the river, as one may be higher than the other at the particular time. Under the circumstances, we think that a person owning land abutting upon the slough has an equal right to take water therefrom, and an equal right to a reasonable share of the water, with another person who owns land abutting upon the main stream. In the case of any enlargement in the width of a flowing stream, it always happens that there is but little current at the sides, and in the case of an extensive enlargement there would be either a body of still water adjoining the flowing stream in the center, or there would be an eddy whereby a part of the water of the stream would flow back around the edge of the extension and enter the main channel again at the upper end thereof. No line could be fixed beyond which it could be declared that the water could not extend so as to carry riparian rights in the stream to the land along its borders. The only reasonable conclusion is that no such distinction exists, and that the rights of all persons owning land adjoining upon the stream, or upon any bay, inlet, or slough connecting therewith, are equal and coextensive with those of persons owning land bordering upon the main current or channel, regard being had, of course, to the quantity of land of each, their respective interests, the quantity of water in the slough, as compared to that in the river, the quantity the slough is capable naturally of diverting from the river, and all other circumstances affecting the question of a reasonable division of the water in case there should not be enough to supply the needs of all.

So far as the right to use a reasonable share of the water of Fresno slough for the irrigation of land riparian thereto is concerned, it is of no consequence how, or from what source, the water comes into the slough, or what causes or forces excavated the channel of the slough, provided both are the results of natural forces. The particular natural cause which made the excavation is immaterial to the question in any event. The source from which the water is derived becomes material only in determining what is a reasonable share of the water. While the water is running into the slough from Kings river, the slough is a part of that river, and the reasonable share of the water apportionable to the lands riparian to the slough is to be fixed by reference to the rights and needs

of other lands riparian to Kings river. When Kings river does not run into the slough, the latter becomes a part of the San Joaquin river, with which it is then connected, and during that period the lands riparian to the slough are entitled to a share of the water of the whole San Joaquin river, including the slough. This latter right is the result of the fact that, while that condition prevails, the slough is really a part of the river, and the taking of water from the slough will affect the flow of the river, either by preventing by that much an addition to the main stream when that stream is so low that the water will flow into it from the slough, or by drawing water into the slough from the river when the slough is lowered by the diversion. There is no more reason for declaring that the owner of lands on the river can prevent the owner of lands on the slough from taking a reasonable share of the water of the slough, although it may affect the flow of the river, than of holding that the owner of land on the slough could prevent the riverman from taking his reasonable part of the water of the river to the depletion of the water in the slough. One has as clear a right as the other to the natural advantages of his situation, and an equal right to complain of the deprivation thereof by the undue use of the other.

Inasmuch as the J. G. James Company's lands are riparian to Fresno slough, and the slough is, for a considerable period each year, connected with, and properly a part of, the San Joaquin river, it follows that, for the irrigation of such lands, it has, during such periods, a right to take its share of the water from the main river at any convenient point thereon, whether such point of diversion is upon its own land or not, so long as such taking does no injuriously affect the rights of owners of land abutting upon the river between the point of diversion and the company's riparian land. The fact that it must carry the water from the river over intervening nonriparian lands, belonging to other persons, is of no consequence. The person over whose land it is carried could object, of course; but other riparian owners have no privity with such third person, and cannot avail themselves of his rights. So long as the riparian owner takes no more than his reasonable share and uses it upon his riparian land, without unreasonable waste, other riparian owners below have no right to inquire how, or by what means, or at what place, he manages to divert his share from the stream, whether at a point on his own land, or at some point far above, where the elevation of the stream will be sufficient to carry it by gravity to the surface of his land, and whether by a dam and headgate, or by pumps and buckets. This principle was practically decided in *Charnock v. Higuerra*, 111 Cal. 479, 44 Pac. 171, 32 L. R. A. 190, 52 Am. St. Rep. 195, and *Rose v. Mesmer*, 142 Cal. 329, 75 Pac. 905. Its necessity

is illustrated in the first-named case by the suggestion of the obvious fact that, unless the water can be obtained by a dam on land above, in many instances it could not be obtained at all, owing to the fact that the surface of the adjoining land is of necessity higher than the surface of the stream. To restrict the riparian right in such cases to the taking of water by pumps operating only upon the land where it is to be used would be to make it often practically valueless, and would be unreasonable. In *Rose v. Mesmer* it is said: "A riparian owner may, for the more convenient use of the water on his riparian land, go upon the land of another farther up the stream, with the consent of such landowner, and there divert the water for use upon the land below, or he may raise it to the surface of his land by pumps or other artificial means." In *Jones v. Conn*, 39 Or. 45, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630, the defendant, a riparian proprietor, was diverting water for irrigation by means of a ditch leading from a dam some two miles above his land. The plaintiff owned land on the stream, below the defendant's land. The court said: "The defendant was not a wrongdoer when he used the water of the stream for the purposes of irrigation, nor does the fact that his land lies above the level thereof, so that it cannot be irrigated by means of ditches wholly on his own premises, affect his right to the use of the water." In such cases it may be that there will be an unreasonable waste of water by carrying it in open ditches subject to evaporation and seepage, and to that extent the method and place of diversion is a proper subject of inquiry in determining the comparative rights of different riparian owners. As to the lands upon the stream between the place of diversion and the place of use, a different question is presented. It has been held that this particular diversion is unlawful, so far as it operates to the injury of such intervening land. *California Pastoral, etc., Co. v. Enterprise Canal & Land Co.* (C. C.) 127 Fed. 742. But no such question as this is presented here.

The decision in *Miller & Lux v. Enterprise Canal & Land Co.*, 145 Cal. 652, 79 Pac. 439, does not conflict with these conclusions, but rather confirms them. In that case there was a finding that Fresno slough was not a part of the San Joaquin river, but was a part of Kings river. The court below had granted a new trial to J. G. James, the owner of the lands bordering on Fresno slough, and the predecessor of J. G. James Company, a defendant here. The present case, with respect to the character of Fresno slough, was decided largely upon evidence given in the case cited, which upon the trial of this case was read from the record in that case. Referring to that evidence, the court in that case said that it was of such char-

acter that it authorized the court below to grant a new trial on the ground that the finding above mentioned was contrary to the evidence.

The level of the plaintiffs' land is such that during the floods above mentioned the water of the San Joaquin river usually overflows and covers an extensive area thereof, deposits sediment thereon, and thereby moistens, fertilizes, and enriches the soil, and causes it to yield larger crops of grass than it would otherwise produce, which circumstance materially adds to the value of the land. For the purpose of making such overflow more valuable and beneficial, the plaintiffs, at great expense, have made levees, checks, and works for the regulation and control of the overflow and to obtain a greater use of it. The complaint alleges, and the court finds, that the diversion and use of the water of the river by the defendants for the irrigation of defendants' land, as threatened, will materially diminish the overflow of the river, during floods, and will deprive plaintiffs of the benefits of the natural irrigation and fertilization of their said lands from the overflowing of the river, to their great and irreparable damage. It appears to be contended, on behalf of the plaintiffs, that they, as owners of riparian land having the above-mentioned advantages of situation, have the absolute right to prevent any diversion of the water of the river above by other riparian proprietors, for irrigation of their riparian lands, to the end that the river may continue high enough to overflow plaintiffs' land during the floods. It was upon this theory that the court gave its judgment, and not upon the theory that the reasonable use of the respective riparian owners required that the defendants should abstain from any use of the water in order to allow the plaintiffs to receive the overflow. In support of this position plaintiffs invoke the alleged common-law rule that a riparian owner upon a stream is entitled as of right to the full flow of the stream in its natural course through his land. The cases are numerous wherein the right of a riparian proprietor to have the stream flow to his land undiminished by any diversion made by an appropriator for use on nonriparian land has been declared. Among them may be cited *Lux v. Haggin*, 69 Cal. 396, 4 Pac. 919, 10 Pac. 674, *Heilbron v. Last Chance, etc., Co.*, 75 Cal. 121, 17 Pac. 65, and *Heilbron v. Fowler, etc., Co.*, 75 Cal. 432, 17 Pac. 535, 7 Am. St. Rep. 183. It is obvious, of course, that, if this supposed rule were strictly enforced against riparian owners, as well as appropriators, the waters of the streams in the state could not be used at all, but would flow to the sea, or until they disappeared in the sands and washes, without benefit to any one, except in the few instances where flood waters might escape naturally and flow upon lands situated sim-

ilarly to those of the plaintiffs. The rule is evidently not suited to the conditions of a dry climate such as we have in this state. It is accordingly well settled here that each riparian owner has a right to a reasonable use of the water on his riparian land, for the irrigation thereof, and that the so-called common-law right of each to have the stream flow by his land without diminution is subject to the common right of all to a reasonable share of the water. *Lux v. Haggin*, supra; *Harris v. Harrison*, 93 Cal. 681, 29 Pac. 325; *Wiggins v. Muscupiabe*, 113 Cal. 190, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337; *Smith v. Corbit*, 116 Cal. 592, 48 Pac. 725; *Gould v. Eaton*, 117 Cal. 543, 49 Pac. 577, 38 L. R. A. 181; *Hargrave v. Cook*, 108 Cal. 77, 41 Pac. 18, 30 L. R. A. 390; *Van Bibber v. Hilton*, 84 Cal. 588, 24 Pac. 308, 598; *Gould v. Stafford*, 77 Cal. 67, 18 Pac. 879; *Heilbron v. Land & Water Co.*, 80 Cal. 193, 22 Pac. 62; *Barneich v. Mercy*, 136 Cal. 205, 68 Pac. 589; *Rose v. Mesmer*, supra. These cases also declare that the determination as to what is the reasonable share of each riparian owner is a question of fact, to be decided according to the circumstances of the case, and that an upper riparian proprietor is entitled to a reasonable use for irrigation, although it may diminish the flow to a lower proprietor, and put him to substantial inconvenience in his use of the stream. Thus, in *Harris v. Harrison*, *Wiggins v. Muscupiabe*, and *Smith v. Corbit*, supra, it was held that the upper proprietors could be allowed to take the whole stream for certain hours or days, at stated intervals, and that the use of the lower owner could be limited to the intervening periods.

It is clear from these principles that the J. G. James Company is entitled to a reasonable use of the water of the San Joaquin river on its lands riparian to Fresno slough, during the times when the slough is properly a part of that river, although such use may interfere with the natural irrigation of the plaintiffs' lands by the overflowing of the river during floods. To what extent such interference can be allowed without being unreasonable is a question of fact for the trial court, upon a consideration of the needs of each, the comparative benefits of the respective uses, the comparative injuries, caused to each by the deprivation ensuing from the use by the other, and all other circumstances bearing thereon. The court below held that the defendants were not riparian owners, that they had no right to any use of the water, and that the rights of the plaintiffs were paramount. In so holding the court erred, and for this error the judgment and order must be reversed.

The question of the right of plaintiffs to have the river maintained at its high flood level for the natural irrigation of their lands, as against an appropriator for public or private use on nonriparian land, is not here

presented, and we express no opinion on the subject, mentioning it only to distinguish it.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.; HALL, J. pro tem.

NOTE.—Justice HALL, one of the justices of the District Court of Appeal for the First Appellate District, participates herein pro tempore, pursuant to section 4 of article 6 of the Constitution, and an order filed August 4, 1908, pursuant thereto, having heard the oral argument in place of the late Justice McFARLAND, who was at the time of such argument unable to act by reason of sickness.

9 Cal. App. 372

ALDIS v. SCHLEICHER. (Civ. 538.)

(Court of Appeal, Second District, California.
Nov. 19, 1908.)

1. BROKERS (§ 43*)—APPOINTMENT—SALE OF LAND—NECESSITY OF WRITING.

In an action to recover commissions for selling realty owned by defendant and K., the complaint alleged that, in offering the property for sale, defendant acted as agent for K., and as such agent made the oral agreement to pay plaintiff a reasonable commission for selling the property. Civ. Code, § 1624, requires agreements authorizing the sale of realty, or some memorandum thereof, to be in writing and signed by the party to be charged, or his agent. *Held* that, conceding that a broker could contract orally with another as to the compensation he was to receive from the owner for selling realty, the complaint did not allege any written contract by defendant with K., and hence he was entitled to no compensation which could be the subject of an oral contract with plaintiff, so that, whether the complaint charged defendant individually or as agent for K., the oral agreement with plaintiff for commissions was invalid.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43; * *Frauds*, Statute of, Cent. Dig. § 131.]

2. BROKERS (§ 43*)—APPOINTMENT—WRITTEN AUTHORITY—NECESSITY—SALE OF LAND.

Civ. Code, § 1624, making an agreement authorizing an agent to sell realty invalid, unless it, or some memorandum thereof, is in writing and signed by the party to be charged, applies to any contract, whether by the owner, his agent, or another, authorizing the sale of realty by another for a stipulated commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43; * *Frauds*, Statute of, Cent. Dig. § 131.]

3. PLEADING (§ 34*)—CONSTRUCTION—CONSTRUCTION AGAINST PLEADER.

A pleading will be construed more strongly against the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.*]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by F. F. Aldis against Adolph Schleicher. From a judgment for plaintiff, and an order denying a new trial, defendant appealed. Judgment and order reversed.

Woodruff & McClure, for appellant. S. M. Haskins, for respondent.

SHAW, J. At the time of the transaction both plaintiff and defendant were real estate brokers. The former seeks to recover from defendant a broker's commission upon an oral agreement for services rendered in effecting a sale of certain real estate, which agreement it is alleged was made with defendant as the agent and broker of Frances D. Kraemer and Frank White, each of whom, with defendant, owned an undivided one-third interest in the property sold. It is alleged in the complaint "that in offering said property for sale the defendant was acting as the agent of said Frances D. Kraemer and of said Frank White as to the interest held by each of them in said property as aforesaid; that, as such agent for said Frances D. Kraemer and said Frank White, defendant entered into an oral agreement with plaintiff, wherein and whereby the defendant agreed to pay plaintiff a reasonable commission if plaintiff would effect a sale of the property hereinbefore described." It is further alleged that plaintiff effected a sale thereof, by reason whereof, and by reason of said agreement, there became due to him from the defendant a reasonable commission upon the price for which the property was sold. Defendant interposed a general demurrer, and also demurred to the complaint specially, alleging as grounds therefor that the cause of action was barred by subdivision 6 of section 1624 of the Civil Code, and that the complaint was uncertain in that it could not be ascertained whether the agreement was for the division of commissions between plaintiff and defendant, or whether the plaintiff was to receive the entire commission for the sale of the property. This demurrer was by the court overruled. Upon trial judgment was rendered in favor of plaintiff for a reasonable commission upon that portion of the sale price of the property other than that found to be owned by the defendant. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

Section 1624 of the Civil Code provides in express terms that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is "invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent." While it is true, as said in *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289, that said provision was "designed to protect owners of real estate against unfounded claims of brokers," it is nevertheless equally applicable to any contract whereby one, whether owner or not, employs another to effect a sale of real estate, and agrees unconditionally to pay a stipulated sum for the performance of such services. Conceding that the compensation recoverable by a broker for selling real estate is the sub-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ject of an oral contract between him and another, under which agreement the latter is to recover the commission for effecting the sale, nevertheless a complaint, in order to state a cause of action upon such oral contract, must allege that the one from whom it is sought to recover was by his principal authorized in writing to effect a sale. Therefore, in the absence of an allegation in the complaint showing some written memorandum signed by her, Kraemer could not be chargeable with the payment of a commission to defendant for effecting a sale of her interest in the property. Hence there was no commission that could be the subject of an oral contract. While a pleading must be construed most strongly against the pleader, nothing appears in the complaint which, by any stretch of the imagination, could be construed as a memorandum or note subscribed by her and constituting an employment of defendant to make the sale of her interest, from which a promise to pay a reasonable, or any, commission to defendant could be implied. It is alleged that "in offering the property for sale defendant was acting as the agent of said Frances D. Kraemer," and "that as such agent"—that is, such acting agent—he entered into an oral agreement with plaintiff, not to pay him what defendant might recover under a written employment signed by Kraemer for effecting a sale of her interest, but a reasonable commission for making a sale of the whole property. It would appear the complaint could not be otherwise drawn; for plaintiff himself testifies, "he [defendant] promised me \$1,250 commission for the selling of that piece of property [the whole] for \$24,500." Assuming the words "as agent," used in the complaint, as being *descriptio personæ*, and that the contract was made in defendant's individual capacity, or considering it made on behalf of Kraemer, for whom it is alleged he was the acting agent, it charges him unconditionally in the one case, and his principal in the other, with the payment of compensation which, under subdivision 6, § 1624, Code Civ. Proc. cannot be recovered in the absence of a written memorandum or note of the agreement. None is alleged, and therefore the demurrer should have been sustained.

The judgment and order appealed from are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 368

KING v. ARMSTRONG. (Civ. 528.)

(Court of Appeal, Second District, California. Nov. 19, 1908.)

1. BANKS AND BANKING (§ 250*)—NATIONAL BANKS—STOCKHOLDERS—LIABILITY—ACTION TO ENFORCE—LIMITATION.

An action to recover from a stockholder of an insolvent national bank an assessment levied

on the stock is an action to enforce a liability created by law, within Code Civ. Proc. § 359, providing that the title, under which it is placed "Of the time of commencing civil actions," does not affect actions against stockholders to enforce a liability created by law, but that such actions must be brought within three years after discovery of the facts on which the liability was created; and a stockholder who has been absent from the state during a part of the period of limitation is not barred from relying on the statutory limitation, notwithstanding section 351 of the same title which excludes from the limitation period the time during which defendant may have been absent from the state.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 250.*]

2. STATUTES (§ 194*)—CONSTRUCTION—GENERAL AND SPECIAL PROVISIONS.

Where there are in a statute specific provisions relating to a particular subject, such provisions govern as to that subject as against general provisions in other parts of the statute, though the latter, standing alone, are broad enough to include the subject to which the more particular provisions relate.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. § 194.*]

3. STATUTES (§ 174*)—CONSTRUCTION.

There is no room for interpretation of a statute when the language thereof leaves no doubt as to the meaning of the Legislature.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 174.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Albert S. King, as receiver of an insolvent national bank, against W. W. Armstrong. From a judgment for defendant, after sustaining a demurrer to the complaint without leave to amend, plaintiff appeals. Affirmed.

Patton & Page, J. T. Houx, and Maguire & Barrett, for appellant. W. W. Butler, for respondent.

SHAW, J. This is an action brought by plaintiff, as receiver of an insolvent national bank in the state of Kansas, to recover from defendant, as a stockholder of said bank, the amount of an assessment levied upon certain stock of which he was the alleged owner. After the bank had gone into voluntary liquidation a proceeding was instituted by one of its creditors in the United States Circuit Court for the district wherein the bank was located, in which proceeding plaintiff was appointed receiver of the bank. Thereafter, on February 12, 1900, the court, by an order made in said proceeding, levied an assessment of \$38.84 upon each share of the capital stock of said bank, and ordered that the same be paid by the holders thereof to said receiver within 60 days from said date. It is alleged that at the time, and ever since the incurring of the indebtedness for which the said assessment was levied defendant resided out of the state of Kansas, and that he has never been a resident of this state, nor been within the state for a period aggregating one year. Defendant demurred generally

to the second amended complaint, and also upon the ground that plaintiff had not legal capacity to sue in this state, and upon the further ground that the cause of action was barred by reason of the provisions of section 359 of the Code of Civil Procedure. The court sustained this demurrer, without leave to amend, and rendered judgment for defendant, from which plaintiff prosecutes this appeal.

The sole ground for sustaining the demurrer urged by the respondent upon this hearing is that the cause of action is barred by said section 359, Code Civ. Proc., which is as follows: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created." The record does not disclose when either the original or the second amended complaint was filed. We feel warranted in assuming, however, from counsel's discussion that the action was instituted more than three years after the expiration of the 60 days within which the assessment was ordered to be paid. The suit is to recover upon a liability created by law. Under the provisions of said section 359, Code Civ. Proc., such actions are barred unless commenced within three years after such liability be created. Appellant concedes this to be true, but contends that, inasmuch as defendant has been out of the state for the entire period, excepting less than one year, since the cause of action accrued, the time of his absence is not part of the time limited for the commencement of the action. In other words, defendant must, in order to avail himself of the statute, have been within the state for a period aggregating the full term of three years. This contention is based upon the provisions of section 351, Code Civ. Proc., which excludes from the period within which actions may be commenced the time during which the party defendant may be absent from the state. Said section 351 is one of 51 sections, numbered 312 to 363, both inclusive, constituting the statute of limitations, and arranged under title 2, Code Civ. Proc., entitled "Of the time of commencing civil actions," all of which relate to the subject named. Section 359 is also one of said sections, and in positive and express terms provides that "this title does not affect actions against * * * stockholders of a corporation to * * * enforce a liability created by law." Said section 351, the provisions of which appellant invokes, is a part of the title which by section 359 in express terms is declared inapplicable to actions to enforce a liability created by law, to which class this action belongs. It is

true, as argued by appellant, that the provision of section 351, extending the time during the period of absence, is broad and without qualification. That its provisions are general may be admitted, but "where there are in an act specific provisions relating to a particular subject, they must govern in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate." *Frandsen v. County*, 101 Cal. 319, 35 Pac. 897. In other sections of title 2 the Legislature declare a general rule as to the time within which actions shall be brought, and provide that such prescribed time shall not run during the absence from the state of the party against whom such action has accrued, and then deliberately and in positive terms provide that such rule shall not apply to an action against a stockholder to enforce a liability created by law. As said in *Hunt v. Ward*, 99 Cal. 614, 34 Pac. 336, 37 Am. St. Rep. 87: "There is no room for the play of interpretation when the language under review leaves no doubt as to the meaning of those who used it."

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 440

IRRGANG v. OTT. (Civ. 513.)

(Court of Appeal, Third District, California. Nov. 28, 1908. Rehearing Denied by Supreme Court Jan. 22, 1909.)

1. PARTIES (§ 71*)—DESCRIPTION—PARTICULAR CAPACITY—ALLEGATION—SURPLUSAGE.

Where the complaint in an action for injuries while painting a house showed clearly that the action was against defendant individually, allegations that defendant was a stockholder in and president of the company which engaged plaintiff to paint its house were surplusage, and did not charge the company with any liability.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 113; Dec. Dig. § 71.*]

2. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—OVERRULING DEMURRER—AMBIGUITY OF COMPLAINT.

Where defendant answered and went to trial upon the issues, and was not misled in any way as to the issues so that the case was fairly tried upon the merits, any error in overruling a demurrer to the complaint for ambiguity and uncertainty was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4105; Dec. Dig. § 1040.*]

3. NEGLIGENCE (§ 134*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for injuries sustained by defendant's negligence in letting loose a rope which held a scaffold on which plaintiff was working, causing plaintiff to fall, evidence held to sustain a verdict based on the theory that defendant was negligent in letting loose the rope.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 267; Dec. Dig. § 134.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. DAMAGES (§ 42*) — AMOUNT—PERSONAL INJURIES — ITEMS OF DAMAGES — INCREASED LIVING EXPENSES.

If plaintiff's living expenses were increased by reason of his illness, resulting from his injuries, in an action for such injuries, the excess of living expenses were recoverable as an item of damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 89; Dec. Dig. § 42.*]

5. DAMAGES (§ 221*)—VERDICT—GENERAL VERDICT — FINDINGS INCONSISTENT WITH GENERAL VERDICT.

Where a special interrogatory asked the jury what amount would compensate plaintiff for all the damage caused by his injuries, and the jury answered \$600, and the general verdict found for plaintiff for certain items of damage, including doctor's bill, compensation for injuries, etc., which made a total of \$600, there was no conflict between the general and special verdicts, though some of the items of the general verdict were not supported by evidence, and hence the special findings would not control the general verdict as to the amount of damages recoverable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 564; Dec. Dig. § 221.*]

6. NEGLIGENCE (§ 3*) — ACTS CONSTITUTING NEGLIGENCE.

Where plaintiff was injured by defendant letting loose a rope which supported a scaffold on which plaintiff was working, defendant's belief that plaintiff told him to let the rope loose would not excuse him, unless in exercising that belief he acted with the prudence the situation demanded.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 5; Dec. Dig. § 3.*]

7. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

Where the jury found that defendant did not exercise ordinary care in loosening a rope which held the scaffold on which plaintiff was at work, so that it was immaterial whether he believed that plaintiff told him to let go, there was no prejudicial error in refusing special interrogatories as to whether defendant loosened the rope in the belief as a prudent man that plaintiff directed him to do so.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225, 4227; Dec. Dig. § 1068.*]

8. TRIAL (§ 351*)—SPECIAL INTERROGATORIES —NECESSITY—REPETITION OF QUESTIONS ALREADY ASKED.

The court may refuse a special interrogatory which merely repeats, in form or substance, one already given involving the same questions of fact, and, where a special issue required an answer whether plaintiff and defendant were both negligent, another question as to whether both used ordinary care was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 834; Dec. Dig. § 351.*]

9. APPEAL AND ERROR (§ 870*)—REVIEW—EXTENT—APPEAL FROM JUDGMENT—ORDER TAXING COSTS.

Where judgment was not rendered until some time after verdict, and in the meantime the court made an order settling the cost bill as rendered and included the amount in the judgment, the order settling the bill will be reviewed on appeal from the judgment, though there was no appeal from the order.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3512; Dec. Dig. § 870.*]

10. COURTS (§ 57*) — OFFICERS — STENOGRAPHERS — COMPENSATION — TRAVELING EXPENSES.

Code Civ. Proc. § 274, relating to compensation of court reporters, does not authorize payment of their traveling expenses in civil cases.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 200; Dec. Dig. § 57.*]

11. COSTS (§ 175*) — AMOUNT — EXPENSES OF JURY.

Expenses for the board of the jury while sitting in the case are not allowable as costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 698; Dec. Dig. § 175.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Adolph Irrgang against Frank Ott. From a judgment for plaintiff, defendant appeals. Affirmed as modified.

Weldon & Held, for appellant. J. W. Preston, for respondent.

CHIPMAN, P. J. This is an appeal from a judgment on the verdict of a jury awarding damages to a plaintiff for injuries received by him through the negligence of defendant. Defendant appeals from the judgment on bill of exceptions.

1. It is first contended that the demurrer to the complaint for ambiguity and uncertainty should have been sustained. We think the complaint shows clearly enough that defendant was sued as an individual, although it is alleged, quite unnecessarily, that he was a stockholder and president of the company that had engaged plaintiff to paint its house. This averment was superfluous, and does not charge the company with any responsibility for the injury. The allegations as to the circumstances of the injury were sufficiently definite and certain to show prima facie that defendant alone was responsible for the injury. Besides, defendant answered and went to trial upon the issues, and nothing appears to indicate that he was misled in any way as to the issues he was to meet, and, in fact, did meet as best he could, and the cause was fairly tried upon its merits. *Bank of Le Moore v. Fulgham*, 151 Cal. 234, 90 Pac. 936.

2. It is urged that the evidence does not support the verdict. It appeared that plaintiff was engaged in painting a building belonging to the company of which defendant was president; that his work required the use of a swinging scaffold which was fastened to the roof of the building by hooks to which ropes were attached and fastened to the scaffold. It became necessary to move the scaffold to another part of the building, and to do this ropes and pulleys to support it were used while supporting hooks were being attached to the roof of the building. Defendant had assisted plaintiff in removing the scaffold at other times, and on the occasion in question he did so. His station was on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ground in front of the building, where he was able without effort to hold the scaffold in place by ropes fastened to each end while plaintiff got onto the scaffold and adjusted the hooks which when done made it no longer necessary for defendant to retain his hold of the ropes. Plaintiff left defendant holding these ropes, went to the roof, got down upon one end of the scaffold, which was about four feet from the top of a three-story building, fastened a hook, and told defendant to let go the rope holding that end which defendant did. Plaintiff then "started to crawl along on the scaffold for the purpose of fastening the other end," as he testified, and when about midway of the scaffold, he "noticed that Ott (defendant) was not on the outside of the building holding the rope. Mr. Ott had moved and gone inside the building, and the rope he was holding led into the door of the building." Plaintiff "called to him to come out and attend to business, that this was no monkey business." The next instant the scaffold fell, and plaintiff was precipitated to the ground, thus receiving the injuries complained of. Defendant testified that he stepped into the door of the building, with his back towards the outside, holding the rope over his shoulder, so as to draw the scaffold up against the building, as the wind was blowing "and the loose end of the scaffold would swing away from the building." Standing there he heard plaintiff call, and thought he said to "let go." He let go of the rope, and the scaffold fell to the ground immediately. Witness Harris, who was assisting plaintiff in painting the building, testified that the scaffold was "right against the wall," and that "the first position assumed by Mr. Ott was a good position to hold the ropes and keep the scaffold where he wanted it. There was not on that occasion any necessity for moving his position either by going inside the building or to any other place." The question of defendant's negligence was fairly before the jury, and we think the evidence was sufficient to support the verdict.

3. The jury rendered the following verdict: "We, the jury, find for the plaintiff and fix the damages as follows: First. For personal injuries, \$135.00. Second. For loss of time, \$300.00. Third. For expenses of sickness, including services of a physician, nurse hire and medicine: Physician, \$75.00, board and nurse, \$85.00, drugs, \$5.00." At the request of defendant the following special issues were submitted to and answered by the jury:

"(1) What amount will compensate the plaintiff for all the detriment proximately caused to him by his injuries?" The jury answered: "\$600.00."

"(2) Were the plaintiff, and the defendant, both guilty of negligence herein?" The jury answered: "No."

"(3) When the defendant turned loose the rope, as testified to herein, did he exercise that degree of care which an ordinary, pru-

dent, and careful person would exercise under like circumstances?" The jury answered: "No."

There were certain other special issues presented by defendant which the court, it is claimed, erroneously refused to submit to the jury and are here given:

"When the defendant turned loose the rope, as testified to herein, did he, acting as a prudent man, believe that the plaintiff had called to him to let go the rope?"

"If the answer to the above question is 'Yes,' do you find that when the defendant turned loose the rope he did so, acting on the belief as a prudent man, that the plaintiff had directed him to do so?"

"Did the plaintiff and the defendant both use ordinary care in the transaction out of which arose the injuries to plaintiff?"

It is contended that it was error for the court to enter judgment on the verdict for \$600; the erroneous elements therein being: First, the item of \$85, because the court had allowed \$300 "for loss of time" and plaintiff was not entitled to both, for he would thus "receive double damages if allowed the expense of living, in addition to the value of his time" (citing *Graeber v. Derwin*, 43 Cal. 495); second, \$5 for drugs as to which there is no evidence. It was held in the case cited that, "if it had appeared that the expenses of living were increased by reason of the illness resulting from the injury, there would have been plausible ground for claiming the excess as an item of damage." In the present case it so appeared. Before the injury, he was paying \$5 per week for his living expense, but he was charged \$10 per week, as the result of his injuries "for board and nurse" for 8½ weeks, which amounted to \$85. There was no evidence of the purchase of any drugs. Respondent concedes that the judgment is \$42.50 too much for board, and that the item of \$5 for drugs is not supported. But he claims that the answers to the special issues were in conflict with the general verdict and that the special verdict must control (citing *Code Civ. Proc.* § 625, and *Clementson*, Spec. Ver. p. 153). The Code provision reads: "Where a special finding of facts is inconsistent with the general verdict the former controls the latter and the court must give judgment accordingly." The special issue which was submitted to the jury, marked "1," called for an answer as to all the detriment caused by defendant to plaintiff, and the jury answered \$600, which is exactly the sum of the items mentioned in the general verdict. In answering the special issue, the jury, we think, intended to and did make their answer conform to their estimate of the amount of damages as stated by items in their general verdict. The general verdict gave the items constituting the damage and the special verdict purported to and did give the amount for "all the detriment" or damages caused by defendant to plaintiff. There is no conflict or inconsistency between the

two verdicts—one gives the items and the other the amount of those items. It was said in *Froman v. Rous*, 83 Ind. 94, cited in note Clementson on Special Verdicts, supra: "We have no doubt that a plaintiff may be awarded a larger sum than that stated in the general verdict if the answers show him entitled to it. Where the facts specially found clearly show that the jury have erred in computing the amount of recovery, there is a conflict between the answers and the general verdict, and the former must control." Respondent admits that there is no support in the facts for \$47.50 included in the judgment, and we do not think his reason for retaining that amount is sound. The judgment must be modified to that extent.

4. It is next contended that the court should have given to the jury the rejected questions for the reason that they were based upon the theory of inevitable accident, and were not given in the form requested or otherwise. The first two questions, which were refused, do not present the issue of inevitable accident, unless it be true that defendant's belief that plaintiff had directed him to let go the rope was a complete defense. The questions hinges on defendant's belief alone which we do not think would excuse him, unless in exercising that belief he acted with that prudence which the situation of the parties demanded. This question of prudence was clearly presented by the question given to the jury marked "3." It was there asked if when defendant "turned loose the rope, as testified to herein, did he exercise that degree of care which an ordinary, prudent and careful person would exercise under like circumstances?" To which the jury answered, "No"; the jury having thus determined the vital question it was immaterial what defendant's belief was.

The third question, which was refused, called for an answer whether or not both parties used ordinary care, while question numbered 2, which was given, required an answer whether or not both were guilty of negligence. Plaintiff's negligence was not an issue in the case, and no evidence pointed to negligence on his part. Furthermore, we think both questions were in effect the same and one being answered the other became immaterial. Where the same issue or question of fact is involved in another special issue or question of fact, the court may refuse to submit a special issue which is but a repetition, in form or substance, of the one given. *Plyer v. Pac. Portland Cement Co.*, 152 Cal. 125, 92 Pac. 56; *Clementson*, Spec. Ver., p. 53.

5. Defendant moved the court to retax the cost bill filed on the same day of the verdict. The court did not enter judgment until some time after the verdict was rendered. Meanwhile the court made an order settling the cost bill as rendered, and afterwards included the amount in its judgment. There is no

appeal from the order. We may, however, review its action on the appeal from the judgment. *Empire Lumber Co. v. Bonanza Co.*, 67 Cal. 406, 410, 7 Pac. 810. The jury sat one day and was paid their per diem by defendant. The item of \$4.55 "was incurred for the board of the jury during the time the jury were deliberating upon their verdict, and after the case had been submitted to them and before a verdict was rendered." The item of \$4.50 was a charge "for the traveling expenses of the reporter from Santa Rosa to Ukiah, there being no regular court reporter for the superior court of Mendocino county, by appointment or otherwise." No authority is given by section 274 of the Code of Civil Procedure for payment of traveling expenses of reporter in civil cases. We know of no authority for allowing as costs the board of a jury. Respondent says he is "inclined to the belief that the contention of the appellant is correct." We are similarly inclined.

The judgment should be modified by deducting therefrom the sum of \$47.50 for excess of board and for drugs, and the further sum of \$9.05 erroneously allowed for costs and otherwise to stand affirmed, and it is so ordered.

We concur: HART, J.; BURNETT, J.

9 Cal. App. 361
COMPRESSED AIR MACHINERY CO. v.
WEST SAN PABLO LAND & WATER CO. (Civ. 512.)

(Court of Appeal, First District, California.
Nov. 19, 1908.)

1. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR.

Defendant in replevin cannot complain because the jury disregarded an instruction that the damages for detention should be the same whether the property could or could not be delivered to plaintiff and found a lesser sum in case delivery could not be had; the proper amount being awarded in case delivery could be had.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4059; Dec. Dig. § 1033.*]

2. CONTRACTS (§ 333*)—BREACH OF CONTRACT—PLEADING.

An allegation of damage for failure to pay stipulated sums of money is proper in an action upon a contract to make such payment.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 333.*]

3. ACTION (§ 65*)—RECOVERY LIMITED TO BRINGING OF SUIT.

In an action to recover money due under a contract, no recovery can be had for money not due at time suit was brought.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 735; Dec. Dig. § 65.*]

4. REPLEVIN (§ 76*)—DAMAGES FOR DETENTION—COMPUTATION.

In replevin damages for the detention should have been computed to the date of the filing of the complaint, and not to the entry of judgment.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 305; Dec. Dig. § 76.*]

5. APPEAL AND ERROR (§ 1151*)—REVERSAL—MODIFICATION OF JUDGMENT.

Error in replevin in allowing damages for the detention to the entry of judgment, instead of to the filing of the complaint, is not reversible; it being proper to modify the judgment to conform to the verdict read in connection with the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4500; Dec. Dig. § 1151.*]

6. JUDGMENT (§ 251*)—CONFORMITY TO PLEADINGS.

Under the express terms of Code Civ. Proc. § 580, a judgment for plaintiff must be consistent with the case made by the complaint and embraced within the issues.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

7. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS.

In replevin of property leased with an option to buy, it was not prejudicial error to instruct that, if when a particular payment was made by defendant to plaintiff after plaintiff had presented an account for other moneys due, defendant had not elected to purchase, there was no obligation for the purchase of said property to which the payment could be applied so as to defeat the right to recover, where plaintiff's right to recover depended on whether defendant had exercised the option, and the uncontradicted evidence showed that it had not done so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Compressed Air Machinery Company against West San Pablo Land & Water Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Modified and affirmed.

Thos. E. Haven, for appellant. Morrison, Cope & Brobeck, for respondent.

HALL, J. Appeal from judgment for plaintiff and order denying defendant's motion for a new trial.

The action was brought to recover the possession of certain machinery, to wit, an air compressor and receiver, and their connections, or the sum of \$1,200, the value thereof, in case a delivery cannot be had, and damages in the sum of \$673. The action was tried before a jury, which first returned a verdict for plaintiff for the recovery of the property, and for damages at the rate of \$50 per month for the detention thereof, or, in case a delivery cannot be had, for the sum of \$1,200, as the value of the property, together with \$150 damages for its detention. The court thereupon refused to receive the verdict, but directed the jury to insert the date from which the \$50 per month should be reckoned, and also instructed them that the damages should be the same whether the property could or could not be delivered to plaintiff. The jury again retired, and subsequently brought in the following

verdict: "We, the jury in the above-entitled cause, find that the plaintiff herein is entitled to recover possession of the property described in the complaint herein, together with \$50 per month damages for its detention from February 7, 1906, or, if delivery thereof cannot be had, the sum of \$1,200, as the value of said property, together with \$150 as damages for its detention," which was received by the court. It is insisted by appellant that the verdict is against law, for the reason that the jury plainly disregarded the instruction of the court that the damages should be the same whether the property could or could not be delivered to plaintiff. This undoubtedly was the rule laid down in *Emerson v. County of Santa Clara*, 40 Cal. 545, and *Aguirre v. Alexander*, 58 Cal. 30; but the rule so broadly stated in said cases is no longer followed in this state. A judgment will not be reversed or a new trial granted for a mere error when it clearly appears that the appellant has suffered no injury therefrom. *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 104, 45 Pac. 1047; *Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386; Code Civ. Proc. § 475; *O'Neil v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, overruling *Emerson v. County of Santa Clara*, supra. In the case at bar we think it perfectly clear from the pleadings and the evidence of both plaintiff and defendant that, if plaintiff was entitled to recover the possession of the property sued for, it was also entitled to recover as damages the sum of \$50 per month from the 7th day of February, 1906. The finding therefor of a lesser sum in case a delivery could not be had could in no wise injure appellant, but was to its benefit. The complaint alleges that plaintiff delivered to defendant the property sued for on the 18th day of October, 1905, upon an agreement that defendant should have the use of the same for 60 days upon the payment of \$100, with the right at the expiration of said 60 days to buy the same for \$1,200, and in that event the \$100 to be taken as part of the purchase price, and that if defendant did not elect to buy the property, but retained the same after the expiration of the 60 days, it should pay for the use thereof \$50 per month in advance for every month it should retain possession, with right to plaintiff to demand possession thereof at any time after the expiration of the 60 days. It was alleged that defendant never did elect to buy the property, never paid the purchase price therefor, or any part of the sums of \$100 or \$50 per month. The allegation of the non-payment of the monthly rental was not denied.

The defendant in its answer alleged that "it was understood and agreed by and between plaintiff and defendant that said air compressor and receiver should be installed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and placed in operation by plaintiff, and that, after the same was completely installed to the satisfaction of defendant, said defendant should have the option of purchasing said air compressor and receiver and other machinery so described in said complaint at the reasonable value thereof, or of renting the same from plaintiff at a monthly rental of fifty dollars per month. Subsequent to the installation of said air compressor and receiver, and prior to the accruing of any rent therefor, defendant notified plaintiff of its election to purchase said air compressor and receiver and the parts and connections therefor, described in said complaint, at their reasonable value." It is thus apparent that upon the pleadings there was no contention as to how much the rent should be per month in case the property was not purchased. There was a contention as to when the rent should commence, but upon this point the jury found in accordance with the contention and evidence of defendant. Upon the question as to amount of rent per month, both the pleadings and evidence of defendant were that it was to be \$50 per month. The principal contention in the case was as to whether or not plaintiff was entitled to recover the possession of the property. This depended upon whether or not defendant ever purchased the property. Upon this point the verdict of the jury was against defendant; and it is not and cannot be attacked upon the record before us as not justified by the evidence. The finding of the jury being conclusive that defendant did not purchase the property, plaintiff was entitled to \$50 per month for the use of the property, which defendant's answer admitted to be unpaid. This amount the jury awarded as damages in case the property could be delivered, but awarded a less amount if delivery of the property could not be made. In this contingency the jury awarded less than plaintiff was clearly entitled to, and defendant cannot be injured thereby.

It is next insisted that the verdict and judgment are erroneous and against law because awarding an amount in excess of that demanded in the complaint. After pleading the contract and agreement upon which the property was delivered by plaintiff to defendant, by the terms of which defendant was to pay for the use of the property, if it did not elect to buy, the sum of \$50 per month in advance, as well as \$100 for the first 60 days, and that defendant has ever since the 18th day of October, 1905, retained the possession and use of the same, but has never elected to purchase the same, and has never paid the agreed price of \$1,200, or any part thereof. It is alleged in paragraph 7 that "defendant has not paid the said sum of \$100, or the said sum of \$50 per month, or any part thereof, but the whole thereof is still due, owing and unpaid from defendant to plaintiff." Next follows the allegation that plaintiff after the expiration of the period of 60 days

from the delivery of the property, to wit, on the 9th day of November, 1906, demanded from defendant the possession of said property, and its refusal to deliver the same.

It is finally alleged, in paragraph 9, "that plaintiff has been damaged by the failure of defendant to pay for the use of said air compressor and receiver in the sum of \$100, and the additional sum of \$50 per month from and including the 18th day of December, 1905, together with interest at the rate of 6 per cent. per annum on said sum of \$100 from the 18th day of October, 1905, and on each installment of \$50 per month from the date when the same became due and payable, as hereinabove alleged, to the time of the commencement of this action." It is thus seen that the damages alleged are damages for failure to pay sums of money agreed to be paid as rent for the use of the property sued for. The action was one to recover property leased upon the termination of the lease, and certain sums of money contracted to be paid as rental for said property. There is in the complaint no allegation of damage other than the allegation of damage for failure to pay the stipulated sums of money. This allegation of damage is quite correct in an action upon a contract to pay a stipulated sum of money. "The theory of the law is not that the party recovers the particular note or chose in action, as is commonly imagined, but that he recovers damages for the nonperformance of the contract, and, in case of failure to pay money due, it has always been held that the true measure of damages was the amount of money owing and the interest which was agreed upon." *Guy v. Franklin*, 5 Cal. 416. The pleader in the case at bar followed this rule. In the body of his complaint he alleged a failure to pay certain agreed sums, and damages for such failure, in the same amounts, with interest from the time the several amounts became due to the time of the commencement of the action.

The prayer of the complaint is "for damages in the sum of \$673," which sum is the aggregate of the due, unpaid, and agreed rentals, with interest to the commencement of the action. The allegations in the body of the complaint upon the question of damages, as well as the prayer for judgment, relate to the damages directly resulting from a breach of a contract to pay certain agreed rentals. In other words, in this respect the action is one to recover money due under a contract. In such an action no recovery can be had for money not due at the time of beginning the action.

This brings us to a consideration of the verdict rendered by the jury, and the judgment entered thereon by the court. First as to the verdict. The jury did not find a gross sum, but fixed the damages at \$50 per month from a given date. This was in the nature of a special finding of fact, from which the court could by mathematical calculation determine the total damages in view of the is-

sue upon the question of damages presented by the pleadings. Under this verdict, read in connection with the pleadings, the damages should have been calculated at the rate of \$50 per month from the 7th day of February, 1906, to the date of filing the complaint, which was November 21, 1906. So calculated, the damages amount to the sum of \$473.33, which is not in excess of the damages pleaded in the body of the complaint or demanded in the prayer. In entering judgment upon the verdict, the court calculated the damages from the date fixed by the jury to the date of the entry of judgment. If we are correct in what we have said regarding the verdict and the pleadings, this was erroneous. The error, however, does not affect the verdict, or require a new trial, but may and should be corrected by modifying the judgment so as to conform to the verdict read in connection with the pleadings. In any case the relief that may be granted must be consistent with the case made by the complaint and embraced within the issues. Code Civ. Proc. § 580.

Appellant presents but one other point as calling for a reversal. The court charged the jury as follows: "If you find from the evidence that, when said payment of \$1,000 was made by defendant to plaintiff, defendant had not elected to purchase said machinery, you are instructed that there was at the time no obligation existing for the purchase of said machinery to which said payment could be applied." The \$1,000 payment referred to is a payment that was made by defendant to plaintiff after the presentation of a bill containing five pages of items, aggregating \$2,641.69, and another for \$1,271.50, but neither of which contained any charge for the purchase of the property in suit. Defendant disputed the bills, but finally made a payment of \$1,000, taking a receipt as follows: "San Francisco, Feby. 7, 1906. Rec'd from West San Pablo Land and Water Company, one thousand dollars, to be applied as credit on bills as presented when they shall be accepted as correct. The Compressed Air Mch. Co., per W. E. Hampton." Under some circumstances, in a case such as this, it might well be claimed that this instruction would be misleading to the jury and prejudicial to defendant. But, in view of the evidence in this case, no such result could possibly follow. Plaintiff's right to recover possession of the property depended on whether or not defendant had ever purchased the property. We think the evidence both of plaintiff and defendant without contradiction clearly establishes that it never did do so. Defendant, both in its answer and in the evidence which was given by Mr. Hellings, defendant's only witness, only claimed to have been willing to purchase the property in suit at \$1,000. He makes it perfectly clear that defendant was not willing to pay \$1,200 for it, and never

notified plaintiff that it would take it at \$1,200, and never elected to take it at that price. This is in accordance with defendant's answer, which sets up that it notified plaintiff of its election to purchase the property in suit at its reasonable value which it alleged does not exceed \$1,000. On the other hand, the evidence shows without contradiction that the property was delivered and installed on the premises of defendant, with an option to defendant to purchase the same at the fixed price of \$1,200. Mr. Hampton, who acted in the matter for plaintiff, so testified; and Mr. Hellings, who acted for defendant, testified to the same effect. We quote from his testimony: "Mr. Hampton stated that he would set up the compressor, and after a run I was to have the privilege of buying or renting it, and he stated the price as \$1,200." We think it perfectly clear from defendant's own evidence that the price agreed on before the machinery was installed was \$1,200. Defendant never elected to take the property at that price. It therefore cannot apply the payment of \$1,000 to the purchase price of property it has never purchased or agreed to purchase.

The order denying the motion for a new trial is affirmed, and the action is remanded to the trial court, with directions to said court to amend and modify the judgment as of the date of the entry thereof, by striking therefrom the following, to wit: "Nine hundred and sixty-six and 66/100 (\$966.66) dollars, said sum being at the rate of \$50.00 per month from February 7th, 1906, to date hereof" and inserting in lieu thereof the following, to wit: "Four hundred and seventy-three and 33/100 (\$473.33) dollars, said sum being at the rate of \$50.00 per month from February 7th, 1906, to the date of the commencement of this action" and, as so modified, the judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 396.

MILLER v. ABRAHAMSON. (Civ. 558.)

(Court of Appeal, Second District, California.
Nov. 24, 1908.)

1. MONEY RECEIVED (§ 17*)—LANGUAGE AND FORM OF ALLEGATIONS.

A complaint in the form of a common-law declaration in assumpsit, alleging that defendant is indebted to plaintiff in a sum specified, for money had and received by defendant to the use of plaintiff within two years last passed, is sufficient, under the code practice requiring plaintiff to state the facts constituting the cause of action.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 55; Dec. Dig. § 17.*]

2. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Where one count of the complaint, to which a demurrer was properly overruled, is sufficient to sustain the judgment, the error, if any, in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

rulings on demurrers to other counts is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4089; Dec. Dig. § 1040.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by J. K. Miller against N. S. Abrahamson. Plaintiff had judgment, and defendant appeals on the judgment roll. Affirmed.

Charles I. Sweet, for appellant. Avery & French, for respondent.

SHAW, J. The ground upon which a reversal is urged is the alleged error of the court in overruling defendant's general demurrer to the first count of the complaint. The pleading, instead of stating the facts constituting the cause of action based thereon, is in the common-law form of a declaration in indebitatus assumpsit, alleging "that defendant is indebted to plaintiff in the sum of \$622.10, for money had and received by defendant to the use of the plaintiff and L. P. Laursen within two years last past." Appellant contends that this form of pleading is inconsistent with the provision of the Code requiring the plaintiff to state the facts constituting the cause of action. At an early date in this state (*Freeborn v. Glazer*, 10 Cal. 337), this identical question was made the subject of judicial expression by our Supreme Court, which then held that a complaint for money had and received in the language here used was sufficient. In discussing a like objection presented in *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998, the court says: "The objection that the common counts are inconsistent with the provision of the Code that a complaint must state the facts constituting the cause of action in ordinary and concise language, and are therefore insufficient, is not tenable. It was held in this state at an early day, and has since been repeatedly held, that the common counts may be used to state a cause of action, notwithstanding the provision referred to, which was found in the old statutes and was adopted into the Code (citing cases); and this rule has been recognized and acted upon in most of the states where the code practice has been adopted." See, also, *Abadie v. Carrillo*, 32 Cal. 172; *McDonald v. Pacific Debenture Co.*, 146 Cal. 667, 80 Pac. 1090. It is apparent from these decisions that the question is no longer an open one in this state.

The complaint contained second and third counts, based upon the same cause of action, as to which special demurrers, alleging that the same was uncertain and unintelligible, were interposed. As the first count, to which the general demurrer was interposed and properly overruled, is sufficient to sustain the judgment rendered in favor of plaintiff, it is immaterial as to the rulings made by the court upon the demurrers to the second and third counts. Even if such rulings were

erroneous, it would, at most, constitute harmless error. However, we may say that a cursory examination discloses no merit in the special objections urged to these counts. The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 398

SHEDOUDY v. SPRECKELS BROS. COMMERCIAL CO. (Civ. 539.)

(Court of Appeal, Second District, California. Nov. 25, 1908. Rehearing Denied by Supreme Court Jan. 21, 1909.)

1. WAREHOUSEMEN (§ 33*)—UNPAID CHARGES—SALE OF GOODS—CONTRACT AVOIDING LIMITATION.

If a warehouseman expressly agrees to keep goods until a specified date, or until the owner makes an extended trip, the limitation of 60 days fixed by the statute, after which sale may be made for charges, as provided by Pol. Code, §§ 3152, 3153, does not apply.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 33.*]

2. WAREHOUSEMEN (§ 34*)—AGREEMENT TO HOLD AND DELIVER GOODS—EVIDENCE SUSTAINING FINDING.

Evidence held to sustain a finding of an agreement by a warehouse company to continue to hold and warehouse goods and deliver them on the owner's order.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 34.*]

3. WAREHOUSEMEN (§ 33*)—UNPAID CHARGES—SALE OF GOODS.

The right of a warehouseman, under Pol. Code, § 3153, to sell property for charges if not called for within 60 days from its receipt applies as well to a case where the owner is known as to that where he is unknown.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 33.*]

4. WAREHOUSEMEN (§ 33*)—UNPAID CHARGES—SALE OF GOODS—SALE IN VIOLATION OF AGREEMENT—NEGLIGENCE—REPRESENTATIVE.

Failure of a warehouse company's representative to recollect his agreement to deliver goods to the owner at a particular time, or to note the agreement on the account kept with the goods, which were afterward sold for charges, in violation of the agreement, was the negligence of the company.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 33.*]

5. WAREHOUSEMEN (§ 30*)—LIEN FOR STORAGE CHARGES—EFFECT OF AGREEMENT WITH OWNER OF GOODS—"DEPOSITARY FOR HIRE."

A warehouseman who agrees to hold goods for a specified time and deliver them on the owner's order becomes a "depositary for hire" under Civ. Code, § 1856, and his lien for charges is regulated by the title on liens.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 2, p. 2000.]

6. WAREHOUSEMEN (§ 33*)—STORAGE CHARGES—SALE OF GOODS—NECESSITY OF NOTICE.

In view of Civ. Code, §§ 3002, 3003, requiring a demand of performance and notice before sale of pledged property, notice if not waived, is necessary to render valid a sale of the goods for storage charges, and otherwise a foreclosure of the lien by sale under direction

of the court, pursuant to section 3011, is necessary.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 33.*]

7. WAREHOUSEMEN (§ 33*) — SALE OF GOODS FOR CHARGES—EFFECT OF AGREEMENT WITH OWNER.

Where a warehouseman agrees to hold goods and deliver them on the owner's order, the latter is entitled to have them held a reasonable time, under the circumstances of the case, before a sale.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 33.*]

8. WAREHOUSEMEN (§ 34*) — SALE OF GOODS FOR CHARGES—EFFECT OF AGREEMENT WITH OWNER—QUESTION FOR JURY.

Where a warehouse company was informed by an owner of goods left in storage that he was going on a long trip, and agrees to keep them for him and deliver them on his order without specification as to time, six months cannot be said to be, as a matter of law, a reasonable time before sale for charges on his failure to call for them.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 34.*]

9. WAREHOUSEMEN (§ 33*) — SALE OF GOODS FOR STORAGE CHARGES—EFFECT OF AGREEMENT WITH OWNER.

Where a warehouseman continues to hold goods for the owner under an express agreement, without specification as to time, the minimum time of one year, fixed by Civ. Code, § 1857, for the sale of nonperishable goods for storage charges furnishes a measure that may well be applied to the time before which a sale may be made in case of the owner's failure to call for the goods pursuant to the agreement.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 33.*]

10. WAREHOUSEMEN (§ 34*)—ACTION FOR VIOLATION OF CONTRACT—EVIDENCE.

In an action against a warehouse company for the sale of plaintiff's goods for storage charges, in violation of an agreement by defendant's representative to continue to hold the same and deliver them on his order, it appeared that at the time of the agreement defendant's agent wrote on a card "Charges to Nov. 7, 2.50, 25 c. per mo. thereafter," and handed it to plaintiff on the latter's suggesting that he might forget the amount to be paid. *Held*, that defendant was not entitled to show the general use of the cards, one of which was handed to plaintiff with the terms of storage on it, as it was not the card, but the particular figures written on it by defendant's representative, which was evidence.

[Ed. Note.—For other cases, see Warehousemen, Dec. Dig. § 34.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Elias A. Shedoudy against Spreckels Bros. Commercial Company (a corporation). From a judgment for plaintiff, and from an order denying new trial, defendant appeals. Affirmed.

E. W. Camp, A. H. Van Cott and U. T. Clotfelter, for appellant. Conkling, Bretherton & Young, for respondent.

TAGGART, J. Appeal from judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial.

On the 10th day of July, 1905, plaintiff

shipped a case of crockery and oriental goods from San Bernardino to Los Angeles, addressed to "Elias A. Shedoudy, Los Angeles, Cal.," via the Santa Fé Railway. This case of goods was delivered to the defendant, as a warehouse keeper, at Los Angeles by the railway company, on August 7, 1905, to be stored until plaintiff should claim it. On November 7, 1905, plaintiff called at defendant's warehouse in said city, and in a conversation with defendant's representative was told that defendant had the case of goods, and the charges on them were \$2.50 to November 7th, and would be 25 cents a month thereafter. Plaintiff said he would like to leave the goods in storage, and was told that defendant would "keep them as long as you want." He then stated that he was going on a long trip, and that when he located he would send defendant a letter to send the goods C. O. D. The representative replied: "We might not send them C. O. D. You better send the money"—and upon plaintiff suggesting that he might forget the amount, defendant's agent wrote upon a card, "Charges to Nov. 7, 2.50, 25 c. per mo. thereafter," and handed it to plaintiff. To a suggestion made by the representative of defendant that the goods might not be worth the money (evidently referring to the charges that might accrue from storage, shipping, etc., in case the goods were sent C. O. D.) plaintiff replied, "there is about \$1,500 worth of goods in that case." Plaintiff went away "to the old country," and on reaching New York on his return wrote to defendant, under date of April 24, 1907, asking for a bill of the charges on the goods, and stating that, as soon as located, he would write where to send them. In response to this he received a postal card saying, "Your shipment was sold for unpaid charges more than a year ago." The evidence discloses that the case of goods was sold at public auction, without being opened, for \$3, on April 24, 1906, the unpaid charges at that time being \$3.25, and that the sale was made in accordance with the provisions of sections 3152 and 3153 of the Political Code. It is practically conceded that if defendant was authorized to sell under these sections, it has a good defense to the plaintiff's cause of action; otherwise not.

We think the fundamental question to be answered here is, "Was there a contract between the parties?" It must be admitted that if the defendant had expressly agreed to keep the goods until a specified date, the limitation of 60 days fixed by the statute after which sale might be made would have had no application. And so, if the agreement had been that they were to be kept by defendant while the plaintiff made an extended trip to Europe, it is evident that a sale in 60 days would not have been authorized. It is apparent, then, that the sections of the Code in question are to be considered as stating

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the terms of the contract implied by law where none has actually been made. The finding of the court that there was an agreement made between plaintiff and defendant, on November 7, 1905, whereby the defendant agreed and undertook that it would continue to hold and warehouse said goods for and on behalf of plaintiff, and to deliver them to the latter's order, is sustained by the evidence and is conclusive upon us that there was a contract. We do not think it material to the determination of the applicability to this case of the sections above mentioned that the name of plaintiff was known to defendant. He might have been as effectually unknown to defendant, for all the purposes of the law in question, from a lack of knowledge of his address as he would have been if his name had been unknown. And, again, property belonging to a known owner may be "unclaimed," as well as that which belongs to an unknown one, and, if such an owner did not call and pay within "sixty days from the receipt," no reason is suggested why the warehouseman would not be entitled to his remedy.

The facts here show that plaintiff called and claimed his goods on November 7, 1905, and while he did not pay the charges, he gave such assurances of his ability to pay that defendant accepted him as its debtor for the amount of charges already accrued, and without demanding payment of this, or of future charges, agreed to keep the goods until demanded by plaintiff, at the rate of 25 cents per month, to be shipped as ordered by plaintiff when the charges were paid. The failure of defendant's representative to recollect or to note the agreement upon the account kept with the goods was the negligence of defendant. From the date this agreement was made defendant became a depositary for hire, under section 1856 of the Civil Code, and its lien for storage charges was regulated by the title on liens. *Stewart v. Naud*, 125 Cal. 599, 58 Pac. 186. To render the sale valid notice was necessary, if notice was not waived. Sections 3002, 3003, Civ. Code. Otherwise, a foreclosure of the lien by a sale under the direction of a court was necessary. Sec. 3011, Civ. Code. No time being specified in the agreement, the plaintiff was entitled to have the goods held a reasonable time, under the circumstances of the case, before they were sold. Six months cannot be said, as a matter of law, to have been such time, and therefore the finding of the court that the goods were sold within an unreasonably short time, being a proper inference of fact from the evidence, will not be disturbed. Indeed, we are inclined to think that by analogy the minimum fixed by section 1857 in the case of nonperishable goods (one year) furnishes a measure of the legislative intention on this subject that might well be applied.

Several of the errors as to admission and

rejection of testimony relied upon by appellant are based upon objections having for their foundation the theory that sections 3152 and 3153 of the Political Code were applicable to the case. As to the others, the objections that the respondent and his witness Salem Balda were not qualified to testify on the subject of market value of the goods were properly overruled; and the objection to the question of defendant, which sought to show the general use of the cards, one of which was handed to the plaintiff with the terms of storage noted on it, was properly sustained. It was not the card, but the particular figures written on it by defendant's representative, which was evidence.

All the other grounds of reversal fail with the principal question considered.
Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 473

ARONSON et al. v. FRANKFURT ACCIDENT & PLATE GLASS INS. CO. (Civ. 524.)

(Court of Appeal, First District, California. Dec. 2, 1908. Rehearing Denied by Supreme Court Jan. 28, 1909.)

1. INSURANCE (§ 539*)—INDEMNITY INSURANCE—CONTRACT—CONSTRUCTION—"IMMEDIATELY"—"IN REGARD TO WHICH A CLAIM MAY ARISE."

An elevator liability insurance policy, which stipulates that, on the occurrence "of an accident to any person" in regard to which a claim may arise, notice in writing shall be immediately given by insured to insurer, that insurer, on receiving notice of any "accident or claim," may take on itself the settlement of the same, and that on any legal proceedings being taken to enforce a claim against insured, insurer shall be notified thereof, and it shall have absolute control of the defense of the action, requires insured, on the occurring of an accident, to immediately notify insurer in writing; and, unless legal proceedings are immediately commenced against insured for the accident, he must also give notice to insurer of the action when brought; the word "immediately" referring to the occurrence of the accident, and the words "in regard to which a claim may arise" meaning any accident which may be the foundation of a claim against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1329; Dec. Dig. § 539.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3403-3410.]

2. INSURANCE (§ 539*)—INDEMNITY INSURANCE—CONTRACT—CONSTRUCTION.

A liability insurance policy which stipulates that, on the occurrence of an accident in regard to which a claim may arise, notice in writing shall be immediately given by insured to insurer is not satisfied by a notice given nine months after the accident.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1329; Dec. Dig. § 539.*]

3. INSURANCE (§ 645*)—ACTIONS—ISSUES—WAIVER.

Where, in an action on an insurance policy, stipulating that, on the occurrence of an accident in regard to which a claim may arise, notice in writing shall be immediately given by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

insured to insurer, plaintiff alleged that he had duly performed the conditions of the policy, and did not allege any waiver of notice, and insurer denied that plaintiff had performed the conditions on his part, and that he had never given any notice in writing, evidence of a waiver of the notice was inadmissible, for the issue was whether plaintiff had performed the conditions of the policy as to notice.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1640; Dec. Dig. § 645.*]

4. ESTOPPEL (§ 110*)—WAIVER—NECESSITY OF PLEADING.

One relying on a waiver of the performance of an act on which his right of action depends must specially plead the waiver.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

5. INSURANCE (§ 558*)—CONTRACT—NOTICE—WAIVER.

A liability insurance policy required immediate notice, in writing, of an accident. The agent of insurer who had procured the policy, but who had ceased to act as agent, read of an accident in the newspapers, and went to the office of insurer and told the man at one of the desks there that he had read in the papers about an accident, and the man replied that he would attend to it. Neither the policy nor the name of insured was mentioned, and nothing was said about any notice, or waiver of notice, and no promise of any kind was made. The agent subsequently told insured what had been done, and insured replied that the agent had done right. Held, not to show a waiver by insurer of notice in writing.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1382; Dec. Dig. § 558.*]

6. ESTOPPEL (§ 52*)—"WAIVER."

A "waiver" in law is the intentional relinquishment of a known right.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831, 7832.]

7. ESTOPPEL (§ 116*)—BURDEN OF PROOF.

A party, relying on a waiver of the performance of an act on which his right of action depends, has the burden of proving waiver by such evidence as will not leave the matter doubtful or uncertain.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 116.*]

8. INSURANCE (§ 558*)—CONTRACTS—STIPULATIONS—WAIVER.

To hold that insurer issuing a liability policy, stipulating that insured shall give notice in writing of an accident, waived the written notice, insurer must have done something inconsistent with its intention to claim notice, which operated to mislead insured and justified him in omitting to give notice.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1382; Dec. Dig. § 558.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by A. Aronson and another against the Frankfurt Accident & Plate Glass Insurance Company. From a judgment for plaintiffs, defendant appeals. Reversed.

C. H. Wilson and Monroe & Cornwall, for appellants. M. S. Eisner, for respondents.

COOPER, P. J. This action was brought to recover the costs of defending a certain damage suit instituted by one Lyon against

the plaintiffs, it being claimed that defendant is liable under the terms of an elevator liability policy of insurance issued by defendant to plaintiffs. At the close of plaintiffs' evidence the defendant moved for a nonsuit, which was denied, and the jury returned a verdict for the plaintiffs, upon which judgment was duly entered. This appeal is from the judgment, for the purpose of reviewing the order of the court denying the motion of defendant for a nonsuit.

It appears from the record that on the 11th day of October, 1898, while said Lyon was a passenger in the elevator owned and operated by plaintiffs, an accident occurred, which caused certain physical injuries to said Lyon. On the 11th day of May, 1899, said Lyon commenced an action against the plaintiffs in the present controversy for the purpose of recovering damages on account of said injuries, claiming that the accident occurred by reason of the negligence of the plaintiffs herein in operating said elevator. The provisions of the policy upon which this action is based, so far as material to the questions necessary to be discussed, are as follows: "It is furthermore agreed and understood that upon the occurrence of an accident to any person in regard to which a claim may arise, notice in writing shall be immediately given by the assured to the managers for the United States of the company, or their duly authorized state agent, containing the fullest information available, and to be made out if possible upon the blanks provided by the company for this purpose. It is further agreed and understood that the company, on receiving notice from the assured of any accident or claim may take upon itself the settlement of the same, in which case the assured shall give all necessary assistance and information. * * *

It is furthermore agreed and understood that if any legal proceedings are taken to enforce a claim against the insured the company shall be at once notified thereof, and the company shall have absolute conduct and control of defending such action at its own cost and expense, in the name and on behalf of the assured. * * * The terms and conditions of this policy cannot be changed except by the managers for the United States at San Francisco, California; and all alterations, waivers and assignments shall be absolutely void unless they are indorsed upon the policy, and approved and signed by the said managers for the United States."

The plaintiffs did not give a notice of the accident in writing immediately, nor within a reasonable time after it occurred, nor until the action was commenced against them by Lyon nearly nine months thereafter. The main question then is as to whether it was necessary for the plaintiffs to have notified defendant in writing immediately

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

upon the occurring of the accident, or within a reasonable time thereafter, in order to hold it liable upon its policy. We are of opinion that such is the plain reading of the policy. It was therein provided that "upon the occurrence of an accident to any person, in regard to which a claim may arise, notice in writing shall be immediately given by the assured. * * *" The very moment the accident occurred and the injuries were inflicted upon Lyon the event had taken place which entitled the defendant to immediate notice. It was so stipulated in the policy, and the stipulation was one which the parties had the right to make, and upon which the defendant had the right to rely. In order to hold the defendant liable it was necessary that the plaintiffs should have done the thing which they agreed to do, by giving the written notice when the accident occurred. It was of the utmost importance to defendant to be immediately notified of the accident, for the reason that, by the terms of the policy and upon such notice, it would become liable (if a liability existed), and the real party in interest. While the facts were fresh in the memory of witnesses, before they had been seen, and ex parte statements taken in favor of the injured party, before there may have been inducements held out to them, it was the right of the defendant to have been notified and put upon its guard if the assured desired to hold it liable. If notified immediately, the defendant might have settled for a small sum, if upon investigation it found that it was liable.

Plaintiffs' counsel contend in their brief that under the policy sued upon "notice need be given of only those accidents in regard to which a claim arises, that the policy calls for but one notice of the accident and consequent claim, and that therefore no notice is required until a claim actually arises from an accident." The argument of plaintiffs is that the claim did not arise until suit was brought upon it, for the reason that the policy further provides that the company "on receiving notice from the assured of any accident or claim may take upon itself the settlement of the same," and that the word "claim" has a different meaning from the word "accident," and must refer to a claim upon which suit is brought. This argument does not have even the merit of being plausible. The word "immediately" refers to the "occurrence of the accident," and the words "in regard to which a claim may arise" mean any accident that may be the foundation of a claim against the insurer. If the accident, at the very moment it occurs, is such a one that a claim may arise from and by reason of such accident, the defendant was entitled to immediate notice. It is evident that the parties, when they used the words "in regard to which a claim may arise," had in contemplation the provisions of the policy as to accidents in re-

gard to which a claim could not arise; for instance, those happening directly or indirectly from boiler explosions, those happening under conditions which would not impose upon the insured by common or statutory law a liability, and those happening while the elevator was being attended or operated by any female, or by any male under 15 years of age, which are expressly excepted by the terms of the policy. The first clause of the policy is followed by the provision that the insurer, upon receiving notice from the insured of any accident or claim, may take upon itself the settlement of the same. The accident referred to is the event by which a party is injured, that is, the time, place, and facts of the transaction. The claim refers to a demand made by the injured party upon the owner of the elevator for money or redress in some manner for injuries. After the two clauses, the first referring to a notice in writing of the accident, and the second to a notice of the accident or claim and the right of the insurer to settle the same with the assistance of the assured, we find the independent and separate clause that if legal proceedings are taken to enforce a claim, "the company shall be at once notified thereof, and the company shall have absolute conduct and control of defending such action at its own cost and expense in the name and on behalf of the assured." The notice as to legal proceedings need not be in writing, but in this case such notice was given in writing after the suit had been commenced by Lyon. The notice of the accident must have been in writing, but no such notice was given. In other words, the notice which is expressly required to be given in writing is claimed by plaintiffs to have been given orally, and the notice which might have been given orally was in fact given in writing. The policy evidently contemplates two notices, unless the legal proceedings are commenced immediately—that is, within a reasonable time or very soon after the accident—in which case one notice in writing would be sufficient. Here we cannot hold that a notice, given nine months after the accident, was a notice given immediately.

In *Foster v. Fidelity & Casualty Co. of N. Y.*, 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833, the policy provided that: "Immediate written notice must be given said company at New York City of any accident and injury for which a claim is to be made, with full particulars thereof, and full name and address of the insured." The accident took place between the 1st and the 5th days of September, 1895, and the assured died on the 5th of September of the same year. Notice was not given until October 16th of the same year, and it was held not to have been in time. The court said: "A notice given after the lapse of such length of time, with knowledge of the facts, cannot be held immediate notice. The decisions to this ef-

fect are numerous and well nigh unanimous. Niblack Ben. Soc. & Acc. Ins. Co., sec. 416. It was argued that the requirement of notice applied only to accidents or injuries not resulting in death, but we think the plain words of the policy cannot be so construed. The provision is that immediate notice must be given of 'any accident or injury for which a claim is to be made.' An accident resulting in death is certainly as much one for which a claim is to be made as one resulting simply in disablement, and the necessity of a notice is certainly fully as great, if not greater. * * * Under the proofs before us we hold as matter of law that the notice given was not an immediate notice." In *Deer Trail, etc., Mining Co. v. Maryland Casualty Co.*, 36 Wash. 46, 78 Pac. 135, 67 L. R. A. 275, the policy provided that in case of an accident the assured "shall give immediate notice thereof in writing with the full particulars to the home office of the company at Baltimore, Md." The accident occurred on May 19, 1900, and notice was not sent until January 21, 1901, and it was held insufficient. The court, after referring to the rule that immediate notice in policies of the kind before the court means notice within a reasonable time, said: "Eight months had already expired since the accident, without any reasonable excuse for not complying with the terms of the policy. It was too late on January 21st to give the notice. The respondents were then in default." See, further, *Travelers' Ins. Co. v. Myers & Co.*, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760; *Railway Passage Assur. Co. of Hartford v. Burwell*, 44 Ind. 460; *Smith, etc., Mfg. Co. v. Travelers' Ins. Co.*, 171 Mass. 357, 50 N. E. 516; *Bastian v. British-American Assur. Co.*, 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255.

Plaintiffs contend that the defendant was notified orally, and that it waived a notice in writing by making no objection to such oral notice. The plaintiffs, in effect, allege that they gave notice in writing, because they allege that they had duly performed all the conditions of the policy on their part, and they did not attempt to allege any waiver of notice by the defendant. The defendant denied that the plaintiffs had performed all the conditions of the policy on their part, and further expressly alleged that plaintiffs never gave any notice in writing of the occurring of the accident. The issue was thus distinctly made as to whether or not the plaintiffs performed the condition of the policy to immediately notify the defendant in writing. The evidence as to a waiver of the notice in writing was objected to by defendant as being irrelevant and immaterial, and when it had been received the defendant moved to strike it out upon the ground that it was "incompetent under the pleadings." The evidence was clearly not admissible under the pleadings. The plaintiffs did not ask to amend. They should not have been al-

lowed to allege one thing and prove another and different thing. The rule is that when a party relies upon the waiver of the performance of an act upon which his right of action depends, such waiver must be specially pleaded. *Jerome v. Stebbins*, 14 Cal. 457; *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867; *Gillon v. Northern, etc., Co.*, 127 Cal. 480, 59 Pac. 901; *Rogers v. Kimball*, 121 Cal. 247, 53 Pac. 648; *Gillett v. Burlington Ins. Co.*, 53 Kan. 108, 36 Pac. 52; *Dwelling House Ins. Co. v. Johnson*, 47 Kan. 1, 27 Pac. 100; *May on Insurance*, § 589. Not only this, but it appears plain to us that the evidence does not show any waiver by the company of the provision requiring immediate notice in writing of an accident. The judge of the trial court did not place his ruling in denying the nonsuit upon any such ground, but held, in effect, that the policy does not provide for notice until suit is commenced.

In support of their claim of a waiver the plaintiffs called one Gruman, who had, some time before, acted as agent in soliciting the policy of insurance, for the purpose of proving verbal notice of such facts as would, in law, constitute a waiver. Gruman testified that after he read of the elevator accident—without seeing the plaintiffs, who were out of the city, or either of them, and, not pretending to be the agent, either of plaintiffs or defendant, he went to the office of the defendant company on behalf of the plaintiffs, and called the attention of a young man, whose name he believes to be Hodgkin, to the accident. The language of the witness is: "I told him that a lady had been injured at the Hotel Savoy, and I asked him if he had noticed it in the paper. I told him that I had, and he said they would attend to it, or that he would attend to it." "Q. Did you tell him for whom you came there? A. No, I didn't tell him for whom, but I presumed that he knew that I placed the insurance, and I simply called his attention to the accident so that they would take charge of it. Q. What did you say about the policy on that occasion? A. I didn't say anything about the policy, but I thought I would notify him about the accident that took place. That was my intention." The substance of the evidence of Gruman is that, without any request from plaintiffs, and of his own volition, after reading of the accident in the newspaper, he went to the office of the company and told a young man at one of the desks that he had read in the papers about an accident at the Hotel Savoy, and the young man replied that they would attend to it or that he would attend to it. That the policy was not mentioned. The names of plaintiffs were not mentioned. Nothing was said about any notice, or waiver of notice, and no promise of any kind was made. That the witness afterwards told plaintiff Aronson what he had done, and that Aronson replied he thought witness had done right. Hodgkin was called on behalf of defendant,

and testified that Gruman never came to the office, or told or notified him in any manner as to the accident, and that the records of the accident department of the office did not show that any notice or report of the accident was received prior to June 17, 1899. For the purpose of passing upon the motion for a nonsuit we must concede the testimony of Gruman to be true, and still it does not show any waiver. The agent of the company was merely told of an accident that had occurred in the Hotel Savoy. He was not spoken to about the policy, nor were the names of either of the plaintiffs mentioned, nor was notice mentioned or referred to in any manner. The reply of the agent to the effect that he would attend to it, conceding that it meant the policy of plaintiffs and the accident occurring on the elevator on which the policy was issued, could mean no more than that the defendant would do what the law required of it upon being properly notified. He did not undertake to attend to anything for plaintiffs, nor did he state that notice would not be required. He did not mislead the plaintiffs, nor induce them to change their condition, nor promise to do anything for them. A waiver in law is the intentional relinquishment of a known right, and the burden is upon the party claiming such waiver to prove it by such evidence as does not leave the matter doubtful or uncertain. In order to hold that the defendant waived the written notice in this case it must have done something inconsistent with its intention to claim such notice, and which operated to mislead the plaintiffs, and which would in law justify them in omitting to give the notice. The evidence does not show such condition of facts. When plaintiff Aronson returned home, and was told by Gruman that he had informed defendant of the accident, he did not inquire as to whether a notice of the accident had been waived, nor did he take any steps whatever to give notice. He did not even speak to defendant's agents about the matter, nor go to see them. The defendant had the right to remain silent. It had the right to rely upon the written notice as a condition of its liability.

The judgment is reversed.

We concur: HALL, J.; KERRIGAN, J.

9 Cal. App. 457

BARBEE et al. v. SOUTHERN PAC. CO.
(Civ. 475.)

(Court of Appeal, First District, California.
Dec. 1, 1908. Supplemental Opinion, Dec. 15,
1908. Rehearing Denied Jan. 12, 1909.)

1. RAILROADS (§ 411*)—MAINTENANCE—FENCE LAWS—PERSONS ENTITLED TO BENEFIT OF.

A lessee of lands adjoining a railroad right of way has such an ownership therein as to be within the benefit of laws requiring railroads to fence their rights of way, and giving a cause of action on failure to do so to owners of ad-

joining lands for injuries to domestic animals, resulting from such failure.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1426; Dec. Dig. § 411.*]

2. RAILROADS (§ 411*)—MAINTENANCE—FENCE LAWS—PERSONS ENTITLED TO BENEFIT OF.

Civ. Code, § 485, requires railroad corporations to make and maintain sufficient fences on either or both sides of their track and property, and makes them liable to owners of domestic animals killed or maimed as a result of failure so to do. It further provides that railroad corporations paying to the owner of the land through or along which their railroad is located an agreed price for making and maintaining such fences, or paying the cost of such fences, with the award of damages allowed for the right of way, are relieved from all claims for damages from the killing or maiming of any animals belonging to persons who thus failed to construct and maintain such fences. *Held*, that the section was enacted for the benefit of landowners through or along whose land the railroad runs, and was not intended for the benefit of the public at large.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1426; Dec. Dig. § 411.*]

3. RAILROADS (§ 411*)—OPERATION—INJURIES TO ANIMALS—FAILURE TO FENCE RAILROAD—PERSONS ENTITLED TO BENEFIT OF FENCES—“ALONG.”

The word “along,” as used in Civ. Code, § 485, making railroad companies liable for killing or maiming domestic animals belonging to landowners through or along whose land the railroad runs, resulting from failure to maintain suitable fences, means “adjoining,” and implies “contact,” and hence the section did not give a right of action to an owner or lessee of land which was separated from the railroad right of way by a public road.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1426; Dec. Dig. § 411.*]

For other definitions, see Words and Phrases, vol. 1, pp. 351-356.]

4. RAILROADS (§ 443*)—OPERATION—INJURIES TO ANIMALS—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for the alleged killing of a domestic animal, through the negligence of defendant in running its freight train without sounding a whistle or ringing a bell as it approached a public crossing, evidence, though circumstantial, *held* sufficient to support a finding that it was struck at the crossing and because the whistle and bell were not sounded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608, 1610, 1618; Dec. Dig. § 443.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by W. R. Barbée and another against the Southern Pacific Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded, with directions.

Dougherty & Lacey, for appellant. Alexander & Alexander and C. B. Rosendale, for respondents.

HALL, J. Plaintiffs upon the trial recovered judgment against defendant for the sum of \$165, as damages for the killing of two bulls of plaintiffs by the trains of defendant, and from the judgment defendant within 60 days from the entry thereof appealed.

The complaint is in two counts, the first

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes Cal. Rep. 98-101 P.—27

of which sets out a cause of action under the provisions of section 485, Civ. Code, for the killing of a bull, valued at \$100, that entered upon the right of way of defendant through a defect or gap in the fence inclosing said right of way, and was there killed by a train of cars operated by defendant. The action was brought in the justice court; but, as the issues under the first count involved the right to the possession of land, the action was transferred for trial to the superior court. *Baker v. Southern Cal. Ry. Co.*, 110 Cal. 455, 42 Pac. 975. It is contended by appellant that the facts do not bring plaintiffs' case within the benefits of section 485, Civ. Code, and it is conceded by respondents that the responsibility for damage rests entirely upon the question whether the lands of respondents are within the provisions of said section.

Most, if not all, the states have enacted railroad fence laws. These laws vary in their terms and effect in the different states. In some they are regarded as police regulations, intended for the benefit and protection of the public generally, while in others they are regarded as providing for division fences, and intended for the benefit of the adjoining property owner only. 2 *Thomp. Neg.* § 2047. This latter construction has been placed upon the law of this state. *Baker v. Southern Cal. Ry. Co.*, 110 Cal. 455, 42 Pac. 975; *Baker v. Southern Cal. Ry. Co.*, 126 Cal. 516, 58 Pac. 1055; *Boyd v. Southern Cal. Ry. Co.*, 126 Cal. 572, 58 Pac. 1046. A lessee has such an ownership as to be within the benefit of the statute. *Walther v. Sierra Ry. Co.*, 141 Cal. 288, 74 Pac. 840. From the bill of exceptions it appears: That the bull in question was killed on the right of way of defendant where it passes through Kings City township in Monterey county; "that there is a county road which runs parallel with said right of way through said township, and such county road was in existence at all times mentioned in the complaint; that the fence on the north boundary of said right of way constitutes the southern boundary of said county road; that the land described in the complaint is located on the north of said railroad right of way and immediately adjoining said right of way, and also on the north of and immediately adjoining said county road; that by some unknown means said bull escaped from the lands leased by plaintiffs on the north of said county road, and entered upon said county road, and from said county road said bull passed through a hole in the fence on the north side of said railroad right of way in and upon said right of way, where it was soon thereafter killed as aforesaid." In other words, the parcel of land from which the bull escaped is separated from the right of way of the defendant by a county road, and the facts are so stated in the bill of exceptions that we are precluded from assuming that the lessor of plaintiffs owned the fee to the county road, or that plaintiffs had any interest or rights therein different from the

general public. The pertinent part of the section under which the count is framed is as follows: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engines or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence, with the award of damages allowed for the right of way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence. * * *

It is apparent from the reading of the entire section that it has for its purpose the benefit of the landowners through or along whose land the railroad runs, and was not intended for the benefit of the public at large. For the benefit of the landowner it is first made the duty of the railroad corporation to erect and maintain a fence on either or both sides of its track; but because the burden is imposed on the corporation for the benefit of the landowner, and not for the benefit and protection of the general public, the corporation is allowed to relieve itself from the burden by paying to the landowner an agreed price therefor. A right of action is not given to every person whose animal gets upon the track through a defective fence and is in consequence killed, but is given only when the corporation's "line of road passes through or along the property of the owner" of the animal killed or injured. It is not alleged in the complaint that the railroad right of way passes through the lands described in the complaint, but only that it ran "alongside of and adjoining" said lands. From the statement in the bill of exceptions it is clear that the right of way of defendant did not adjoin the parcel of land from which the bull escaped on to the county road, and only in a general sense can it be said to pass along said parcel of land. *Baker v. Southern Cal. Ry. Co.*, 110 Cal. 455, 42 Pac. 975; *s. c.*, 126 Cal. 516, 58 Pac. 1055; *Boyd v. Southern Cal. Ry. Co.*, 126 Cal. 572, 58 Pac. 1046; *Walther v. Sierra Ry. Co.*, 141 Cal. 288, 74 Pac. 840. The word "along," as used in the statute, means adjoining, and implies contact. This is the meaning that has been given in Missouri to the same word in a statute requiring every railroad to erect and maintain fences on the sides of the road where the same passes through, along, or adjoining inclosed and cultivated fields or prairie land. *Walton v. St.*

Louis, I. M. & S. Ry. Co., 67 Mo. 56. In this case it was held that the railroad was not required to fence against prairie land from which it was separated by a strip of timbered land sixty feet in width. The statute of Nevada is very similar to the statute of this state in that it requires the railroad company to fence on either or both sides of its property, and gives an action to the owners of animals killed when they stray upon the road where it passes through or alongside of the property of the owners thereof. It is there held that the obligation to fence is for the benefit of the owners of adjoining land, and that the statute only renders the company liable where the animals killed or injured stray upon the road directly from the land of their owners. *Walsh v. Virginia & Truckee R. R. Co.*, 8 Nev. 110. See, also, *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246. As the land from which the bull escaped does not adjoin the railroad of defendant, plaintiffs have not brought themselves within the benefits of section 485, Civ. Code, and for this reason the judgment must be reversed.

The second count is for damages for the killing of a different bull, found to be of the value of \$65. It is alleged that this bull was killed through the negligence of defendant in running its locomotive and cars. The particular negligence relied on is in not sounding a whistle or ringing a bell as a freight train approached a public crossing. Evidence was given that such train passed the crossing before daylight without sounding a whistle or ringing a bell. The bull was shortly afterwards found near the crossing "all bruised up." The evidence that the bull was struck by that particular train is purely circumstantial, but we think it sufficient to support the inference that it was so struck at the crossing and because the whistle and bell were not sounded. The evidence as to the second cause of action supports the findings.

For the insufficiency of the evidence to support the findings as to the first cause of action, the judgment is reversed, and the cause remanded for further proceedings.

We concur: COOPER, P. J.; KERRIGAN, J.

Supplemental Opinion.

PER CURIAM. The decision of this court filed herein on the 1st day of December, 1908, is modified by striking out the last three words thereof, to wit, "for further proceedings," and inserting in lieu thereof the following, to wit, "for a new trial as to the first cause of action. Such judgment to be finally entered as shall be warranted by such findings as shall be made on such new trial as to such first cause of action, and the findings as they now stand as to the second cause of action."

9 Cal. App. 452

HENDERSON v. PERROTT. (Civ. 481.)

(Court of Appeal, Third District, California.

Nov. 30, 1908.)

APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE.

Where the evidence was conflicting on an issue as to whether a broker's contract of employment was limited to 60 days, a verdict finding the issue in the negative would not be set aside on appeal as against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

Appeal from Superior Court, Humboldt County; E. W. Wilson, Judge.

Action by George Henderson against William Perrott. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

J. H. G. Weaver and W. Ernest Dickson, for appellant. F. A. Cutler and T. R. Sweasey, for respondent.

CHIPMAN, P. J. This is an action to recover commissions for the sale of land. Plaintiff had judgment, from which, and from the order denying his motion for a new trial, defendant appeals.

The complaint avers: "That on or about October 1, 1905, defendant and one G. R. Georgeson, then being the owners in common of 3,494 acres of timber lands situate in Humboldt county, entered into an agreement with plaintiff, whereby they agreed that if plaintiff should find a purchaser for said lands, at the agreed price of \$25 per acre, they would pay to plaintiff, as a commission, the sum of \$1 per acre on said lands"; that thereafter Georgeson "sold his individual one-half interest in said lands to one John C. Bull, Jr., who purchased the same with knowledge of said agreement and its terms"; that thereafter plaintiff secured a purchaser in the person of one Hickey, at the agreed price, and on December 8, 1906, said Hickey purchased of said defendant and said Bull the said lands, paying therefor the sum of \$25 per acre, and the said Bull paid to plaintiff \$1,747.47, the same being due plaintiff from said Bull as owner of the undivided one-half of said lands; that defendant refused and still refuses to pay plaintiff the sum of \$1,747.47 as commissions due from defendant to plaintiff for selling said land. Defendant denied specifically the averments of the complaint, "and in that behalf avers that defendant and one G. R. Georgeson entered into a contract with plaintiff whereby plaintiff was to have a commission from the sale of said timber lands in Humboldt county provided said plaintiff sold said lands within a limited time, and defendant further avers that said plaintiff did not sell said land within the time limited." As a separate defense, it is averred that the agreement sued upon is invalid under section 1624 of the Civ-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

il Code, because not in writing and denied having entered into any agreement in writing or having made any note or memorandum in writing relating to the sale of said lands. The cause was tried by a jury, and a verdict was rendered for \$1,747.47 with interest from the day of sale of said lands. There were two interrogatories given the jury to be passed upon, as follows: "Q. Was there a time limit to the agreement sued upon? Answer. No. Q. If you find that there was such a time limit, was the purchaser produced in time? Answer. (Left unanswered.)" Thereupon the court entered judgment pursuant to the verdict.

Plaintiff testified that the agreement sued upon was in writing and signed by Georgeson and Perrott, by the terms of which plaintiff was to receive \$1 per acre for the land mentioned in the complaint upon his having found a purchaser therefor, and that there was no limit of time within which the option was to be exercised. It appeared: That after the agreement was signed plaintiff took it and certain maps descriptive of the property to San Francisco and placed them in the keeping of P. Rothermel, who was to assist in finding a purchaser and was to have some interest with plaintiff in the commissions in case of sale; that some time thereafter, in the great fire of April 18, 19, and 20, 1906, which occurred in that city, these papers were destroyed. Rothermel corroborated plaintiff as to the loss of the documents and also as to signatures and the provisions of the option agreement. Plaintiff testified to the sale of Georgeson's interest in the land to Bull and Bull's knowledge of the contract and payment by Bull of one-half of the commissions. Rothermel testified that Hickey, the purchaser of the land, knew nothing about its being for sale until he, through plaintiff, called his attention to it, and that he (Rothermel) sold the land to Hickey. Hickey testified that his attention was called to the land through Rothermel. He testified: "I made two visits to Humboldt county to inspect these lands pursuant to Rothermel's presentation of them to me who claimed to be acting with George Henderson. I had two or three conversations with Mr. Henderson relating to the sale of these lands. I did not know they were for sale before Mr. Rothermel told me about them. I never met Mr. Bull, Mr. Perrott, or Mr. Georgeson in connection with the sale of this land until Mr. Rothermel and Mr. Henderson interested me in the purchase of the same. It was through their efforts that I opened negotiations to purchase the same." The acreage conveyed to Hickey was 3,494.95 acres.

Appellant makes no point as to any rulings of the court in the admission or rejection of evidence. Nor of any other ruling except on his motion for judgment of nonsuit at the close of plaintiff's evidence. In his brief,

however, appellant states two grounds only on which reversal is asked, namely: (1) That the verdict and special finding of the jury are not sustained by the evidence; (2) that the court abused its discretion in denying defendant's motion for a new trial. The evidence is discussed in its entirety and not at all with reference to the motion for nonsuit. We shall so treat the matter. The only specification is as follows: "The evidence is insufficient to justify the verdict and the special findings of the jury, in that the evidence shows without any substantial conflict that the option given to the plaintiff was to be performed within a limited time, not to exceed 60 days after the same was given; in other words, it contained a time limit of not to exceed 60 days, and that it expired prior to March 8, 1906. In point of fact the controversy at the trial was narrowed down to the single question whether or not the option contained a time limit, the answer of defendant presents this as the chief defense, and this is the sole question to which the specification of insufficiency of the evidence is directed and is the only finding implied by the verdict which will be reviewed. *Citizens' Bank v. Jones*, 121 Cal. 32, 53 Pac. 354; *O'Leary v. Castle*, 133 Cal. 508, 65 Pac. 950; *Heaton's Estate*, 135 Cal. 385, 67 Pac. 321.

The testimony is in sharp conflict upon the point as to a time limit in the contract. If the matter were to be determined alone by the preponderance of the witnesses, a different verdict might well have been given; but this is not a test by which the appellate court must be governed, nor, indeed, was the jury bound by it. It was the function of the jury to reconcile any conflict in the testimony. This case does not fall within the rule of the cases cited by appellant where the appellate court has said that it might pass upon the evidence when conflicting. There was some testimony submitted by defendant tending to show that the Redwood Land & Investment Company signed the option which was contradictory of plaintiff's testimony, submitted by plaintiff, that it was signed only by Georgeson and Perrott, and this testimony might in some degree have borne upon the question of plaintiff's truthfulness in testifying to the issue of a time limit in the option; but of this the jury were the exclusive judges. There was also some evidence, much commented upon by defendant, to the effect that there was but one contract, and that it called for 7,000 acres, instead of the acreage mentioned in the complaint, which also, it is claimed, tended to prove the untruthfulness of plaintiff's testimony. It appeared, however, that this tract of 7,000 acres included the Georgeson and Perrott land and other lands belonging to the Redwood Land & Investment Company, but that the Georgeson and Perrott land was owned separately from that of the

company. They had agreed between themselves that neither should sell except by consent of the other. Title to the exact acreage, for the sale of which a verdict was given, was, however, made to Hickey by Perrott and Bull, the latter being Georgeson's successor in interest, and these are the lands Hickey bought upon plaintiff's representations. This collateral evidence was introduced apparently to discredit plaintiff and to show the improbability of his testimony. Whatever its weight or effect, the jury resolved it, and we cannot interfere with their conclusion.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

9 Cal. App. 447

GERETY v. O'SHEEHAN. (Civ. 581.)

(Court of Appeal, Second District, California. Nov. 28, 1908. Rehearing Denied by Supreme Court Jan. 25, 1909.)

1. TRUSTS (§ 79*)—RESULTING TRUST—PURCHASE OF LAND—PART PAYMENT OF CONSIDERATION.

Under Civ. Code, § 853, providing that, when a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust results in favor of him by or for whom such payment is made, it is not necessary that such payment consist of the entire consideration, nor that it be for the purchase of an aliquot part of the estate, in order that a trust for proportionate parts shall arise.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 111; Dec. Dig. § 79.*]

2. TRUSTS (§ 17*)—AGREEMENT TO PURCHASE LAND—NECESSITY OF WRITING.

Under Code Civ. Proc. § 1971, providing that no estate or interest in real property nor any trust or power over or concerning it shall be created otherwise than by operation of law, or a conveyance or other instrument in writing, etc., an oral agreement between plaintiff and defendant to purchase certain land in common, each furnishing a part of the consideration, the title to be taken in defendant's name, did not constitute an express trust, nor could plaintiff base any right to recover thereon.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 18; Dec. Dig. § 17.*]

3. TRUSTS (§ 63½*)—RESULTING TRUSTS—INVALID AGREEMENT.

Where plaintiff and defendant each contributed certain sums to the purchase of land, the title to which was taken in defendant's name, the fact that they agreed verbally that defendant should hold the title to such a proportion of the land as the amount contributed by plaintiff bore to the amount paid did not prevent the creation of a resulting trust in accordance with such agreement by operation of law.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 93; Dec. Dig. § 63½.*]

4. TRUSTS (§ 70*) — RESULTING TRUSTS — RIGHTS OF PARTY—MORTGAGE.

Plaintiff and defendant agreed to purchase certain land for \$3,500, payable \$2,000 in cash, with a mortgage for \$1,500. Plaintiff contributed \$600 and defendant \$1,400, defendant taking title in his own name and executing the required mortgage. *Held* that, between plaintiff and defendant, defendant was a resulting trustee of an undivided three-tenths of the prop-

erty for plaintiff, subject to a lien for the same proportion of the mortgage indebtedness.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 70.*]

5. WITNESSES (§ 206*)—ATTORNEYS—COMPETENCY—PRIVILEGED COMMUNICATIONS.

Plaintiff, accompanied by defendant, called on an attorney to secure her services in assisting plaintiff to negotiate a loan of \$600 to enable him to contribute such amount to the purchase price of certain property he had agreed to buy with defendant. The attorney had been employed by defendant in certain litigation which was then undetermined, but was not acting as defendant's attorney in negotiating the loan for plaintiff. *Held*, that a conversation occurring at that interview at which plaintiff, defendant, and the attorney were present was not privileged.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 761, 764, 765; Dec. Dig. § 206.*]

6. TRUSTS (§ 89*)—RESULTING TRUSTS—PAYMENT OF CONTRIBUTION.

In a suit to establish a resulting trust, evidence *held* to warrant a finding that plaintiff contributed his share of the money used to purchase the property before title was taken in defendant's name.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 135; Dec. Dig. § 89.*]

7. APPEAL AND ERROR (§ 1002*)—CONFLICTING EVIDENCE—FINDINGS—REVIEW.

Where there is a substantial conflict in the evidence, the Supreme Court will not determine the weight to be accorded thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

8. JUDGMENT (§ 248*)—ISSUES.

Plaintiff sued to establish his interest in certain land and to secure a transfer thereof to him from defendant. Defendant offered evidence that he had paid certain amounts for taxes, assessments, and interest on the mortgage for plaintiff, amounting to \$25.20. *Held*, that defendant thereby raised an issue as to the amount which plaintiff should be required to pay as a condition of recovery, on which a court had jurisdiction to pass.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 248.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Edward A. Gerety against Tim O'Sheehan. Judgment for plaintiff, and defendant appeals. Affirmed.

H. C. Dillon, for appellant. C. L. Shinn, for respondent.

SHAW, J. Action to enforce an alleged resulting trust. The trial court found, in substance: That on February 13, 1906, pursuant to an existing oral agreement between them, plaintiff delivered to defendant the sum of \$600, which, with \$1,400 contributed by defendant, was to be used by him in acquiring in his own name, but for the joint use and benefit of plaintiff and defendant, in the proportion that \$600 bears to \$2,000, certain real estate, the purchase price of which was \$3,500, payable \$2,000 in cash, contributed as aforesaid, and the balance by giving a mortgage upon said real estate. That, in accordance with said understanding

and agreement so had between plaintiff and defendant, the latter purchased the property, using the \$600 contributed by plaintiff, together with \$1,400 of his own funds, in making the cash payment of \$2,000, and took the title in his own name as grantee and executed a mortgage thereon, whereby the balance of the purchase price of \$1,500 was secured. As conclusions of law the court found that plaintiff was the owner of an undivided three-tenths interest in the property, which interest was held in trust by defendant for plaintiff, and that plaintiff was entitled to a deed of said interest, subject to a lien thereon in favor of defendant for certain sums paid by defendant for account of interest, taxes, and street assessments, and subject also to three-tenths of the mortgage indebtedness. In accordance with these conclusions judgment was rendered for plaintiff, from which and an order denying his motion for a new trial, defendant prosecutes this appeal. A number of alleged errors are assigned as grounds for reversal.

Section 853 of the Civil Code provides that "when a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." Appellant insists that the consideration mentioned in this section as being paid by another is the entire consideration, and that, unless the whole consideration be thus paid, there can be no resulting trust. In view of the fact that the question is not an open one in this state, the numerous authorities from other jurisdictions cited by counsel in support of this contention are entitled to little weight. In this state a resulting trust does not depend upon the fact that the one who seeks to establish it has paid the entire consideration; nor that what he may have contributed was for an aliquot part of the estate. In *Case v. Codding*, 38 Cal. 191, the court, after announcing the well-established rule that a resulting trust arises in favor of one paying the entire consideration for property the title to which is taken in the name of another, says: "And it is now equally well settled that, if the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party, pro tanto." And in discussing the same question in *Hidden v. Jordan*, 21 Cal. 93, the court says: "The English cases are referred to by Mr. Chancellor Kent in *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 404, and he comes to the conclusion that payment of part of the consideration carries with it a proportional interest in the land. This we understand now to be the settled rule, and it appears to us to be the logical and necessary result of the principle upon which trusts of this character are maintained." To the same effect is *Somers v. Overhulser*, 67 Cal. 237, 6 Pac. 635, and *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482.

Any agreement found to exist between the parties was oral. Hence such agreement could not constitute an express trust (Code Civ. Proc. § 1971), and, being oral, plaintiff could not base any right to recover thereon. Therefore, any allegation in the complaint or findings of fact in respect to this oral agreement may be disregarded as immaterial. The fact that the parties agreed verbally to do that which the law implies from their acts did not in any wise affect the character of the transaction as a trust created by operation of law. *Bayles v. Baxter*, 22 Cal. 575. Nor is there any uncertainty as to the portion of the property to which the trust extended, as it results, not from any agreement, oral or otherwise, with reference to the proportion of interest which each shall hold, but from the facts shown as to the amount of purchase money advanced by each. *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482.

It is next contended that, conceding the existence of a resulting trust, the judgment awards the plaintiff an interest in the property greater than that to which he is entitled; appellant insisting that plaintiff at most was entitled to such an interest in the property as \$600 bears to \$3,500. The fact that \$1,500 of the entire purchase price was obtained by giving a mortgage upon the entire estate is in effect identically the same as though the purchase had been made subject to an existing mortgage, in which case each party's interest would, as between themselves, be subject to his proportionate share of such mortgage and their respective interest in the property be correspondingly lessened. Plaintiff's interest in the property is obligated for his share of the indebtedness, and it is immaterial whether this obligation was incurred by his act in executing the mortgage or by the act of another. We can conceive of no equitable principle which would permit defendant, without plaintiff's consent, to hypothecate the latter's property for the purpose of obtaining funds wherewith to enlarge his own interest in the estate.

There was no error in permitting the witness Kenney to testify. It appears that plaintiff, accompanied by defendant, called upon her for the purpose of securing her services in assisting the former to negotiate a loan of \$600 to enable him to make his payment in the purchase of the property. She was an attorney at law and had theretofore been employed by defendant in the conduct of some litigation then undetermined. She was not, however, acting as defendant's attorney in negotiating this loan for plaintiff, in addition to which fact, both parties were present at the time of the conversation concerning which she testified. The rule as to privileged communications between attorney and client is inapplicable to such case. *Estate of Bauer*, 79 Cal. 304, 21 Pac. 759; *Harris v. Harris*, 136 Cal. 379, 69 Pac. 23.

A large part of appellant's brief is devoted

to a discussion of the evidence, which he contends is insufficient to support the findings. Where there is a substantial conflict in the evidence, it is not the province of this court to determine the weight to be accorded it. The evidence clearly tends to prove the facts as found by the court, the material part thereof being that plaintiff contributed \$600 and defendant \$1,400 in the purchase of the property, the title to which was taken in defendant's name. Appellant insists, however, that this \$600 was not paid before or at the time of the purchase, but thereafter. The contrary appears to be the case. The negotiation for the purchase of the property was initiated on February 8th, at which time a receipt for \$100 was given to defendant by the seller's agent. On February 13th following plaintiff delivered to defendant the \$600 contributed by him towards the purchase. The grantor's deed was executed in the sense of being signed and acknowledged on February 12th, and on the 13th of February this deed, together with \$1,900 in cash, \$600 of which was contributed by plaintiff, together with \$1,500 in checks representing the sum borrowed on the mortgage, were placed in escrow under instructions to the holder to complete the transfer. Clearly the deed was not delivered, nor the transfer made, until after plaintiff had delivered to defendant his money to be used in effecting the purchase. The purpose of the action was to establish plaintiff's interest in the property and secure a transfer thereof to him. By its judgment the court decreed that the interest of plaintiff was subject to a lien in favor of defendant in the sum of \$25.20, and also to a three-tenths share of the existing mortgage of \$1,500 upon the property. Appellant attacks this portion of the judgment as being unwarranted. The finding, however, upon which this part of the decree is based, was made upon evidence which defendant introduced apparently for the purpose of showing that he had, for plaintiff's benefit, paid certain amounts for taxes, assessments and interest on the mortgage, thereby raising an issue which was litigated and which we think the court clearly had jurisdiction to pass upon.

Appellant also contends that the judgment is erroneous by reason of decreeing that plaintiff's portion of the estate is only liable for his share of the mortgage; his contention being that such portion is liable for the entire mortgage. This undoubtedly is true so far as the rights of the mortgagee are concerned, but the question being litigated is the respective rights of plaintiff and defendant, and, as between them, plaintiff's interest is, as decreed by the court, subject to his proportionate share of the mortgage.

There is no sufficient merit in other points suggested by appellant which justifies other notice than to say an examination thereof discloses no prejudicial error.

The judgment and order appealed from are therefore affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 481

TANNER v. EMBREE et al. (Civ. 548.)

(Court of Appeal, Second District, California.
Dec. 2, 1908.)

1. LIBEL AND SLANDER (§ 10*)—PUBLIC OFFICERS—CHARGE OF CORRUPTION.

Newspaper articles charging that plaintiff, a constable and president of a municipal board of trustees, had winked at prostitute and gambling dens and street brawls, had lined himself with the lawbreaking element, and that he had strong grounds for saying that it was useless to convict for unlawful liquor sales, since he was one of the peace officers, and since it rested with him or another person to determine the character of the juries drawn, and stating that one afflicted with "Tanneryitis," plaintiff's name being Tanner, helps drag the law down, and becomes a common "drunk" and a gambler, are actionable per se, as imputing to a public officer corruption or want of integrity, and as exposing him to hatred, contempt, and obloquy.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 93; Dec. Dig. § 10.*]

2. LIBEL AND SLANDER (§ 125*)—ACTIONS—FINDINGS.

When the facts and circumstances under which an alleged defamatory publication is made are undisputed, it is a question of law for the court to determine whether it was privileged, and the conclusion loses none of its force because incorporated in the findings of fact.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 125.*]

3. LIBEL AND SLANDER (§ 50*)—WANT OF MALICE—EFFECT.

That publications falsely charging official corruption, etc., were made with good intent and for justifiable ends, without malice, and under belief that they were true, did not make them privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 50.*]

4. LIBEL AND SLANDER (§ 48*)—PUBLIC OFFICERS—CRITICISM.

A publisher has no greater right than any other person respecting publication of false charges against a public officer.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 48.*]

5. LIBEL AND SLANDER (§ 48*)—PUBLIC OFFICERS—CRITICISM.

A public officer or candidate may be publicly criticised so far as his moral delinquencies affect his official character or fitness to hold office, on the theory that the public is entitled to know how the officer is discharging his trust, and how to intelligently exercise the election franchise, but false charges may not be published.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 48.*]

Appeal from Superior Court, Riverside County; Benjamin F. Bledsoe, Judge.

Action by E. T. Tanner against A. B. Embree and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Collier & Carnahan and John H. Dunn, for appellants. Lafayette Gill and W. G. Irving, for respondent.

ALLEN, P. J. Appeal by defendants from a judgment in favor of plaintiff, and from an order denying a new trial.

The action was sought to be maintained by plaintiff on account of certain false and libelous publications made, or caused to be made, by defendants of and concerning plaintiff. The trial court finds, and there is evidence warranting the same, that plaintiff, at and before the publication of the matter complained of, was a duly appointed and qualified constable of the judicial township of San Jacinto, Riverside county, and was the president of the board of trustees of the city of San Jacinto, and was at all of said times a candidate for re-election to the office of constable of said judicial township; that the defendants, in an issue of a certain newspaper called the "San Jacinto Register," printed and published by them, on Thursday, the 1st day of November, 1906, printed of and concerning plaintiff the following, among other things: "This man [referring to plaintiff], together with those trustees who appointed him, have winked at the prostitute dens and the gambling dens, and the street brawls, and have had nothing to say, or nothing to do; but the moment the matter is agitated by the citizens of our town, they rise up with indignation; they stand in the way of the movement and line themselves with the lawbreaking element of our town. Now, as to this man, Tanner, * * * it so happens that he holds an office of great importance just now. He is constable for this township. He says that it is absolutely useless to convict anybody of illegally selling liquor in this town, * * * and he has strong grounds for his statement, for he is one of the peace officers that have the matter largely in their own hands. McKim is the other, and we all know what he is. It rests with one or the other of these two men to decide the character of any jury that may be selected to try violations of the law. They are both sworn sympathizers against the movement to punish the lawbreakers of our town. Small wonder that Tanner says we can't convict anybody of lawbreaking when he, or McKim select the men from whom the jury must be chosen." The court further finds that said defendants, in an issue of said newspaper, printed and published on Monday, the 5th day of November, published of and concerning the plaintiff the following: "Have you Tannerytis? * * * There now arises two distinct types of the disease. * * * He [meaning one afflicted with Tannerytis] knows a prostitute den is a prostitute den. Selling liquor without a license he realizes is breaking the law. * * * But, alas, this black type of the disease has so fouled

his mind that he now not only acquiesces in the breaking of the law, but is willing to help drag it down. He [meaning one afflicted with Tannerytis] becomes a common drunk and a gambler." These excerpts are given to show the general tenor of the publications. The court finds that each and all of the matters charged were false in fact. Such matters published of and concerning the plaintiff are open to no construction other than as charges against a public officer, imputing want of integrity or corruption, in the discharge of his official duties. Such publications, if false in fact, are actionable of themselves (*Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216); and the whole purport of such publications was to expose, and did expose, plaintiff to hatred, contempt, and obloquy.

It is appellants' contention that such publications were privileged, in that they were criticisms and comments upon the qualifications of the plaintiff as a public officer, and as a candidate for an office of trust and confidence before the people, appearing in a newspaper the management and control of the policy of which was undertaken by defendants merely to purify politics and improve the public service, and, further, that the finding of the court in its findings of fact that such publications were not privileged was an insufficient finding. It is sufficient, with reference to this last suggestion to say, "when the facts and circumstances under which an alleged defamatory publication is made are undisputed, it is a question of law for the court to determine whether it was privileged or not" (*Dauphiny v. Buhne* [Cal.] 96 Pac. 880); and such conclusion of law loses none of its force by being incorporated in the findings of fact. That the publications were actually made with good intentions and for justifiable ends without malice, and under honest belief of their truth, does not render the same privileged, provided the same are false in fact. *Dauphiny v. Buhne*, supra. In measuring the right to discuss in public print the character and conduct of one who is a public officer, or a candidate for public office, all persons stand upon an equal plane. It matters not that one causing such publication may be in the publishing business as a means of livelihood, or for a less selfish purpose, while another committing the same act may be engaged in some other pursuit. Neither may print or publish any matter which falsely charges such person so in office, or a candidate, with the commission of a crime without incurring a liability for the injury occasioned thereby. The law tolerates public criticism of such officer or candidate in so far as his moral delinquencies so made public may affect his official character or fitness to assume the public duties to which he aspires, upon the theory that the general public is entitled to know the truth that

they may intelligently exercise the elective franchise, or, in the case of a public officer, be advised of the manner in which those in office are discharging the duties of their trust. But in assuming to discuss in print the private character of such candidate or officer one may not publish any matter false in fact. "While facts may be published, falsehoods may not, and he who would justify a charge of specific acts of misconduct against a candidate for office must do so by proof of the truth of the charge, or he does not justify at all." *Dauphiny v. Buhne*, supra.

There is no merit in the contention that the nonsuit should have been granted. The preliminary proof upon the part of plaintiff was sufficient to make a prima facie case, and warranted the denial of such motion.

We find no error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 462

CLAPP v. VATCHER. (Civ. 532.)

(Court of Appeal, Second District, California. Dec. 1, 1908. Rehearing Denied by Supreme Court Jan. 25, 1909.)

1. WILLS (§ 427*)—PROBATE—QUESTIONS CONCLUDED.

Under Code Civ. Proc. §§ 1908, 1911, providing that an order in respect to the probate of a will is conclusive as to the will, etc., an order admitting a will to probate determines that the will has been duly executed by a testator who possessed legal capacity, and that it has not been revoked.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 916; Dec. Dig. § 427.*]

2. JUDGMENT (§ 725*)—RES JUDICATA—PROBATE—QUESTIONS CONCLUDED.

In proceedings to probate a will contestant alleged that testator had executed a later will and a deed conveying all his property. Proponent alleged that testator was incompetent to make a will when the later will was executed, or to make a deed when the deed was executed. The earlier will was admitted to probate. *Held* that, since under Civ. Code, §§ 1292-1296, the later will, if valid, and under section 1304, the deed, if valid, revoked the will, the unsoundness of the mind of testator at the time of the execution of the later will and the deed was necessarily adjudged, and was conclusive on the parties in a subsequent action to set aside the deed.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 725.*]

3. TRUSTS (§ 94*)—"INVOLUNTARY TRUSTEE"—STATUTES.

Under Civ. Code, § 2224, providing that one gaining a thing by wrongful act is an involuntary trustee thereof for the benefit of the person who would otherwise have had it, a grantee under a deed of land by a grantor, not possessing legal capacity to execute a deed, is an "involuntary trustee" of the land for the benefit of the owner thereof.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 143; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 8, p. 7693.]

4. TRUSTS (§ 373*)—ACTIONS FOR BREACH—PLEADING—PROOF—VARIANCE.

Since an action by an executor for the value of real estate conveyed to defendant by testator while of unsound mind is in the nature of an action for breach of trust, an allegation of ownership of the premises by testator at the time of his death, and a finding that a sale made by defendant was made by him as trustee for testator, or as trustee for his estate, are not inconsistent.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 373.*]

5. TRUSTS (§ 339*)—BREACH OF TRUST—DAMAGES.

The law draws no distinction as to the amount of damages recoverable for breach of a voluntary trust and the breach of an involuntary trust.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 339.*]

6. TRUSTS (§ 339*)—BREACH OF TRUST—DAMAGES.

Civ. Code, § 2237, providing that a trustee who wrongfully disposes of the trust property may, at the option of the beneficiary, be required to account for the profits made, or to replace the property with its fruits, or to account for its proceeds with interest, is a general rule applicable to cases of trusts created by constructive or actual fraud, and to sales of trust property made in good faith, as well as to those which are fraudulent; and, where the element of fraud is to be considered as an aggravation, justifying additional damages, section 3294, authorizing exemplary damages, applies.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 339.*]

7. TRUSTS (§ 339*)—BREACH OF TRUST—DAMAGES.

Under Civ. Code, §§ 2237, 2243, defining the measure of liability for breach of trust, and declaring that every one to whom trust property is transferred in violation of the trust holds it as an involuntary trustee, unless he purchased it in good faith and for value, a beneficiary of a trust, who sues the trustee for a wrongful sale of the trust estate, and his transferee, with notice, and who demands that the property be replaced with its fruits, is entitled, on the trustee and transferee being unable to reconvey because the property is held by an innocent purchaser for value, to recover the value of the property, and a beneficiary suing the trustee for the proceeds of the sale is entitled to recover the proceeds with interest.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 339.*]

8. APPEAL AND ERROR (§ 1151*)—CORRECTION OF ERROR ON APPEAL.

Where the part of a general verdict, which was predicated on an erroneous instruction, is ascertainable, the error may be adjusted by the court on appeal, and it will direct judgment for the proper amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Lizzie Clapp, executrix of Albert Clapp, deceased, against Herbert J. Vatcher. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Modified and affirmed.

M. C. Hester and D. Z. Gardiner for appellant. J. G. Rossiter and McNutt & Hanon, for respondent.

TAGGART, J. This is an action to recover the value of real property, alleged to have been conveyed to the defendant by a deed made by plaintiff's testator while the latter was of unsound mind; the defendant having sold the property and appropriated the proceeds to his own use. Judgment was for plaintiff, and defendant appeals from the judgment, and from an order denying his motion for a new trial.

Albert Clapp died April 1, 1903, leaving a will dated November 17, 1899, wherein plaintiff was named as executrix and devisee of certain parcels of real estate, which are specifically described in the will. The only parcel of the property located in the state of California is "Lot No. 74 of Lincoln Park in the city of South Pasadena, county of Los Angeles, state of California." When this will was propounded for probate the defendant filed an opposition and contest on two grounds: (1) That Albert Clapp had made a later will, dated March 16, 1903, whereby he devised to defendant all his estate, both real and personal; (2) that on the same day (March 16, 1903) he also executed a deed to defendant conveying the property particularly described above, which it is averred was all the property belonging to Albert Clapp in the state of California, and that therefore said conveyance was wholly inconsistent with the terms and nature of the disposition of the said property made by the testator to plaintiff by the will of November 17, 1899. It was also alleged in the opposition filed that the will and deed so executed on the 16th day of March, 1903, operated to revoke the will of November 17, 1899, and the prayer of the opposition is that the last named will be denied probate. Proponent answered, and alleged that Albert Clapp was incompetent and of unsound mind, and acting under duress, menace, fraud, and undue influence of defendant and one C. B. Ladd at the time of the execution of the deed and will of March 16, 1903. The contest was heard upon these issues by the court without a jury, and it found that Albert Clapp was of unsound mind, and incapable of understanding the business in which he was then engaged, or any other business whatever, and was incompetent to make either a will or deed on March 16, 1903. The court also found that he was not acting under duress, fraud, or undue influence, but made no finding on the issue of menace tendered. Upon these findings an order admitting to probate the said will of November 17, 1899, as the last will and testament of Albert Clapp, deceased, was duly entered, and letters testamentary were issued thereon to the plaintiff, and she now brings this action to recover from defendant the value of the property conveyed to him by said deed, which defendant, since the probate of said will, has sold and disposed of.

The complaint contains two counts: The cause of action in the first being based

upon an estoppel of defendant by the finding of the invalidity of the deed and the unsoundness of mind of Albert Clapp on March 16, 1903, and the judgment of the court made in the probate proceeding; and the second upon the unsoundness of mind and incapacity of the grantor to make the deed on the 16th day of March, 1903, without pleading the judgment or proceedings in probate. The case went to trial on the first cause of action, and the plaintiff introduced in evidence the papers in the contest proceeding leading up to and including the order admitting the will of November 17, 1899, to probate, the deed and will of March 16, 1903, and the testimony of witnesses as to the value of the property at the time it was sold by defendant, and also at the time of the commencement of the action, and rested her case. A motion for a nonsuit was made and denied, and an objection by plaintiff to defendant's offer of evidence, tending to show that decedent was of sound mind at the time of the execution of the deed, was sustained by the court. Certain instructions were requested to be given to the jury by the defendant, but the request was denied, all of which matters raised, or tended to raise, merely the question whether or not the defendant was estopped by the adjudication in the contest proceeding to assert the soundness of mind of the grantor at the time the deed was executed.

As to the measure of damages, the trial court instructed the jury that: "(1) If the defendant acted in good faith in selling the property, the damages should be fixed at the value of the property at the date of sale, and 7 per cent. interest from that date; (2) if the sale was made for the purpose of preventing plaintiff from recovering the property, the measure of damages would be the value of the property at the time of the beginning of the action, with interest at 7 per cent. from that date." In response to three special issues submitted, the jury found the value of the property to have been at the date of the sale \$800, at the date of the commencement of the action \$1,200, and that the consideration actually received by defendant for the property was \$630, which was received in August, 1903. The general verdict was for \$1,200 and 7 per cent. interest from the time of the commencement of the action, being rendered, apparently, in accordance with the second above-mentioned instruction of the court, which was based upon the theory of defendant's bad faith in making the sale.

The will and deed of March 16, 1903, were both pleaded as grounds of opposition and contest of the probate of the will of November 17, 1899, on the theory that they worked its revocation; the former under sections 1292-1296, and the latter under section 1304 of the Civil Code, the deed being pleaded in the language of the section last cited. By the answer of plaintiff to the contest an

issue was directly raised as to the mental capacity of the testator at the time of the execution of both the will and deed, and the finding thereon was necessary to the support of the order entered by the court. The validity of the will of November 17th was determined and adjudicated by the order of the court admitting it for probate, and the effect of this was to determine that the will was valid, and that there was nothing to prevent its being admitted to probate. *Bigelow on Estoppel* (5th Ed.) p. 230. Its probate is evidence that the will was duly executed by the testator, that he had legal capacity to execute it, and that it had not been revoked. *Black on Judgments* (2d Ed.) § 635; sections 1908, 1911, Code Civ. Proc. The unsoundness of mind of Albert Clapp, both at the time of executing the will and of executing the deed, was necessarily adjudged and became conclusive as to the parties before the court. Sections 1908, 1911, Code Civ. Proc. Had the will of March 16, 1903, been held valid, it would have revoked the one of November 17, 1899 (Civ. Code, §§ 1292-1296), and had the deed of the same date been sustained, it might have done the same thing (Civ. Code, § 1304). Contestant, having litigated the sufficiency of his deed to convey the property of the deceased in the probate proceedings, is estopped to assert anything contrary to the adjudication made therein, against any one interested in the estate of Albert Clapp, deceased, as the proponent, in offering the will for probate, represented all persons claiming or to claim under the will. *Concha v. Concha*, 11 App. Cas. 541; *Bigelow on Estoppel*, 231. The defendant in taking the property under the deed of March 16, 1903, became an involuntary trustee thereof, holding for the benefit of the persons who owned the property. Civ. Code, § 2224. As he held the legal title, we see nothing inconsistent between the allegation of ownership of the deceased at the time of his death and a finding that the sale was made by defendant as trustee for Clapp, or as trustee for his estate. The cause of action by the estate of Albert Clapp is in the nature of an action for a breach of trust. We know of no rule which draws any distinction between a voluntary and an involuntary trustee as to the amount of damages that may be recovered for such a breach. If the trustee disposes of the trust property, he is required to replace it, with its fruits, or to account for its proceeds with interest. Civ. Code, § 2237. This rule is general, and applicable to cases of trusts created by constructive, as well as actual fraud, and to sales of trust property made in good faith as well as to those which are fraudulent. The breach of obligation here involved is one "not arising from a contract," and therefore it would seem that if the element of fraud is to be considered as an aggravation, justifying the assessment of additional damages, the pro-

visions of the Code to be applied are those of section 3291 of the Civil Code.

No authority for the rule adopted by the court in the second instruction referred to is called to our attention, and we know of none. The first mentioned is substantially the first alternative provided by the Code in cases of wrongful conversion of personal property. In such cases the measure of damage is fixed at the value of the property at the time of conversion with interest, or the highest market value between conversion and verdict without interest, at the option of the party injured; the option being exercisable in the case of conversion of personal property only where the action is prosecuted with reasonable diligence. Section 3336. We do not agree with respondent's view that by analogy this rule is applicable here, but if we did, neither the instructions given nor the verdict rendered conform to the theory upon which the rule is based. *Niles v. Edwards*, 90 Cal. 10, 15, 27 Pac. 159, 296; *Fromm v. Sierra Nevada S. M. Co.*, 61 Cal. 629, 631. The option given a beneficiary of a trust by section 2237 is made effective against the transferee of the trust property, with notice of the trust, by section 2243, and the beneficiary's remedy against either or both the trustee and his grantee includes the right to have the property, with its fruits, replaced, or to recover the proceeds with interest. If plaintiff had brought an action to replace the property, and the trustee and his transferee with notice had been unable to reconvey—in other words, if the property was held by an innocent purchaser for value—the measure of her recovery from the violator of the trust would have been the value of the property. *Price v. Reeves*, 38 Cal. 457, 460. But, instead, she elected to sue for the proceeds, which her complaint alleges were converted by the defendant to his own use. And it is upon this allegation that respondent rests his application of the rule of damages for conversion of personal property. The instructions given to the jury as to the measure of damages were incorrect and erroneous, as the pleadings were framed.

As there is a special finding of the amount of proceeds received by defendant from the sale of the property, that portion of the general verdict predicated upon the erroneous instruction is readily ascertainable; and the effect of the error upon defendant's case may be remedied and adjusted by this court so as to render it harmless. *Salstrom v. Orleans, etc.* (Cal.) 96 Pac. 292, 296. The finding that \$630 was the amount of the proceeds of sale of said property indicates that the jury should have rendered their verdict on January 30, 1908, for that sum, with interest, and the judgment should have been for \$630, with interest thereon from August 30, 1903, to January 30, 1908, at 7 per cent. per annum, \$194.77, or for a total of \$824.77, instead of \$1,410. The amount

of the judgment, therefore, should be reduced by the sum of \$585.23.

The motion of defendant to strike out the fourth amended complaint was addressed to the sound discretion of the trial court, and we are not prepared to say that it abused this discretion. The other alleged errors relied upon for a reversal of the judgment, and for the granting of a new trial, have been passed upon and determined adversely to appellant's contention by the views hereinabove expressed.

It is ordered that if the plaintiff, within the time provided by law for this judgment to become final, file with the clerk of this court her written consent to a modification of the judgment of the superior court by a deduction of said sum of \$585.23, leaving the judgment to stand for \$824.77, and costs and disbursements in the action, said judgment shall be modified accordingly, and the order denying the new trial affirmed; but, if such written consent be not so filed, within said time, the judgment and order denying a new trial shall be reversed. And it is further ordered that, in the event of such written consent being filed and the judgment modified, only, plaintiff do have and recover her costs on appeal.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 469

YOUNG et al. v. PATTERSON.

SAME v. WAGNER, County Auditor.
(Civ. 545, 546.)

(Court of Appeal, Second District, California.
Dec. 1, 1908.)

1. TAXATION (§ 679*)—SALE TO STATE—EFFECT.

Under Pol. Code, § 3788, providing that a tax deed to the state conveys absolute title as of the date of five years from the date of the sale, the sale vests the equitable and the deed the legal title in the state, and as against the state the owner at the end of five years forfeits all rights excepting the privilege under section 3817 to redeem at any time before the state actually enters, sells, or disposes of the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

2. TAXATION (§ 679.*) — SALE BY STATE—DEEDS—DELIVERY—NECESSITY FOR.

A sale on proper notice by the state of land sold to it for taxes was complete when the purchase money was fully paid and deposited in the county treasury; delivery of the deed not being essential.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

3. TAXATION (§ 679*)—SALES BY STATE—TIME FOR—OWNER'S RIGHTS.

Under Pol. Code, § 3897, prescribing the method for sales by the state of land sold to it for taxes, and authorizing a sale whenever directed by the controller and noticed by the tax collector, the original owner cannot require a sale to be made or not made on a particular day.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.*]

4. HOLIDAYS (§ 6*)—OFFICIAL MINISTERIAL ACTS—TAX SALES.

In the absence of statutory prohibition, a ministerial act, such as a sale by a tax collector of land sold to the state for taxes, is not void because performed on a legal holiday.

[Ed. Note.—For other cases, see Holidays, Cent. Dig. § 6; Dec. Dig. § 6.*]

Appeals from Superior Court, San Bernardino County; Benjamin F. Bledsoe and Frank F. Oster, Judges.

Actions by Wesley Young and another against J. W. Patterson and against W. D. Wagner, County Auditor. From judgments for the respective defendants, plaintiffs appeal. Affirmed.

L. M. Sprecher, for appellants. H. L. Dickson, Curtis & Curtis and Mack & Light, for respondents.

TAGGART, J. These actions were brought to establish the right of plaintiffs to redeem certain real property after sale to the state for delinquent taxes, and a sale and conveyance by the state to the defendant Patterson. No. 545, against Patterson, the purchaser from the state, is to declare the sale and deed to him void; and No. 546, against defendant Wagner, as auditor of San Bernardino county, is for a writ of mandate to compel him to furnish an estimate of amount necessary to redeem and his authorization to the treasurer of the county to receive from plaintiffs the money required for the redemption of the property. Judgment in No. 545 is for defendant upon failure of plaintiffs to amend their complaint after demurrer sustained; and, in No. 546, is for defendant after issue joined, and the case heard upon stipulation of facts. Appeal is from the judgment in both cases, and the appeals are submitted upon the same briefs.

The lands in question were regularly assessed, and taxes thereon levied and returned delinquent for the years from 1894 to 1900, inclusive, and thereafter said lands sold to the state for nonpayment of such taxes in the year 1901, and again sold to the state in the years 1902 and 1903 for delinquent taxes, and the deeds therefor properly issued to the state, after the expiration of five years from the dates of the respective sales. Thereafter, pursuant to a proper authorization and direction by the state controller, the tax collector of San Bernardino county, after notice regularly given as provided by section 3897 of the Political Code, sold the property at public auction to the defendant Patterson, who immediately paid the amount of his bid in full, and three days thereafter the money was paid into the county treasury and apportioned to the funds to which the law required. The sale was made and the money paid on November 2, 1907, the money apportioned November 5, 1907, and the deed from the state delivered to Patterson on November 9, 1907, all of which days were holidays by virtue of

proclamation by the Governor of the state; the right of the Governor to so create holidays not being questioned. On November 6, 1907, plaintiffs tendered to Patterson the full amount paid by him, with interest and expenses, and on the same day made a similar tender to the tax collector, auditor, and county treasurer, all of whom refused to receive it. This tender was renewed on the first day following the holidays. The right of plaintiffs to redeem at the time of the tender (November 6, 1907) is predicated upon: (1) The invalidity of the sale to defendant because made upon a legal holiday; and (2) the fact that the deed from the state was not delivered to the purchaser until November 9, 1907, three days after the tender made by plaintiffs.

Real property sold for delinquent taxes may be redeemed within five years from the date of the sale to the state, or at any time prior to the entry or sale of said land by the state, in the manner provided by section 3817 (Pol. Code, § 3780). Section 3817 provides the method to be followed and specifies that the redemption of the property shall be made "before the state shall have disposed of the same." These sections must be read in connection with sections 3787 and 3788, the latter of which provides that the deed made to the state "conveys to the state the absolute title to the property as of the date of the expiration of the period of five years from the date of the sale of said property to the state." The deed must be made to the state at the expiration of the five years and must contain a recital that no person has redeemed the property within the time allowed by law for its redemption. Section 3785. The sale vests the equitable and the deed the legal title of the land in the state. *Santa Barbara v. Savings Soc.*, 137 Cal. 463, 465, 70 Pac. 457. As against the state the property owner at the end of five years has forfeited all rights in the property, except the privilege accorded him by the statute of redeeming it at any time before the state actually enters, sells, or disposes of it. *Baird v. Monroe*, 150 Cal. 560, 567, 89 Pac. 352. A sale at public auction is complete when the auctioneer publicly announces, by the fall of his hammer, or in any other customary manner, that the thing is sold. Civ. Code, § 1793. The bid is then accepted, and the bidder cannot withdraw it. Section 1794. The property here in question was sold on November 2, 1907. It appears to have been assumed in an early case that a proper note or memorandum made by the auctioneer on such a sale would satisfy the statute of frauds (*People v. White*, 6 Cal. 75), and certainly when the purchase money was fully paid and deposited in the county treasury, following a sale made according to legal notice, the state had disposed of the property, and the delivery of the deed was not requisite to complete the sale.

The right of the state to sell the property was unrestricted. The method was prescribed by section 3897, and whenever the controller directed the sale, and the tax collector gave notice, it could be sold. Plaintiffs had no right to demand that it be sold or not sold on some particular day, and we are not called upon to determine whether some act required to be done by them on a certain day of the month may not have been done on the following day because the day appointed fell upon a legal holiday; neither are we required to pass upon the question of their right to an extension of some fixed period within which they were to exercise some privilege or right because the last day of such period was a holiday. The only question is: Was the sale on a legal holiday by the tax collector void?

In *Baxter v. Vineland, etc.*, 136 Cal. 185, 193, 68 Pac. 601, 604, a similar question was presented to the Supreme Court, but its decision was held not to be necessary in that case. It is said in the opinion (referring to section 13, Pol. Code, section 11, Civ. Code, and section 13, Code Civ. Proc.): "The law had not appointed a particular day for the sale in question, and whether a day which the law authorizes to be fixed upon a particular day may be said to be a day appointed by law is at least doubtful. * * * We find no statute prohibiting such a sale on a holiday, and we find no statute prohibiting the postponement of a sale noticed on a holiday." We think the rule applicable here is that, in the absence of a statutory prohibition, a ministerial act of the kind in question is not void because performed upon a legal holiday. *People v. Town of Loyalton*, 147 Cal. 774, 82 Pac. 620; *Heisen v. Smith*, 138 Cal. 216, 218, 71 Pac. 180, 94 Am. St. Rep. 39; *Reclamation District v. Hamilton*, 112 Cal. 603, 610, 44 Pac. 1074.

The demurrer to the complaint in No. 545 was properly sustained, and plaintiff was not entitled to a writ of mandate in case No. 546.

Judgment is affirmed in both cases.

We concur: ALLEN, P. J.; SHAW, J.

7 Cal. Unrep. 357

PEOPLE v. GLASS. (Cr. 137.)

(Court of Appeal, First District, California.)

Nov. 25, 1908.)

CRIMINAL LAW (§ 1110*)—APPEAL AND ERROR
—RECORD—DEMURRER TO INDICTMENT—MOTION.

On a motion for permission to file a certified copy of a demurrer to the indictment in the appellate court, on the ground that the demurrer should have been made a part of the record by virtue of Pen. Code, § 1207, whether the demurrer is properly a part of the record will not be decided in advance of the hearing of the appeal, but the motion will be granted and the question decided on the hearing.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1110.*]

Louis Glass was convicted of crime and appeals. Motion in appellate court for permission to file a certified copy of a demurrer to the indictment. Motion granted.

D. M. Delmass, T. C. Coogan, H. C. McPike, and C. W. Cross, for appellant. U. S. Webb, Atty. Gen., for respondent.

KERRIGAN, J. Upon suggestion of diminution of the record the appellant moves for permission to file a certified copy of the demurrer to the indictment. He claims that under section 1207 of the Penal Code a copy of the demurrer should have been included by the clerk of the trial court in making up the record. Respondent on the other hand, contends that the demurrer was properly omitted. It is unnecessary for us to pass upon this question at this time. We will permit the certified copy of the demurrer to be filed, subject to further consideration upon the determination of the appeal. If at that time it becomes necessary to pass upon the points raised by the demurrer, we will then consider and determine the question whether or not the demurrer to the indictment is a part of the judgment roll; and, if we determine that it is not, we will not consider it in this case.

It is therefore ordered that the appellant may file with the clerk of this court a certified copy of the demurrer to the indictment.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 402

In re RICHMOND'S ESTATE. (Civ. 388.)

(Court of Appeal, Third District, California.
Nov. 25, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 514*)—ACCOUNTING—ANNUAL ACCOUNT—CONCLUSIVENESS.

An executor lent money of the estate on notes taken in his own name and secured by mortgage without any order of court. He credited himself with the loans in his annual report, which was contested as to those items, but they were allowed, as advantageous to the estate, and the executor assigned the mortgages to the estate. Twelve years afterward the executor renewed the notes in his own name without authority and advice of the court, and notes and mortgages securing them were not assigned to the estate. It was not necessary or advantageous to renew the notes. *Held* that, though the decree settling the annual report was conclusive as to the notes and mortgages as they stood at that time, it did not preclude the court from disallowing the renewals on settling the executor's final account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2292; Dec. Dig. § 514.*]

2. EXECUTORS AND ADMINISTRATORS (§ 104*)—LOAN OF FUNDS—INDIVIDUAL INTEREST OF EXECUTOR—INTEREST.

Where an executor, without order of court, took in his own name new notes and mortgages for the amount of old ones with accrued interest, the executor was liable as for a loan of the

entire sum and was chargeable with interest thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 425, 432; Dec. Dig. § 104.*]

3. EXECUTORS AND ADMINISTRATORS (§ 115*)—MINGLING OF TRUST PROPERTY—EXECUTOR LENDING ESTATE FUNDS IN HIS OWN NAME.

An executor, who renews notes and mortgages of the estate, taking the new notes and mortgages in his individual name without authority of court, in effect mingles trust property with his own the same as if he had deposited trust funds to his own credit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 467; Dec. Dig. § 115.*]

4. STATUTES (§ 263*)—CONSTRUCTION—RETROACTIVE EFFECT.

Statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears, especially where the statute, if given a retroactive operation, would be invalid as impairing the obligation of contracts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 344; Dec. Dig. § 263.*]

5. EXECUTORS AND ADMINISTRATORS (§ 109*)—EXPENDITURES—EXPENSE OF BOND.

Prior to Act March 20, 1905 (Laws 1905, p. 477, c. 377), providing that the expense incurred by an executor in executing his official bond, not exceeding a certain percentage, shall be allowed as part of the expense of executing his trust, the expense of procuring the bond fell upon him personally.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 444; Dec. Dig. § 109.*]

6. EXECUTORS AND ADMINISTRATORS (§ 109*)—EXPENDITURES—RETROSPECTIVE OPERATION OF STATUTE.

Act March 20, 1905 (Laws 1905, p. 477, c. 377), providing that the expense incurred by an executor in furnishing his official bond, not exceeding a certain percentage, shall be allowed as part of the expense of operating his trust, is not retrospective in operation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 444; Dec. Dig. § 109.*]

7. EXECUTORS AND ADMINISTRATORS (§ 513*)—ACCOUNTING—CONCLUSIVENESS—CLERICAL MISTAKES.

A clerical mistake, appearing plainly on an executor's account, is open for correction after settlement of the account, notwithstanding the conclusive character of the decree settling the account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2288; Dec. Dig. § 513.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings for the settlement of the estate of Billings M. Richmond. From an order settling the executor's final account, certain contestants appeal. Affirmed.

S. Solon Holl, for appellant. P. S. Driver, for respondent.

CHIPMAN, P. J. This is an appeal from an order settling the final account of the executor of the above-entitled estate. In

his account he recapitulates his credits and debits, showing:

Credit	\$24,425 24
Debit	22,894 59

Balance due executor from estate	\$ 1,530 65
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In its order, restating the account as settled and allowed, the court, on January 22, 1906, the date of the decree, found as follows:

Debit	\$24,426 77
Credit	8,700 75

Due the estate from executor..	\$15,526 02
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The court, in its decree, charges the executor with certain items for which he took credit in his final account. The items disallowed as credits and charged as debits are the following: (1) Promissory note secured by mortgage executed by the Sacramento Olive Company, May 6, 1901, for the sum of \$9,178.50. The decree charges the executor with interest on the amount of the note at 6 per cent. per annum from its date, less \$1,000 collected thereon, making \$1,588.34. (2) Also promissory note for \$3,753.35, secured by mortgage by the Sacramento Olive Company, dated May 6, 1901. The court made the same order as to this item as to the foregoing item and charged interest from date of the note to the date of the decree, less \$180 paid thereon, amounting to \$878.44. (3) An item, "March 13, 1905, second installment of taxes on Placer county land," \$21.84. (4) Also item, "March 13, 1905, first and second installment, taxes for '04" on Placer county land, \$48.92. (5) Item, "Jan. 16, paid on redemption for tax sale made before estate acquired title," Placer county land, \$209.35. (6) Item, "November 26, 1900, excess on mortgage tax," Placer county land, \$2.93. (7) Certain six items each for \$62.50, being cash paid by the executor March 3, 1889, and annually thereafter to March 3, 1904, \$375. (8) Item to correct an error in the executor's account filed October 13, 1899, \$1,000. Some other items were contested, but the court allowed them. As to these latter, contestants have appealed on separate transcript (No. 389).

In his opening brief appellant calls attention only to the items above enumerated as numbers 1, 2, 7, and 8, and embraced in his appeal, namely, items relating to the Sacramento Olive Company loans, item relating to payments to appellant's bondsman, and item to correct an error in former accounts. In his reply brief appellant addresses himself to contested items in which the court found in his favor. These will be considered in contestant's appeal. Inasmuch as appellant ignores his appeal except as to the items mentioned in his opening brief, we shall follow his example and assume that he has abandoned his appeal as to said items.

1. The items in paragraphs above designat-

ed 1 and 2 present the same questions and may be considered together. The grounds of contest were that the executor made the loans in his own name and on his own behalf, without any order of court, and that the land mortgaged to secure the loans is of less value than the amount loaned. The decree recites that the promissory notes were executed by the Sacramento Olive Company to Samuel M. Coppin May 6, 1901, "and the amount thereof at that time being the sum of (stating amount of each loan), the money loaned on said note and mortgage being the property of said estate, and loaned by said executor in his individual name without authority of court, * * * said executor is hereby charged with the amount of said promissory note (stating amount) and 6 per cent. per annum interest thereon from the date thereof until the amount of said promissory note, together with said 6 per cent. per annum interest, shall be paid into said estate," less the sums shown as paid thereon. Appellant's contention, as we glean from his brief, is: That the larger of the notes of the Sacramento Olive Company was a renewal of a note previously given by other parties, for loan of money of the estate made by the executor in his own name, without authority of court, which was secured by mortgage upon property subsequently purchased by the Sacramento Olive Company and payment assumed by that company in the deeds of purchase; that this note and mortgage was made the subject of annual account by the executor which was allowed and approved; that the decree of the court was and is conclusive and should be so held as to the renewal note and mortgage; that the smaller note was a direct loan to the olive company secured by mortgage and was reported in the earlier annual accounts and was settled and allowed; that this note, made in 1901, was a renewal of the former note; and that the decree approving and allowing the earlier account was and is conclusive as to the renewal note and mortgage. It was said in *Estate of Mary C. Grant, Deceased*, 131 Cal. 426, 63 Pac. 731, that "an order 'settling an account of an executor or administrator' is appealable (Code Civ. Proc. § 963, subd. 3); and it is clear that where proper notice has been given it is conclusive as to all items contained in it, except as to persons laboring under some legal disability. It is so expressly provided in section 1637, and has been so declared in numerous cases. (Citing many cases.) In this respect there is no difference between a final account—that is, one made with a view to immediate distribution of the estate—and any other. The Code makes no distinction between them as to appealability, or as to the conclusiveness of orders settling them, except that section 1634 provides that if the account be for a final settlement, accompanied by a petition for distribution, the no-

tice must state those facts and must be for at least ten days."

It appears that on April 16, 1889, the executor loaned one Frances Williams \$5,500 of money of the estate for which Williams gave a promissory note, due one year from date, with 8 per cent. interest, payable annually, secured by mortgage on 265 acres of land in Placer county. The executor, also, on August 8, 1889, loaned \$1,500 of estate money to A. S. and Sarah Osborn and took their promissory note therefor, due one year after date at 10 per cent. annual interest payable quarterly, secured by mortgage on 320 acres in Placer county. He also loaned of estate money, on May 31, 1889, to T. A. Snider, \$3,000 and took his promissory note therefor due one year after date with 10 per cent. annual interest payable quarterly, secured by property situated in the city of Sacramento. These loans were made by and notes given to the executor in his individual name and without any order of court. In his annual account filed November 16, 1889, he credited himself with these notes and mortgages. His account was contested as to these loans among other items, but the court found that, while irregularly made, without order of court and with full knowledge that if the money was lost "he would be responsible for such loss on his official bond," yet the court found that the loans "were, nevertheless, an advantage to the estate, and the executor having executed proper assignments of these mortgages to the estate, he is entitled to be credited in his account with the several sums loaned." The account was so allowed and settled. The Osborn and Snider notes are not here involved and are mentioned because inseparably connected with the annual accounts. On October 13, 1890, the executor filed his second annual account in which he charged himself with "cash invested in securities \$10,000.00" (the amount of the three notes above mentioned), and took credit for the notes and mortgages as on hand. This account was settled and allowed by the court on December 1, 1890. On January 23, 1893, the executor filed another annual account, also an account on October 10, 1895. These accounts all referred to the promissory notes and mortgages above mentioned, and the accounts were settled and allowed. On July 8, 1898, the executor filed his fourth annual account. In this account he charged himself with interest collected on the Snider note and charged himself with five items of "cash for interest from Olive Company," dated, respectively, April 13, May 4, June 2, and November 18, 1896, and February 10, 1897, aggregating \$1,023.64. Following the signature of the order of the judge settling the account is what purports to be a "schedule of property belonging to estate, other than cash, July 6, 1898." In this schedule are mentioned "note and mortgage of Sacramento Olive Company, secured on real estate in Placer county, \$7,334.00. Note and mortgage of

Sacramento Olive Company, secured on land in Placer county, \$3,000.00." It is stated that the Osborn mortgage was foreclosed on land in Placer county and the property bid in by the executor. This is the first mention of the Sacramento Olive Company as a debtor. It does not appear in the account when or under what circumstances these notes and mortgages were executed, nor does it appear upon what notes interest was paid in 1896 and 1897 as charged in the account. On December 9, 1899, the executor filed his fifth annual account, in which he charged himself with the balance from the last account and interest collected from the Snider note "and interest on note of Sacramento Olive Company, \$500.00," but on what note it is not stated. This account was settled and allowed December 22, 1899, and is the last account appearing prior to the final account now here. It makes no mention of any notes and mortgages, nor of any property in the hands of the executor except money amounting to \$1,064.04. It is not possible from the accounts themselves to determine when or under what circumstances or by what authority the Sacramento Olive Company became a debtor. The only information given us as to the origin of the two notes and mortgages of this company, found in the present account, is as follows: "Preliminary to stating the final account, it is proper to give a short history of the settlement of the estate." Then follows a statement of what appears from the several annual accounts already noticed. Of the two notes and mortgages appearing in the schedule of property appended to the account for 1898 it is explained: That the note and mortgage of the olive company, which at the date of the schedule, July 6, 1898, amounted to \$7,334, were originally the note and mortgage given by Williams to Coppin in 1889 for \$5,500; that the land covered by Williams' mortgage was purchased by the olive company, "and it assumed the Williams mortgage as part of the purchase money and by June 14, 1893, the sum amounted to \$7,334, for which a new note and mortgage was given." It is not so stated, but we infer that this new note and mortgage were given by the olive company. Of the \$3,000 note of the olive company it is explained that at the date of the schedule, July 6, 1898, it amounted to \$3,000. It is then stated: That both notes were renewed May 6, 1901; that at that date the first of these notes amounted, principal and interest, to \$9,167.50, and for this sum a new note and mortgage were given; that on May 6, 1904 (the date to which the amount, principal and interest, was computed in the final account), the amount was \$10,817.50, less \$1,000 paid July 6, 1904, leaving the amount now due \$9,817.50, as shown in the final account, plus the interest from May 6, 1904.

Of the \$3,000 note it is explained: That a new note and mortgage were given, May 6, 1901, for \$3,753.35, and that the principal

and interest due May 6, 1904, amount to \$4,428.95, as charged in the final account. It is conceded that these renewals were made by Coppin in his individual name and without any advice or order or authority of court. How far this alleged history of these loans may be taken as true it is not necessary to decide. There is nothing in the record by way of evidence to confirm these statements, except the meager facts appearing on the face of the accounts, and these fall far short of doing so. We may, however, assume to be true, as admissions of the executor, such of the statements as would justify the conclusion of the court. Out of the confused and tangled and unsatisfactory statements in the accounts and this explanation this much stands out clear enough: That the original loan to Williams was made in 1889 and was renewed by the olive company, with accumulated interest, in 1893, and was again renewed, with accumulated interest, in 1901; that a loan of \$3,000 was made directly to the olive company December 14, 1894, which was renewed May 6, 1901, with accumulated interest, for \$3,753.35 and on May 6, 1904, amounted to \$4,248.95, as stated in the final account. The renewals of notes and mortgages were made by the executor in his individual name and without any authority or advice of the court. There is perhaps enough in the accounts to show that the Williams loan was the origin of the larger note and mortgage given by the olive company, and that this loan and also the loan made directly to the olive company were the subject of annual accounts which were settled and allowed. Conceding that under the authorities such settlement became conclusive, we do not think that the decree of the court, December 22, 1889, the date of the settlement of the last annual account, can be held to conclude the court from disallowing the renewals of the old notes and mortgages, with accumulated interest, in 1901. These notes and mortgages are in the individual name of the executor and have never been assigned to the estate. They are of long standing with large accumulations of interest. There is no evidence showing why, after the early warning given him in 1889 that he assumed all liability in making loans and taking mortgages without any order of court, he persisted in acting on his own responsibility in renewing these notes in 1901. There is no evidence tending to show any necessity for renewing the notes or that payment could not have been enforced, or that it was to the advantage of the estate to renew rather than enforce collection or foreclose the mortgages. It is quite possible that the facts shown on the hearing of former accounts justified the court in its action, but that an entirely different state of facts existed in 1901, when the executor, on his own motion, assumed to renew these obligations, in amounts much larger than the original notes, and that the facts then existing would

have led the court to refuse authority to make the renewals. We think the court was justified in charging the executor with these amounts and was not bound by any previous settlement of the annual accounts.

Appellant also contends that it was error to charge the executor with interest from the date of the notes because he was thus charged with interest on interest; a large part of the notes being accumulated interest. It is claimed that he is not responsible for interest stipulated to be paid, unless he has collected or can collect it, citing *In re Moore*, 72 Cal. 335, 344, 13 Pac. 880, *Estate of Sargent*, 123 Cal. 331, 55 Pac. 1015, and other cases. When the executor took these notes and mortgages in his own name, without any order of court, he became liable to the estate for the amount then by him treated as funds of the estate. Whether part of this was accrued interest is immaterial. He presumably surrendered the old notes and canceled the old mortgages. The new notes and mortgages stood for the loan of funds of the estate in the amount then due the estate and must be so treated. In taking them in his individual name and without authority of court it was in effect a mingling of trust property with his own. It was so held in *Matter of Bane*, 120 Cal. 533, 52 Pac. 852, 65 Am. St. Rep. 197. It was there said: "A careful review of the cases fails to show any difference in principle where the trustee deposits money to his individual credit and where he invests by note and mortgage in his individual name." There was no evidence of the value of the mortgaged property when these notes were executed, but it did appear that the value put upon it at the hearing was several thousand dollars less than the amount of the notes when given, to which should be added accumulated interest since May 6, 1904. We see no error in charging 6 per cent. interest on the amount of the notes.

2. The account showed that the executor had paid out annually \$62.50 to American Surety Company as his bondsman. These payments were made prior to 1895 and subsequent to his last annual account. The court disallowed all these items. The statute of March 20, 1905 (St. 1905, p. 477, c. 377), reads as follows: "Any * * * executor required by law or by order of court to give a bond as such, shall be allowed as part of the lawful expense of executing his trust, the sum paid for such bond, not exceeding, however, one-half ($\frac{1}{2}$) of one (1) per cent. of the amount of such bond, for each year that the same shall remain in force." No ground is stated in the contest for disallowing these items, and in the brief of contestants the only ground suggested is that prior to the passage of the act of 1905 there was no authority of law for paying such expenses, citing 11 Am. & Eng. Ency. of Law (2d Ed.) p. 1236. It seems to have been conceded that the expense was incurred, but the item was contested and doubtless disallowed upon the

ground that the act of 1895 did not apply to such expenses incurred previously to its passage. We have, then, the question: May the act be given a retrospective effect? The general rule is that statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears. It is always presumed that statutes were intended to operate prospectively, and all doubts are resolved in favor of such a construction. See the numerous cases cited in note to section 642, vol. 2, Lewis & Sutherland on Statutory Construction; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48. And the rule is especially applicable where the statute, if given a retrospective operation, would be invalid, as impairing the obligation of contracts. *Id.* Where the statute, if given a retroactive effect, would impair private rights, the rule is stated thus in *Thorne v. San Francisco*, 4 Cal. 127, 133: "We but concur with the great majority of the judges in England and America, when we assert that it is well established not only as the doctrine of the common law, but as a principle of jurisprudence, that no statute shall be so construed as to give it a retroactive effect; to divest the rights of individuals vested previous to its passage, or previous to the time the act took effect—unless such intention is expressed in terms." The heirs become vested with the title to the property of the decedent immediately upon his death, and the Legislature cannot, by a subsequent enactment, interfere with such vested right. *Estate of Packer*, 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58. Whether this principle would protect the heirs against subsequent statutes enlarging the charges which may be made as expenses of administration—such as fees, commissions, and other expenses—when incurred after the passage of the act, need not be considered. Nor need we consider the question whether a statute expressly made retroactive, as to such expenditures, would be invalid. The statute before us is not in terms made retrospective, nor is there any language used which would warrant us in holding it so to be by implication. It relates to an expenditure to be paid out of the corpus of the estate which before the act could not have been legally allowed. *Woerner's Am. Law on Adm'r*, vol. 2, p. 1247, § 514 (2d Ed.). It was held in a Pennsylvania case, in *Miller's Estate*, 13 Pa. Co. Ct. R. 137, that there is a distinction between the case where the bond is given in the ordinary course, which every executor and administrator must give before letters will be granted, and where the performance of some duty devolves upon him in the course of administration—as for sale of real estate, requiring additional bond. But in *Eby's Estate*, 164 Pa. 249, 30 Atl. 124, it was expressly decided that no such distinction could be drawn, and that the expense of procuring bond must be borne by him personally. We

understand that such has been the uniform practice in the courts of this state prior to the act of 1905. The bond required of the executor in this case went to his qualifications to act without which he could not have been commissioned to act. It was voluntarily given and without expectation that any expense attending it would be paid. We do not think we would be warranted in giving retrospective effect to the statute in order to legalize the expense incurred prior to its passage.

3. The only remaining question is the claim that in his annual account filed October 13, 1890, there is an error of \$1,000 against him. It sufficiently appears from the account itself, considered with reference to previous accounts, that the executor charged himself with \$3,000, the full amount of the Snider note, and also \$1,051.20 as principal paid on this note, \$51.20 of which was in fact interest. On the credit side of the account the entry is "Note and mortgage of Snider, \$2,000.00." Obviously he stands charged with \$1,000 too much, or credited for \$1,000 too little. Respondents invoke the rule as to the conclusiveness of the decree settling the account; but we think an error of this character, appearing plainly on the account, should be open for subsequent correction. The difficulty we find in coming to the executor's relief is that upon footing up the debits and credits as shown in the record, in that particular account, we find that his footing of credits shows \$1,846.95 more than the items correctly footed would warrant. If he were now allowed credit for this \$1,000, he would still owe the estate \$846.95 on that year's account. If he insists upon his right to correct an apparent clerical error or misprision in his favor, he should be held by a like error against him.

We can discover no reason for disturbing the order as to the items herein considered, and it is therefore affirmed.

We concur: BURNETT, J.; HART, J.

9 Cal. App. 413

In re RICHMOND'S ESTATE. (Civ. 389.)
(Court of Appeal, Third District, California.
Nov. 25, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 514*)—ANNUAL SETTLEMENT—CONCLUSIVENESS.

Where an executor was credited with the amount of a loan in his annual account, the allowance was conclusive, and he could not be charged in his final account with deterioration in value of the mortgage security.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2292; Dec. Dig. § 514.*]

2. EXECUTORS AND ADMINISTRATORS (§ 111*)—ACCOUNTING—ATTORNEY FEES—DISCRETION OF COURT.

The allowance of attorney fees to an executor is largely in the discretion of the probate judge; he having a right to take into considera-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion the value of the estate, the time necessarily occupied in its settlement, and the services required of the attorney.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 459; Dec. Dig. § 111.*]

3. EXECUTORS AND ADMINISTRATORS (§ 510*)—ACCOUNTING — REVIEW — DISCRETION OF COURT—ALLOWANCE OF ATTORNEY FEES TO EXECUTOR.

The allowance of attorney fees by a probate judge to an executor will not be disturbed on appeal, in the absence of an abuse of the court's discretion.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2251; Dec. Dig. § 510.*]

4. EXECUTORS AND ADMINISTRATORS (§ 152*)—SETTLEMENT—CONVEYANCE OF LAND TO ESTATE.

Where an executor bid in, in his own name, land on which the estate had a mortgage, had the certificate of sale issued to him personally, and so recorded it, and reported the property as belonging to the estate and received credit for it in his account, he should be required to make proper conveyance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 623; Dec. Dig. § 152.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceedings for the settlement of the estate of Billings M. Richmond. From an order settling the final accounts of the executor, contestants appeal. Affirmed.

P. S. Driver, for appellants. S. Solon Holl, for respondent.

CHIPMAN, P. J. This is an appeal by the contestants from the order settling the final account of the executor, being the order and account considered on the executor's appeal, No. 388, this day decided. The contestants appeal from the order allowing the executor a credit of \$2,250 for property on hand, being certain land in Placer county; also from the order allowing the sum of \$1,000 as attorney's fees.

1. It appears that in his account for 1889 the executor reported the loan of \$1,500 to one Osborne and wife, secured by note and mortgage on the land in question. The item was contested on the ground that the loan was made by the executor in his individual name and without any order of court. At the hearing of that account the court found "that this loan was made for the benefit of the estate, and as a means of investing the money of the estate, and was made in good faith by the executor." The court also found that the mortgage given as security was of real estate "ample and complete security for the payment of the sum loaned, and, although irregularly made," it was nevertheless "an advantage to the estate, and, the executor having executed proper assignment of this mortgage to the estate, he is entitled to be credited in his account with the sum loaned." The account was accordingly settled and allowed. In subsequent accounts,

which were settled and allowed, this transaction appeared; the executor charging himself with interest collected on the note and taking credit for the note and mortgage as property of the estate. In his account filed in 1898 he reports the mortgage as "foreclosed and bid in by the executor for the estate valued at \$2,100." It appears from the record now here that a decree of foreclosure was entered August 9, 1897, and an order of sale made October 14, 1897, and filed and returned December 11, 1897, with commissioner's report and account of sale reporting that he had sold the property to Samuel M. Coppin and issued to him a certificate of sale, dated November 13, 1897, which was duly recorded. Witness Frank L. Spencer testified that he was engaged in the business of buying and selling land and was familiar with the land in question, the S. E. $\frac{1}{4}$ of section 17, township 13 N., range 9 E., and "that the value of the land was not over \$2 per acre." It appears that the transaction was fully reported to the court, as we have seen, passed upon, approved, and the account settled and allowed, in 1889, and in several subsequent accounts. Upon the authorities cited in No. 388 (same title and case as this), 99 Pac. 554, we think the order then made is conclusive. The present value of the land is immaterial. When the loan was made the security was found by the court to be ample. No deterioration in value since that time can affect the conclusiveness of that adjudication.

2. It appears that the executor was allowed attorney's fees in his account filed October 13, 1890, the sum of \$2,000. In 1893 he was allowed the further sum for like purpose of \$50, also, in 1895 a further sum of \$50, in 1898 a further sum of \$25, and in 1899 the sum of \$25. In his final account the court allowed the executor \$1,000 as attorney's fees. S. Solon Holl testified that he was employed by the executor as attorney for the estate immediately after the death of decedent, and that ever since that time he had "rendered all the legal services necessary in the settlement of said estate up to the present time; that he counseled and advised the executor in all matters pertaining to the settlement of said estate and the investment of money thereof." The will provided that final distribution should not be made until the youngest child had come of age, which had not occurred at the filing of the account. The delay in settling the estate is thus explained. The trial judge, sitting in probate, was in position to justly measure the value of the attorney's services and the discretion rested with him to fix the amount. It was said in Estate of Straus, 144 Cal. 553, 77 Pac. 1122: "The allowance which shall be made for attorney's fees is largely in the discretion of the court, and is estimated upon the services which are necessarily, and properly, rendered to the ex-

ecutor at the administration of the estate" and is to be determined "upon proper data furnished at the hearing of the application." In the Estate of Byrne, 122 Cal. 260, 54 Pac. 957, 1015, the court expressed the opinion that the amount allowed the attorney was "extremely meager and far less than the sum we should have been willing to approve, but there is no ground upon which we can hold that the superior court abused its discretion in fixing his (the attorney's) allowance in that amount." In Freese v. Pennie, 110 Cal. 467, 42 Pac. 978, it was held that the trial court is not bound by the opinion of experts as to the value of legal services, that while such evidence is proper and admissible by way of assistance to the court, "It is not at all conclusive upon the trial court, and it is for the court to say, upon a consideration of all the evidence, taken in connection with its best judgment, what would be a fair and just allowance for the services rendered.

* * * When a court has done this, this court, as an appellate court, only has the right to interfere with its judgment when a plain and palpable abuse of its discretion (for it has a large discretion in such matters) has occurred." No fact in this record is called to our attention from which we would be justified in holding that the court abused its discretion. The probate judge had a right to take into consideration the value of the property involved in the estate, the time necessarily occupied in its settlement, and the services required of the attorney, and other considerations which presumably were within the knowledge of the judge though not made part of this record.

It appears from the record that the mortgaged property was bid in at the foreclosure sale by the executor in his own name, and that the commissioner's certificate of sale issued to him personally, and as such was recorded by him. There is no evidence of his having assigned this certificate to the estate or to the heirs of decedent. So far as appears, the title is now in Coppin as an individual. He reports the property as belonging to the estate and has credit for it as such. He should be required to make proper conveyance so that the title will rest where it belongs, if this has not already been done.

The order is affirmed.

We concur: BURNETT, J.; HART, J.

155 Cal. 153

In re BENNER'S ESTATE.

SCHROEDER v. HAPP. (L. A. 2,266.)

(Supreme Court of California. Jan. 14, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 314*)—PROCEEDINGS FOR DISTRIBUTION—RIGHT TO BILL OF EXCEPTIONS—FAILURE TO APPEAR AT HEARING—EFFECT.

One claiming as devisee in opposition to a petitioner for distribution to himself as sole heir of property not disposed of by the will is entitled to a bill of exceptions in case of a decree in favor of the petitioner, though she did not appear at the hearing of the petition.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

2. EXECUTORS AND ADMINISTRATORS (§ 314*)—DISTRIBUTION—APPEAL.

Usually the record on appeal from a decree of distribution, in its nature a judgment roll, will be sufficient without a bill of exceptions; but, when the determination depended wholly or in part on the facts established by evidence, so much thereof as is pertinent may be embodied in the bill.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 314.*]

3. WILLS (§ 108*) — WRITING ATTACHED TO WILL — EVIDENCE TO SUPPORT CLAIM AS DEVISEE.

A writing attached to a will, testamentary in its character, but not executed with the formalities required of a will, cannot be received in evidence to sustain a claim as devisee.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 108.*]

4. WILLS (§ 194*)—REVOCATION OF DEVISE—SALE OF LAND.

A sale by a testator of land devised operates as a revocation of it, as contemplated by Civ. Code, § 1304, providing that, where an instrument altering the testator's interest in a thing disposed of by the will contains provisions wholly inconsistent with the testamentary disposition, it shall operate as a revocation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 481-489; Dec. Dig. § 194.*]

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rivers, Judge.

In the matter of the estate of Christina Benner, deceased. Petition by Martin Happ for distribution to himself as the sole heir at law. From a decree in favor of the petitioner, Genevieve Happ Schroeder, claiming as a devisee, appeals. Affirmed.

Isidore B. Dockweiler, for appellant. Hutton & Williams, for respondent.

HENSHAW, J. Christina Benner died, leaving a will, which was admitted to probate. The first clause of the will, over which the present controversy arises is as follows: "I do hereby name my sisters and brothers as my heirs to my property, consisting of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

house and lot No. 154 W. Jefferson St., to be equally divided among them share and share alike after all my expenses are paid." Attached to the will by mutilage, or like substance, was a writing signed by Christina Benner to the following effect: "In foregoing 'will' I have made certain dispositions concerning properties located at No. 154 W. Jefferson St. I have since sold said property, nevertheless the money obtained shall be equally divided as stated in will. The property was sold to Lorena Montgomery, August 22, 1902." This writing, while testamentary in character, was not executed with the formalities required of a will or codicil, and was not admitted to probate. The executor in due course petitioned for a distribution of the estate to the persons entitled thereto. Thereupon Martin Happ, the father and sole heir at law of the deceased, petitioned for distribution to himself. The court held that under section 1304, Civ. Code, the first clause of the will above quoted was a special devise, which was revoked by the subsequent sale of the property devised, and that, there being no residuary legatee or devisee under the will, the property undisposed of descended to the father as heir at law. The appellant, Genevieve Happ Schroeder, is a sister of the deceased, and one of those entitled to share as devisee under the first clause of the will. She did not appear at the hearing of the petition for distribution, but here presents her appeal, supported by bill of exception, contending that the testatrix's intent was, and was legally expressed, that the moneys derived from the sale of the land should be distributed as would have been the land.

It is first urged by respondent that upon this appeal appellant is not entitled to a bill of exceptions, and that the bill of exceptions actually settled by the court should not here be considered. In this respect an analogy is sought to be drawn between the case of a devisee, heir at law, or distributee who fails to make personal appearance upon such a hearing and that of a defaulting defendant in a civil action, as to which latter it is held that he has no right to move for a new trial, because no issue on the facts has been raised by him, and that therefore he would not be entitled to a bill of exceptions or statement. We hold, however, that in cases of this character an appellant in every proper case is entitled to his bill of exceptions, and that without the necessity of first appearing in person in advocacy of, or opposition to, the matter pending for determination. Usually the record, in its nature a judgment roll, will be sufficient without a bill of exceptions, but wherever the determination has depended, wholly or in part, upon facts established by evidence, so much of that evidence as is pertinent the appellant may have embodied in his bill.

Upon this appeal, in support of her position, appellant relies very strongly upon the matter above quoted, found in the writing not admitted to probate. But the bill of exceptions itself establishes that, not only was this writing not admitted to probate, but that it was not even admitted in evidence at all. Indeed it may be added that it doubtless would have been excluded if offered, since, being testamentary in its character, and not executed with the formalities required, it could not have been properly received. The case, then, presented is one of a devise of land, it mattering not whether the devise be considered special or general, and a sale of that land before the death of the testator. Such a sale being wholly inconsistent with the devise, operates as a revocation of it, as contemplated by section 1304, Civ. Code. *Ametrano v. Downs*, 170 N. Y. 388, 63 N. E. 340, 58 L. R. A. 719, 88 Am. St. Rep. 671; *Brown v. Thorndike*, 32 Mass. 388; *Hattersley v. Bissett*, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

The decree appealed from is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

9 Cal. App. 434

LINFORTH v. SAN FRANCISCO GAS & ELECTRIC CO. (Civ. 498.)

(Court of Appeal, Third District, California.
Nov. 27, 1908.)

1. APPEAL AND ERROR (§ 59*)—REVIEW—JURISDICTION—AMOUNT.

An order retaxing costs amounting in all to \$260.15 is reviewable on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 274; Dec. Dig. § 59.*]

2. COSTS (§ 187*)—WITNESSES—EXPERTS.

Where an expert witness was neither called by the court nor by agreement of the parties, fees at the rate of \$50 a day could not be taxed against defendant for his attendance.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 733; Dec. Dig. § 187.*]

3. COSTS (§ 184*)—WITNESSES—REFUSAL TO ACCEPT FEES.

Plaintiff was not entitled to tax as costs fees for witnesses who refused to accept fees from plaintiff.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 727, 728; Dec. Dig. § 184.*]

4. COSTS (§ 184*)—WITNESS FEES—WITNESSES LEGALLY "REQUIRED" TO ATTEND—"REQUESTED."

St. 1895, p. 273, c. 207, provides that for each day's actual attendance when legally "required" to attend on the superior court witnesses shall be entitled per day to \$2 in civil cases, and may demand the payment of their mileage and fees for one day in advance, and, when so demanded, shall not be compelled to attend unless the sum shall have been paid, and Code Civ. Proc. § 1985, declares that a subpoena is a process by which the attendance of a witness is required. *Held*, that the word "required," as so used, was synonymous in substance with "requested," meaning merely to give notice, and hence since the party making a request for the attendance of a witness is lia-

ble for the statutory fee, in case the witness attends, such party is entitled to tax costs for such attendance, though the witness was not subpoenaed.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 717; Dec. Dig. § 184.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6120-6125; vol. 8, p. 7786.]

5. Costs (§ 161*)—ITEMS OF COST—FILING COST BILL.

A successful party is not entitled to tax as costs 25 cents for filing cost bill.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 581; Dec. Dig. § 161.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Walter H. Linforth against the San Francisco Gas & Electric Company. From an order retaxing plaintiff's costs, defendant appeals. Modified and affirmed.

Page, McCutchen & Knight, for appellant. S. M. Shortridge and P. F. Dunne, for respondent.

CHIPMAN, P. J. This is an appeal from an order by the superior court of the city and county of San Francisco, made after final judgment, retaxing plaintiff's costs. The total amount set forth in the memorandum is \$260.15. The order may be reviewed. *So. Cal. Ry. Co. v. Superior Court*, 127 Cal. 417, 59 Pac. 789; *Elledge v. Superior Court*, 131 Cal. 279, 63 Pac. 360. On the hearing of the question, and after some testimony was taken, the court ordered "that the said motion to tax costs be, and the same is hereby, granted at the sum of \$160.15." The court scaled the cost bill by a lump sum, making it impossible to say what particular items were disallowed. We are therefore at liberty, in support of the judgment, to make our own assumption on the subject, and we assume that the court rejected the item of \$100 charged for two days' attendance of the witness Thomas Price as an expert, who was not called by the court nor by agreement of the parties, and this would leave the exact amount allowed by the court. The court no doubt accepted defendant's view as to this item and struck it out on the authority of the cases cited, to wit, *Bathgate v. Irvine*, 126 Cal. 135, 149, 58 Pac. 442, 77 Am. St. Rep. 158, and other cases.

There were two witnesses, Watkins and Webster, whose names were included for one day's attendance each, amounting to \$4. They refused to accept from plaintiff any fees, and plaintiff is not liable to them. We think this charge should be eliminated from the cost bill. There was also an item of 25 cents for filing cost bill, conceded to be error, and this should also be stricken out. There were witnesses called by plaintiff who testified, but were not subpoenaed, and were paid their fees by him before testifying. There were others who were subpoenaed and testi-

fied for plaintiff, and were paid by him after testifying. There were still others who testified for plaintiff, but who were not subpoenaed, but to whom plaintiff testified that he was under liability to pay fees for their attendance. This classification is stated under the impression, probably, that some distinction might be drawn as to defendant's liability for their attendance. Appellant, however, makes no claim that any distinction should be made as to these classes, and we shall assume that there is none. Appellant claims that the same statute applies to all the witnesses of each class, "and prevents respondent from taxing fees, or any of them, as costs against appellant." The statute reads: "Witness Fees. For each day's actual attendance, when legally required to attend upon the superior court, per day, two dollars in civil cases. * * * Witnesses in civil cases may demand the payment of their mileage and fees for one day in advance, and when so demanded shall not be compelled to attend until the same shall have been paid." St. 1895, p. 273, c. 207. The evidence was that all the witnesses for whose attendance a charge is made were requested by plaintiff to attend the trial as witnesses in the case and promised to appear without subpoena, and that plaintiff considered that he had incurred liability for their attendance. They all appeared and testified.

Appellant's contention is that "no witness whose charge is here objected to was 'legally required to attend' the court below"; that it is only by virtue of the statute that witness fees are recoverable at law; that the statute must be strictly construed; that the terms "legally required to attend" mean subpoenaed to attend. Respondent's position is "that the words in question simply mean that the witness, for whose attendance witness fees are sought to be taxed, shall be lawfully in attendance as a witness on the trial of the case, and that a witness is lawfully in attendance on the trial of a case when he is requested by a party to attend as a witness on the trial of the action," and that service of a subpoena is not necessary to entitle the successful party to tax the fees of such witness as costs against the unsuccessful party. It must be held to be the law that witness fees, as costs to be charged against the losing party, in civil actions, are recoverable by virtue of the statute alone. The question, then, is one of construction. The Code defines a subpoena to be a process "by which the attendance of a witness is required." Code Civ. Proc. § 1985. It is the means provided by which a party may compel a witness to appear in court at the trial whether he is willing or not. When called and sworn upon attendance by request, he has placed himself under and subject to the order of the court as much as if subpoenaed. The only object of the subpoena, and its only office, when com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plied with, is to secure his testimony by personal attendance. It issues, of course, by the clerk, and under seal of the court, at the instance of the party, and its "service may be made by any person." Code Civ. Proc. § 1986. The whole purpose of the subpoena is subserved, when a witness attends at the trial by request of the party, quite as effectually as if he had been subpoenaed. No disadvantage or injury can accrue to the losing party if the witness attends by request. On the contrary, he may save the added expense of mileage and per diem as cost of serving a subpoena. St. 1895, p. 273, c. 207. The party making the request becomes liable to witnesses, for the statutory fee for attendance, who attend in compliance with such request. Section 1033, Code Civ. Proc., relating to the cost bill and how and when it is to be prepared and served, requires the party to deliver to the clerk "a memorandum of the items of his costs and necessary disbursements in the action or proceeding," verified by the oath of the party; and the payment of a witness his fee, when attending by request, is a necessary disbursement as much so as when paid to a witness who has been subpoenaed. We can see no reason underlying a statute which, before he could recover as costs the witness fees allowed by law, would compel a party to incur the initial additional expense of serving a subpoena upon the witness, to accomplish the object which a request would secure, and entailing upon the losing party thereby the ultimate payment of this extra and wholly unnecessary charge. Before we should be inclined to give the statute a construction leading to such results, its language would have to be compelling in its force, which we do not think is the case here. In the definition of the word "required" given in Anderson's Law Dictionary it is stated that usage has given the words "request" and "require" meanings differing more in intensity than in effect or substance. "Neither word," he says, "may import more than to give notice"—citing cases.

There are cases, both state and federal, sustaining appellant's view. So far as the federal cases relied upon are concerned, they have been overruled or nonconcurrent in by the later cases. Among the state cases is *Meagher v. Van Zandt*, 18 Nev. 230, 2 Pac. 57. The statute of Nevada reads: "Witness required to attend," etc. The prevailing opinion seems to have proceeded somewhat upon the effect of the change made in the statute which formerly allowed witnesses "for attending before the court," and was changed to read as above. *Hawley, C. J.*, however, filed an extended dissenting opinion, in which he held "that it was the intention of the Legislature that witnesses should be paid for their attendance at court without reference to the means employed in procuring their attendance." He said: "Witnesses may be required to attend court by agreement, or by the request of a party, without the service

of a subpoena; and, if they do so attend, they can in my opinion collect their fees for mileage and attendance from the party at whose request they were 'required to attend.' The fees thus paid would, it seems to me, be a necessary disbursement in the action which could under the provisions of the statute 'be taxed as disbursement costs against the defeated party'"—citing *Crawford v. Abraham*, 2 Or. 163, 166, and other cases taking the same view. It was said in *Wheeler v. Lozee*, 12 How. Prac. (N. Y.) 446, 448: "The nonservice of a subpoena would be no defense for the party when sued by a witness for his fees, who had attended as his witness at his request. Nor is it possible to perceive how the want of a subpoena can relieve the unsuccessful party from the payment of the fees of his adversary's witnesses." So held in *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 423. In *Farmer v. Storer*, 11 Pick. 241, the statute read "duly summoned." The court said: "A witness who attends upon the request of a party we think is duly summoned, within a reasonable construction of the statute and the practice under it." In *I. & G. N. Ry. Co. v. Richmond*, 28 Tex. Civ. App. 513, 524, 67 S. W. 1029, held that attendance by request was a waiver of the issuance of subpoena. The federal statute uses the terms "pursuant to law." In *Hanchett v. Humphrey* (C. C.) 93 Fed. 895, the question is fully covered. We quote: "I am of the opinion that witnesses may be required to attend court by agreement or by the request of a party without the service of a subpoena; and, if they do so attend, they can collect their fees for mileage and attendance from the party at whose request they were required to attend. Fees thus paid would, it seems to me, be a necessary disbursement in the action, which could, under the provisions of the revised statutes, be taxed as disbursement costs against the defeated party. Such attendance would be as 'pursuant to law' as if the witness had been regularly subpoenaed. It is, of course, true that the statutory means of compelling the attendance of witnesses is by subpoena. But what right has the defeated party to complain because the other party caused his witnesses to come without a subpoena and thereby saved expense? If a subpoena was served, the winning party could recover, not only the mileage of the witnesses, but the costs and expenses incurred in subpoenaing them; and these costs might, in many cases, be much greater than the mileage of the witnesses allowed by the United States statute. The objection to allowance of mileage, because no subpoena is served, ground down to the common sense of the question, is that the winning party ought not to collect any disbursements he necessarily incurred by paying the legal fees of the witnesses because he did not go to the further expense of having them subpoenaed. Such reason does not ap-

pear to me to be sound. Its tone is not judicial, and its logic is certainly faulty, and the result, if continued, would lead to unnecessary expense to litigants and ought not to be adhered to any longer. * * * Notwithstanding some conflict of the earlier cases, the law is now well settled that if a witness in good faith attend the court, and whether he comes in obedience to a subpoena or at the mere request of a party, plaintiff or defendant, he is to be considered as attending 'pursuant to law' within the meaning of those words as used in section 848, Revised Statutes, and the party for whom he attends is entitled to recover costs for the legal amounts paid such witness, the same as if he had been legally subpoenaed."

The order should be modified by striking out the item of 25 cents for "filing cost bill" and the items of \$2 each for witness fees of A. A. Watkins and Walter B. Webster, and, as thus modified, the order is affirmed.

We concur: HART, J.; BURNETT, J.

9 Cal. App. 502

HART v. WALTON. (Civ. 515.)

(Court of Appeal, Third District, California. Dec. 8, 1908. Rehearing Denied by Supreme Court Feb. 1, 1909.)

1. LIMITATION OF ACTIONS (§ 19*)—LIMITATIONS APPLICABLE—REFORMATION OF DEED—"ACTION."

An "action" to reform a deed as to the description of the land conveyed on the ground of mutual mistake is not an action within Code Civ. Proc. § 318, providing a limitation of five years for actions for the recovery of real estate, but is within Civ. Code, § 3399, authorizing an action to reform a contract, which because of mutual mistake does not express the intention of the parties.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 19.*]

For other definitions, see Words and Phrases, vol. 1, pp. 128-140; vol. 8, p. 7563.]

2. REFORMATION OF INSTRUMENTS (§ 26*)—ACTIONS—PARTY ENTITLED TO SUE—"PARTY AGGRIEVED."

One who has succeeded to the rights of the grantee in a deed, which, because of a mutual mistake, does not correctly describe the land, is a "party aggrieved," within Civ. Code, § 3399, authorizing the reformation of an instrument which by mutual mistake does not express the intention of the parties, on the application of the party aggrieved.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 94; Dec. Dig. § 26.*]

For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 7569, 7570.]

3. LIMITATION OF ACTIONS (§ 96*)—ACTIONS—LIMITATIONS.

Where no duty is imposed by law on a person to make inquiry to discover a mistake in a contract, and where, under the circumstances, a prudent man would not be put on inquiry, the mere fact that means of knowledge are open to one, and he has not availed himself of them, does not deprive him of relief, when thereafter he makes actual discovery of the mistake, but to debar him the circumstances must be such

that the inquiry becomes a duty, and the failure to make it a negligent omission.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 476; Dec. Dig. § 96.*]

4. LIMITATION OF ACTIONS (§ 96*)—ACTIONS—LIMITATIONS.

Where there was nothing to excite any suspicion of a mistake in a deed erroneously describing the land, and there was nothing to show that the grantee and his purchaser acted without ordinary prudence, the fact that the mistake was not discovered sooner by the grantee and his purchaser did not defeat an action to reform the deed, brought a few days after the discovery of the mistake, though the grantee owed a duty to his purchaser to ascertain whether the deed was correct.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 476; Dec. Dig. § 96.*]

5. PLEADING (§ 72*)—PRAYER FOR RELIEF.

A prayer of the complaint, in a suit to reform a deed on the ground of mutual mistake, that it be adjudged that plaintiff is the owner of the lands described in the complaint, and that defendant be enjoined from asserting any right to them, goes beyond the scheme of the complaint, and may be disregarded.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 72.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Martin Hart against Benson Walton. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Mannoff & Mannon, for appellant. McNab & Hirsch, for respondent.

BURNETT, J. The action was brought to reform a deed. Plaintiff alleges that on the 2d day of November, 1893, defendant was the owner of certain lands in Mendocino county, consisting of 200 acres, which are described in paragraph 1 of the complaint. That on said date the defendant agreed to sell, and did sell, said real property to one Mrs. Louise D. Milks. "That on the said 2d day of November, 1893, the said defendant made, executed, and delivered his deed of conveyance, intending to convey and describe the lands hereinbefore, in paragraph 1 of this complaint, set forth and described, and no other. And said Mrs. Louise D. Milks received said deed fully believing that said deed conveyed the lands which she had purchased, to wit, the real property described in paragraph 1 of this complaint and no other. That by a mistake of both parties to said instrument the said deed of conveyance did not truly or correctly describe the premises sold and intended to be described therein, but said deed of conveyance described certain of the property intended to be conveyed, but failed to include within the description certain other lands intended to be described therein." Then follows a copy of the conveyance as it was executed. The manner in which the mistake occurred is also fully set forth. It was due to the carelessness of the scrivener in writing the word "of" instead of "and" in the following portion of the de-

scription: "N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 21," thereby causing to be conveyed 115 acres less than was intended by the parties. "That thereafter, to wit, on the 11th day of December, 1905, the said Mrs. Louise D. Milks had not discovered the said mistake, and on the said date for a valuable consideration sold to plaintiff herein the lands hereinbefore, in paragraph 1 of this complaint, described. That in making out and executing the deed of conveyance of said lands by the said Mrs. Louise D. Milks to this plaintiff, the scrivener drafting said instrument used the deed of conveyance containing the erroneous description" from defendant to the said Mrs. Louise D. Milks. The same mistake was made, the parties believing that the land intended to be conveyed was properly described. The plaintiff did not discover said mistake until about the 1st of November, 1906. Desiring to sell said property, he had an abstract prepared for the intending purchaser. The attorney who examined said abstract noticed the mistake, and called it to the attention of plaintiff, who had up to that time fully believed that the aforesaid deeds correctly and truly described the lands actually purchased and paid for, and intended to be conveyed by said grantors. The plaintiff immediately demanded of defendant, Walton, and of the said Mrs. Louise D. Milks that each of them execute to plaintiff a new deed to said premises correcting said mistake. Mrs. Milks did so, but "the defendant refused, and still refuses, to either make, execute, or deliver a new or corrected deed to said premises, and refused, and refuses, in any manner to correct said mistake." It is expressly averred that the defendant accepted payment in full for all the land intended and believed to be conveyed by said deed of November 2, 1893. Defendant denied the material averments of the complaint, pleaded the statute of limitations, and filed a cross-complaint to quiet his title against plaintiff. The findings were against defendant, and it was adjudged that "that certain deed of conveyance made, executed, and delivered on the 2d day of November, 1893, by Benson Walton to Louise D. Milks * * * be and the same is hereby reformed in the following particular, to wit: By causing the description contained in said deed, which reads therein, 'N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 21, township 22 N., R. 17 W., M. D. M.,' to be reformed so as to read 'N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 21, township 22 N., R. 17 W., M. D. M.' * * * That said reformation and correction of said description to be made and to take effect as of the date November 2, 1893."

As claimed and stated by respondent, the evidence, without conflict, shows: "(1) That the appellant, Walton, sold the full quota of land misdescribed in the deed, and received payment in full; (2) that by mistake of the scrivener the deed was so drawn that Walton

conveyed 5 acres when he actually intended to convey 120 acres for which he was paid. (It may be added that 80 additional acres are described in another portion of the deed); (3) that Mrs. Milks, to whom Walton conveyed the property, sold to plaintiff all the land Walton had intended to convey, and that in copying the deed the same mistake was made; (4) that Milks recognized the mistake, and corrected it; (5) that appellant, Walton, while admitting that he had sold the entire tract and received payment in full therefor, and acknowledging that he had relinquished all claim to the land, and did not know of the mistake in the deed until a new deed was demanded of him just before the commencement of the action, refused to make a new deed, and determined to make an attempt to hold the land, regardless of the fact that he had sold it and received full payment therefor; (6) that the plaintiff and his predecessor in interest knew nothing of the mistake until a few days before the action was brought." The further facts germane to the issues raised by the cross-complaint and plaintiff's answer thereto are that the whole of said tract intended to be conveyed as aforesaid was properly assessed to said Mrs. Milks from 1893 to 1905, inclusive, and the taxes were paid by her, and for the year 1906 it was assessed to, and the taxes were paid by, plaintiff, and during all this time said parties claimed to be the owners of all of said property, and exercised the acts of ownership over said premises usually and commonly exercised by all owners of such property, it being unimproved timber land.

From the foregoing it is manifest that a judgment in favor of defendant would be clearly opposed to the generally recognized principles of equity and fair dealing. How he could hope to have it adjudged by the court, as pretentiously set forth in his cross-complaint, "that he is, and at all the times herein mentioned has been, the owner and seised in fee, in the possession, and entitled to the possession, of the real property" (describing that omitted from the deed to Milks) and "that the plaintiff herein claims some estate, right, title, or interest in or to the said land adverse to this defendant, but that such claim is without right and unjust, and the said plaintiff has no right, title, estate, or interest whatever in or to said above-described real property, or in or to any part or parcel thereof," is almost incredible, in view of his own testimony that "On November 2, 1893, I agreed to sell to Mrs. Louise D. Milks 200 acres of land for \$800. I intended to convey to her all the land that I owned in that part of the country. I suppose there is a mistake in the description contained in the deed made and executed by me to Mrs. Milks. After I signed the deed I believed that I had deeded away my entire 200 acres. I commenced to claim those lands last fall, before this suit was commenced. I made no explanation of my claim,

or nothing about it. I first discovered that I had made a mistake in the deed to Mrs. Milks since I was asked to make a new deed. Prior to that time I thought the land belonged to Mrs. Milks. I never lived there, but slept there several nights, some years ago, while out hunting." Out of his own mouth, therefore, assurance is furnished that he is not the owner, not in the possession, nor entitled to the possession, of said land, and has not been since November 2, 1893, and furthermore that the claim of plaintiff is not "unjust," but entirely equitable, and one that should be enforced.

But, as we understand appellant, his only serious contention is that plaintiff should not have prevailed for the reason that his cause of action is barred by the statute of limitations; it being asserted that the action is for the recovery of real property, and barred by the provisions of section 318 of the Code of Civil Procedure, which provides that: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action." But, waiving the question whether there is not sufficient evidence to show the possession of the property by plaintiff and his predecessor within five years, it is a sufficient answer to declare that this is an action, pure and simple, for the reformation of a written instrument to make it speak the intention of the parties. The action is not for the recovery of real property or its possession, and the judgment affords no such relief. The judgment simply corrects the deed as of the date of November 2, 1893, and, if pleaded, would not be sufficient, of itself, to show a present cause of action for the recovery of the property or its possession. This proceeding is authorized by section 3399 of the Civil Code, providing that: "When, through fraud or a mutual mistake of the parties * * * a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons in good faith and for value." It is clear that plaintiff is a party aggrieved by the mistake, as he has succeeded to all the rights of Milks in and to the property and the revision of the deed as sought will not prejudice any right acquired by a third party; but, on the contrary, it will promote the intention of all the parties involved, and enable plaintiff to secure what he has purchased in good faith and for value. The time within which an action for relief on the ground of fraud or mistake must be brought is three years, as prescribed by subdivision 4, § 338, of the Code of Civil Procedure. "The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved

party, of the facts constituting the fraud or mistake." As we have seen, the discovery here was made only a few days before the action was brought. Plaintiff's claim is therefore not subject to the bar of the statute.

In *Breen v. Donnelly*, 74 Cal. 301, 15 Pac. 845, it appears that "two tenants in common of a tract of land, for the purpose of making a partition, entered into an agreement for the division thereof into two equal parts, and for the interchange of deeds, so that each would own a half in severalty. In pursuance of their agreement they employed a surveyor, believed by them to be competent, who ran a line which he assured them divided the land into halves. The cotenants thereupon, mutually relying upon the assurance of the surveyor, exchanged deeds in accordance with the line so run. The line did not divide the land into halves, but included in that conveyed to the ancestor of the defendants upwards of 500 acres more than he was entitled to. The plaintiff, who was the heir of the other cotenant, did not discover the mistake until 13 years after the interchange of deeds. Since that time the land had been used exclusively for grazing and no improvements had been placed thereon by the defendants." The court, speaking through Mr. Justice McFarland, declared: "This is an action to reform a deed; to correct a mistake in a written instrument and make it conform to the real intent of the parties. That a court of equity has power to correct such a mistake, in a proper case, is of course beyond doubt, and that the facts here make a proper case is equally clear. It is established beyond doubt that the two tenants in common intended to convey by deed to each other the half of a tract of land, and that by pure mistake the deed sought to be reformed failed to convey such half. There is no question here of innocent purchasers. * * * In good conscience they [defendants] ought to correct the mistake, and their only defense is founded upon the naked plea of the statute of limitations. But we think that the action was commenced in time. * * * In the case at bar, the discovery of the mistake was not made until 1880, at which time the cause of action 'is deemed to have accrued.'" The other cases cited by respondent are in line with the foregoing.

But it is claimed that the mistake should have been discovered sooner by plaintiff and his predecessor in interest, and therefore it must be deemed in law to have been so discovered. But the correct rule in reference to this phase of the question is stated in *Tarke v. Bingham*, 123 Cal. 166, 55 Pac. 760, as follows: "Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar

him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission." In this case there was nothing to excite any one's suspicion as to a mistake in the deed, and it cannot be said that plaintiff or his predecessor in interest acted without ordinary prudence and caution. Again, in what respect can it be said that inquiry became a duty? Duty implies an obligation to some one. If the duty be not performed, injury will probably result to the one to whom the obligation is due. It might be said that Milks owed a duty to plaintiff to ascertain whether the deed from defendant was correct, but plaintiff is the only one to complain of that dereliction. It does not lie in the mouth of defendant to say that it was the duty of plaintiff or his predecessor to ascertain that a mistake had been made, as defendant has not suffered any detriment thereby. He caused the mistake to be made, and he appears now in the attitude of one trying to take advantage of his own wrong and to retain property that he sold and was paid for and that he intended to convey. The duty of inquiry is exacted in favor of innocent parties, and not of wrongdoers.

But appellant claims that it has been held in some recent cases that an action like this is one for the recovery of real property, and, where plaintiff is not in actual possession, must be brought within five years from the time the deed containing the mistake was executed. It will be seen, however, upon an examination that those cases represent a commendable desire, upon the part of the appellate courts, to enlarge as far as it can be done the statute of limitations in the interests of justice, and they were not primarily for the reformation of written instruments, but they involved the features of an action in ejectment or to quiet title. In *Goodnow v. Parker*, 112 Cal. 438, 44 Pac. 738, for instance, the scope of the action is shown in this statement in the syllabus: "Where part of the lands included in partition deeds which were intended to make an equal division of the lands owned by the parties, but which, by mutual mistake, included lands outside of the boundaries of a Mexican grant, of which the lands owned by them formed a part, and upon discovery of the mistake the owners employed a surveyor to make an equal division between them of the lands lying within the grant, and a fence was built between them upon a part of the division line thus established, the remainder of the division line being marked by a furrow, but no correction was made in the partition deeds, an action subsequently brought to compel a conveyance of the corrected division line, and to quiet title to the land up to that line,

is in effect an action to recover real property, and is subject to the limitation of five years prescribed by section 318 of the Code of Civil Procedure, and is not governed by the limitation of three years from the discovery of the mistake, prescribed by subdivision 4 of section 338 of that Code, the mistake being merely incidental to the action for the recovery of the property." In *Murphy v. Crowley*, 140 Cal. 144, 73 Pac. 821, it is said by Mr. Justice Shaw, speaking for the court, that: "The decision of the question whether the cause of action was barred, as alleged, depends on the character of the cause of action set forth in the complaint. If it is to be treated as a cause of action solely for relief on the ground of fraud, it necessarily follows that the action is barred by the statute pleaded." But it was held that since the action was to set aside a conveyance of a tract of land procured by fraud and undue influence, and to enforce a trust as to another tract, and to quiet the title of plaintiff in one-half of each tract, and to recover the possession thereof, and for an accounting of the rents and profits, it was essentially an action to recover the possession of real property, and therefore the five, instead of the three, year limitation was held to apply. It was stated, in reference to earlier cases appearing to hold to the contrary, that "Each presented a simple case for relief on the ground of fraud or mistake, unmixed with any attempt to recover possession or establish title otherwise than by nullifying the act procured by the fraud or mistake." The case of *Union Ice Co. v. Doyle*, 6 Cal. App. 284, 92 Pac. 112, as stated by this court through Justice Hart, was "a suit in equity, the object of which is to correct an alleged misdescription of the land involved in two certain deeds to quiet title thereto, and to compel conveyances of said land in accordance with the true description thereof." It is true that in the case at bar a part of the prayer is "that it be adjudged that the plaintiff is the owner of the lands described in paragraph 1 of this complaint, and that the defendant be enjoined from asserting any right to any of the lands contained in said paragraph," but this goes beyond the obvious scheme and purpose of the complaint, and was properly disregarded by the trial court. The cause of plaintiff is just, and should not be defeated by a strict and technical application of the statute of limitations in behalf of one whose claim must be held intolerable in a court of equity.

Other questions discussed by counsel have been considered, but the foregoing is decisive of the controversy.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 500

WILSON v. DAHLER et al. (Civ. 483.)

(Court of Appeal, First District, California.

Dec. 8, 1908.)

1. NEW TRIAL (§ 61*)—GROUNDS—JUDGMENT CONTRARY TO LAW — COURT'S FAILURE TO MAKE FINDINGS.

In an action to foreclose a mortgage, the answer alleged defendant's interest, and that another had acquired a one-third legal interest in the mortgaged property after the mortgage was executed and before suit, and had died before the action was begun, and that his interest was chargeable with a part of the mortgage debt, and his administratrix was a necessary party, and prayed that she be made a party, but the court failed to find upon the issues raised, and rendered judgment against defendant. *Held* that, since the issues raised were material and supported by evidence, a new trial was properly granted because of the court's failure to find upon the issues raised by the answer.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 61.*]

2. MORTGAGES (§ 434*) — FORECLOSURE ACTIONS—PARTIES—SUBSEQUENT GRANTEES.

A grantee of mortgaged property whose deed is duly recorded is a necessary party in an action to foreclose.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1283; Dec. Dig. § 434.*]

Appeal from Superior Court, City and County of San Francisco; M. C. Sloss, Judge.

Action by James K. Wilson against Henry M. G. Dahler and others. From an order granting a motion for new trial after judgment for plaintiff, plaintiff appealed. Affirmed.

Bigelow & Dorsey, J. W. Dorsey, and R. M. F. Soto, for appellant. W. H. Cobb, for respondent H. M. G. Dahler. Mullaney, Grant & Cushing, for respondents Behrend and Martin B. Joost. Lloyd & Wood, for Ellen Dore and others.

HALL, J. This is an appeal by plaintiff from an order granting the motion of the defendants Joost for a new trial. Plaintiff brought an action to foreclose a mortgage upon real estate, executed by defendant Henry M. G. Dahler to the German Savings & Loan Society to secure payment of a promissory note for the sum of \$5,000, dated December 30, 1893. Behrend Joost and Martin B. Joost were made parties defendant as claiming some interest in the property, which was alleged to be subsequent and subordinate to the mortgage. The mortgage and note were assigned to plaintiff before suit.

Behrend Joost and Martin B. Joost answered the complaint, and set up affirmative matter, upon which the court made no finding. The motion for a new trial was made upon the ground, among others, that the court erred in failing to make findings upon the issues presented by the answer of the Joosts, and was properly granted for this reason. The issues presented by the answer were material. The answer alleged facts from which it appeared that defendant Martin B. Joost

was a beneficial owner of one-third of the mortgaged property and that Maurice Dore at the time of his death—which was after the execution of the mortgage but before suit was brought—was the legal owner of an undivided one-third of the property by deed of conveyance from Dahler duly executed and recorded after the execution of the mortgage and before suit, and that said interest still belonged to his estate; that, as between the owners of the land, the Dore interest was chargeable with the payment of a portion of the mortgage debt. The answer further alleged in express terms that the administratrices of the estate of Maurice Dore, deceased, are necessary and proper parties to the action, and prayed, among other things, that it be not further prosecuted until they be made parties to the action. A grantee of land subject to a mortgage, whose deed is duly recorded, is a necessary party to an action to foreclose the mortgage. *Porter v. Muller*, 65 Cal. 512, 4 Pac. 531; *Woodward v. Brown*, 119 Cal. 291, 51 Pac. 2, 542, 63 Am. St. Rep. 108.

In the case at bar neither the administratrices nor the heirs at law of Maurice Dore were made parties to the foreclosure suit. The judgment that was vacated did not bind the Dore interest in the land, and a sale under such judgment would have resulted in a conveyance of the interest of defendants Joost and Dahler to pay a debt in part properly chargeable against the Dore interest if the allegations of the answer are true in fact. Material issues were presented by the answer which were supported by evidence. The court should have made findings thereon, and for this reason properly granted the new trial.

The order is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 485

SEEBACH v. KUHN. (Civ. 507.)

(Court of Appeal, First District, California. Dec. 5, 1908. Rehearing Denied by Supreme Court Feb. 1, 1909.)

1. CONTRACTS (§ 295*)—PERFORMANCE—SUBSTANTIAL PERFORMANCE—BUILDING CONTRACTS.

Minor defects and omissions in a structure, if not willful, do not prevent recovery by the contractor as for a substantial performance, where the owner receives benefits under the contract, since the owner may recoup his damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1353-1362; Dec. Dig. § 295.*]

2. CONTRACTS (§ 295*)—PERFORMANCE—SUBSTANTIAL PERFORMANCE.

Where a building contract provided that, if the work be destroyed before completion, the loss should be borne by the owner to the extent of accrued installments, and the building was destroyed before it was accepted, and when it had been completed except the laying of stone-work for floor entrances, the cost of which

would be \$39, the contractor could not recover installments payable on the completion and acceptance of the building; the doctrine of substantial performance not applying.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1353-1356; Dec. Dig. § 295.*]

3. PLEADING (§ 380*)—ALLEGATIONS—VARIANCE.

Plaintiff cannot allege one cause of action, and recover upon another.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1252; Dec. Dig. § 380.*]

4. CONTRACTS (§ 332*)—PLEADING—WILLINGNESS TO PERFORM.

Where plaintiff relied upon his willingness to complete a building before its destruction, which event, by the terms of the contract, prevented recovery for payments not then due, he should have pleaded that fact.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1615-1639; Dec. Dig. § 332.*]

5. CONTRACTS (§ 303*)—PERFORMANCE—PREVENTION BY THIRD PARTY.

A building contractor cannot avoid a provision in the contract depriving him of installments which have not accrued at the destruction of the building by showing that completion of the building was delayed by the acts of another contractor.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 303.*]

6. CONTRACTS (§ 322*)—ACTION—SUFFICIENCY OF EVIDENCE.

In an action by a contractor for payments claimed to be due under a building contract, by the terms of which the contractor was to bear the loss of payments becoming due after the building was destroyed, evidence held not to support a finding that the owner's architect prevented the completion of the work before its destruction.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 322.*]

Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Action by A. H. Seebach against Charles J. Kuhn. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed, and judgment directed for defendant.

S. F. Leib, for appellant. Wm. P. Veuve, for respondent.

HALL, J. This action was brought by a contractor to recover the last two payments, amounting to \$1,465, under a building contract, he claiming to have completed the work contracted for, the third payment being payable on completion of the work, and the fourth and last payment 35 days thereafter. The action was tried with a jury, and upon their special and general verdict judgment was entered for plaintiff for the sum of \$1,426. This is an appeal by defendant from the judgment, and the order denying his motion for a new trial.

The building was to be erected by several independent contractors each agreeing by a separate contract with the owner (defendant) to do specified portions of the necessary work. The contract between plaintiff and defendant was entirely in writing, signed and

executed by them and duly filed, with the plans and specifications, in the recorder's office before the work was commenced. By the terms of the contract plaintiff was to furnish all the labor and materials required, and perform and complete in a workmanlike manner all brick work, all granite work, all concrete and artificial stone work. A part of this work, as found by the special verdict, consisted of the laying and constructing of floor entrances to the building, to contain an area of 78 square feet, and to consist of the best artificial stonework laid upon a concrete foundation. The specifications relating to this part of the work are as follows: "The floor of entrances. To be of the best artificial stonework cut up in suitable pattern, and the top finish to be $\frac{3}{4}$ " thick of clean washed sharp sand and Alsens cement equal parts. The concrete to be $\frac{3}{4}$ " thick of one part of said cement to seven parts of clean washed sharp sand and gravel; prepare the ground by filling and floating with water, and tamping so as to make a first class job." The evidence showed without contradiction, and the jury found, that no part of this artificial stone and concrete foundation for the said floor entrances was ever constructed, except that the ground had been prepared for such work, but that on the 18th day of April, 1906, the building so far as it had been completed was wholly destroyed by an earthquake. The jury further found that the cost of finishing the floor entrances in accordance with the contract would be \$39. The jury also found that plaintiff's contract with defendant and the work to be performed by plaintiff thereunder was substantially completed before the earthquake, but had never been accepted by the architect or owner. The contract between plaintiff and defendant is set out in the answer of defendant, and is found by the jury to be the contract under which plaintiff did the work in question. The contract provided that: "In case said work herein provided for should, before completion, be wholly destroyed by fire, defective soil, earthquake, or * * * then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the fifth clause of this agreement; and the loss occasioned thereby and to be sustained by the contractor shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract." The fifth clause of the contract provided that the owner agreed "in consideration of the performance of this agreement by the contractor" to pay him the contract price of \$2,929 in four installments, viz., \$732 when the first story was built to receive the second story floor joists; \$732 when the brickwork was ready to receive the second

story ceiling joists; "third, a payment of \$732 when all the work under this agreement has been completed and accepted by the owner and architect; and fourth, a last or final payment of \$733 thirty-five days after the date of said acceptance."

Appellant contends that under the provisions of the earthquake clause of the contract plaintiff is not entitled to the third and fourth payments, for the reason that all the work contracted to be done was not completed or accepted when the building was totally destroyed by earthquake. Respondent, on the other hand, contends that, notwithstanding the language of the contract, plaintiff is entitled to recover the last two installments of the contract price, less damages for the unperformed work, upon the theory that the work contracted to be done was substantially completed before the earthquake, and that the finding of substantial completion by the jury is conclusive, notwithstanding that the jury also found specifically what work was not in fact done. Undoubtedly the rule is well established that in ordinary cases the contractor in a building contract may recover against the owner, notwithstanding that he has not strictly complied with his contract because of minor defects and imperfections, and even omissions, not willful or fraudulent. This rule is sometimes spoken of as the modern equitable doctrine of substantial performance. It rests for its justification upon the proposition that in such cases the owner has either accepted the benefit of the work of the contractor or because of the nature of the transaction he perforce receives such benefit to his property, and may be protected from any actual pecuniary loss by a recoupment in damages for deficiencies and imperfections. Oftentimes minor defects and imperfections occur in the construction or repair of buildings without intentional fault of the contractor. For such defects the owner may be readily made whole by an allowance of damages. So, too, under the mechanics' lien law it is provided that for the purpose of filing liens a building shall not be held uncompleted because of trivial imperfections. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *Schindler v. Green*, 149 Cal. 752, 87 Pac. 626; *Bianchi v. Hughes*, 124 Cal. 25, 56 Pac. 610; *Marchant v. Hayes*, 117 Cal. 670, 49 Pac. 840; *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 51 Pac. 555.

But we do not think that the doctrine of substantial performance has any application to this case. The defendant did not accept the work or enter into the use and possession of the building. He did not and cannot receive any benefit from the work done, and he cannot be made whole by any allowance for damages for incomplete performance. Each and all of the just and equitable principles upon which the doctrine of substantial performance rests are absent from this case. It manifestly is not a case where both par-

ties may be protected from loss. On the contrary, when the parties to the contract framed the fire and earthquake clause, they had in mind a contingency under which one or both parties must suffer a loss. They deliberately undertook to provide how that loss should be borne. The contract that they made is perfectly lawful, and we know of no reason why courts should not give it effect according to its terms. *Holmes v. Richet*, 56 Cal. 316, 38 Am. Rep. 54; *Hogan v. Globe Mutual Association*, 140 Cal. 610, 74 Pac. 153. We have been cited to no case, and have found none, involving a contract providing how the loss shall be borne in case of the destruction, without the fault of either party, of the building or subject-matter of the contract before completion of the work.

In the case of *Lord v. Wheeler*, 1 Gray (Mass.) 285, a contractor for the repair of a building had substantially completed the repairs when the building was destroyed by fire. The contractor was allowed to recover, but the court said: "And the precise ground upon which the plaintiff can recover in this case is that when the repairs upon the house were substantially done, and before the fire, the defendant, by his tenant, entered and occupied it, and so used and enjoyed the labor and material of the plaintiff." The ground of the recovery in this case is a striking illustration of what we have said is the foundation upon which the doctrine of substantial performance rests, viz., benefits accepted or received from the work and materials of the contractor.

In answer to certain questions submitted at the request of plaintiff the jury found that plaintiff was ready, able, and willing to perform the omitted work before the earthquake, but was prevented from so doing by the acts of another independent contractor, and also by the act of the architect. It is sufficient to say that no such issue was raised by the pleadings. Plaintiff nowhere alleged any matter of prevention, waiver, or excuse for not performing, but in both counts of his complaint alleged that he had performed all the work he had contracted or been employed to do. Plaintiff cannot allege one cause of action, and recover by proving a different cause of action. *Kredo v. Phelps*, 145 Cal. 526, 78 Pac. 1044; *Nichols v. Randall*, 136 Cal. 431, 69 Pac. 26. If a litigant relies upon matter of waiver or estoppel to sustain his cause of action or defense, he must plead such matter. *Jerome v. Stebbins*, 14 Cal. 457; *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867; *Gillon v. Northern, etc., Co.*, 127 Cal. 480, 59 Pac. 901; *Rogers v. Kimball*, 121 Cal. 247, 53 Pac. 648; *Dyer v. Scalmanini*, 69 Cal. 642, 11 Pac. 327; *Clark v. Huber*, 25 Cal. 593; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; 9 Cyc. 727.

As to the prevention by an independent contractor, we know of no principle of law that would make the owner responsible to plain-

tiff for the acts of such independent contractor. The contract itself contemplated that delays might be caused by the acts of other contractors, and provided that the time lost by such delays should be added to the time given plaintiff to complete his work.

Neither do we think that the evidence supports the finding that plaintiff was in fact delayed by any act of the architect. It clearly appears from the evidence given by plaintiff's own witnesses that the woodwork, which was being done by an independent contractor, had not progressed to that stage that the floor entrances could be properly laid. It appears that the store fronts should be put in before the floor entrances should be laid. The contractor for this work had not commenced on it, but was about ready to do so. In this connection it was shown that before this work could be done detail drawings should be furnished by the architect, and that they had not been prepared, but it nowhere appears that they would not have been ready whenever needed. In the nature of building operations, when the different classes of work are being done by different contractors, it will often happen that one contractor must wait until the work of another has been done. Delays arising from such cause are not a prevention or in any sense a delay for which the owner is chargeable. We do not think that the finding that the plaintiff was prevented from doing the omitted work before the earthquake by any act of the architect finds any support in the evidence.

As it appears from the finding of the jury that the parties executed the contract set forth in defendant's answer, which required plaintiff to construct the floor entrances, and that they were not constructed before the building was totally destroyed by earthquake, defendant was entitled to judgment upon the special verdict of the jury.

The judgment is reversed, with directions to the trial court to enter judgment for defendant.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 516

NOYES v. SCHLEGEL. (Civ. 536.)

(Court of Appeal, Second District, California.
Dec. 12, 1908.)

1. VENDOR AND PURCHASER (§ 187*)—CONTRACTS—FORFEITURE—WAIVER.

A vendor, in a contract for the sale of real estate on installments, and for a forfeiture on default in payment by the purchaser, may waive the forfeiture for nonpayment of installments at maturity, by continuing and acting on the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 374, 375; Dec. Dig. § 187.*]

2. SPECIFIC PERFORMANCE (§ 99*)—DELAY IN PERFORMANCE BY PLAINTIFF—EXCUSE.

A purchaser of real estate, who stipulates to make payment in installments, and for a forfeiture on default thereof, may excuse his breach as to the time of payment on showing equitable grounds for relief, and compel the vendor to perform.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 99.*]

3. VENDOR AND PURCHASER (§ 187*)—CONTRACTS—FORFEITURE—WAIVER.

Under Civ. Code, § 1511, subd. 3, and sections 3512, 3515, 3516, providing that when a debtor is induced not to offer to perform by any act of the creditor, want of performance is excused, etc., a vendor, in a contract for the sale of real estate, stipulating for payment in installments and for a forfeiture on default by the purchaser, who stated to the purchaser, at the time the contract was made, and subsequent thereto, that he did not care how the payments were made as long as he had the money in the time fixed by the contract, could not declare a forfeiture for delay in the payment of installments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 187.*]

4. APPEAL AND ERROR (§ 1011*)—FINDINGS OF COURT—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

5. VENDOR AND PURCHASER (§ 182*)—CONTRACTS—FORFEITURE—WAIVER.

Where a vendor in a contract for the sale of real estate, stipulating for the payment in installments and for a forfeiture on default by the purchaser, stated to the purchaser that he did not care how the payments were made, and subsequently withdrew the privilege by notice of forfeiture for default in the payment of installments, the purchaser was entitled to a reasonable time thereafter in which to make payments of installments past due, before the forfeiture became effective.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 182.*]

6. VENDOR AND PURCHASER (§ 182*)—CONTRACTS—FORFEITURE—WAIVER.

A vendor in a contract for the sale of real estate, stipulating for payment in installments and for a forfeiture on default by the purchaser, informed the purchaser that he did not care how the payments were made. He subsequently served a notice of forfeiture for default in payment of installments, and the purchaser 10 days later tendered the amounts due. *Held*, that a finding that the purchaser paid the past-due installments within a reasonable time after notice of forfeiture was not erroneous.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 182.*]

7. SPECIFIC PERFORMANCE (§ 59*)—CONTRACTS ENFORCEABLE.

A contract to make a contract on performance of certain conditions is enforceable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. § 59.*]

8. SPECIFIC PERFORMANCE (§ 65*)—CONTRACTS ENFORCEABLE.

A contract for the sale of designated real estate stipulated for payment in installments, and provided that in consideration of the agreement the purchaser might exercise the option to purchase adjacent lands for a specified sum at any time within a time fixed, and provided for a forfeiture on his failure to comply with the

contract. The vendor waived a forfeiture for nonpayment of installments when due. The adjacent lands were necessary to the purchaser's proper use of the designated real estate. *Held*, that the waiver by the vendor of the forfeiture was not limited merely to the designated real estate, but went to the entire contract, and the purchaser might exercise his option to purchase the adjacent lands.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 65.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by L. B. Noyes against L. Schlegel. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Frank M. Porter and Trusten P. Dyer (Francis P. Harrington, of counsel), for appellant. John W. Kemp and Kemp & Collier, for respondent.

TAGGART, J. Decree in favor of plaintiff for specific performance of a contract to convey real estate. Defendant appeals from the judgment and an order denying his motion for a new trial.

Defendant entered into a written contract to sell and convey to plaintiff two lots of land for \$625, payable \$85 in cash and \$15 per month until paid; plaintiff to have privilege of paying larger sums at his election, and to pay interest on deferred payments and taxes on the property. By the same writing, and "in consideration of the foregoing" (agreement), plaintiff was given an option to purchase two other lots lying immediately in the rear of the first mentioned, "at any time within three years" from the date of the instrument for the sum of \$625. Before bringing the action he paid or tendered to defendant the full amount of all payments agreed to be paid for the first-mentioned lots, with the deferred interest and taxes, all of which was done within the time provided, to wit, three years, and also the day before the expiration of the three years tendered to defendant the full price agreed upon for the other two lots, and demanded deeds for all the lots. But time was made of the essence of the contract, which provided that in the event of a failure to comply with the terms of the contract by plaintiff, defendant was released from all obligation to convey, and plaintiff forfeited to defendant all moneys theretofore paid on the contract. Some of the installments were not paid at the times fixed in the contract, and plaintiff was in default as to some of these for more than six months, but plaintiff claims, and the trial court found, in effect, that defendant waived his right of forfeiture for these defaults in payment, and released plaintiff from the operation of the time clause as to the installments which were not paid promptly, by an express oral agreement, and

by the acceptance of overdue payments, and that, within a reasonable time after notice of defendant's revocation of this privilege, plaintiff tendered to defendant the amount of all delinquent payments, and thereafter tendered all payments on or before the day they became due. It is the insufficiency of the evidence to sustain the findings to this effect upon which appellant relies for a reversal.

Plaintiff testifies that about the time the contract was made (February 24, 1904), and on other occasions, notably one after April 15, 1906, when plaintiff's wife was present, defendant expressly said he did not care how the payments were made as long as he had the money in the three years' time; that there was no formal withdrawal of this privilege until a notice of forfeiture of the contract was served by defendant on July 1, 1906, although in June, 1906, defendant refused to receive from plaintiff's wife the moneys due on the installments and interest at that time, giving as a reason that he would not accept any more money on the contract unless he was released from the option on lots 23 and 24 (the lots in the rear). On July 11, 1906, a tender of the amounts then due upon principal and interest was made by plaintiff, and upon defendant's refusing to receive the money it was deposited in the bank in Los Angeles city to the credit of defendant, and notice of such deposit sent to him. All subsequent installments due under the contract were deposited in the same bank prior to the dates when respectively due, and notice sent, and on February 23, 1907, the sum of \$625 was tendered in payment of the purchase price of lots 23 and 24, which defendant refused to receive. The evidence shows that prior to the refusal of June and notice of July 1, 1906, payments had been made as follows: On principal, March 24 and September 8, 1904, October 30 and November 29, 1905, \$25; on April 24, May 24, and June 24, 1904, \$20; on May 1, 1905, \$70, and August 7, 1905, \$60. On interest, May 24, 1904, \$7.12; May 1, 1905, \$15.05; August 7, 1905, \$9.90; November 29, 1905, \$4.12, the last amount paying interest on deferred payments to February 1, 1906. On taxes, November 29, 1905, \$3.20. All of these payments were accepted by defendant on the dates mentioned, after his statement to plaintiff that he did not intend to exact, or care for, a strict compliance with the contract in respect to the time of payment of the installments of \$15 provided to be paid monthly.

The cases of *Glock v. Howard*, etc., 123 Cal. 1, 15, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, and *North Stockton v. Fischer*, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438, upon which appellant relies, are to be distinguished from the one before us. In the former no waiver of the time clause in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes Cal. Rep. 98-101 P.—29

contract was alleged or proven, either by express agreement or the receipt of payments after they were due. In that case two out of five installments were paid, and 3½ years after the first default and 6 months after final payment was due, the vendee brought his action to recover the two payments made on the contract, relying solely upon a tender made at that late date without offering any reason for the failure to pay, or to comply with his contract. Page 4 of 123 Cal., page 713 of 55 Pac. (43 L. R. A. 199, 69 Am. St. Rep. 17). The other case, holding that a vendor may sue for the unpaid installments on such a contract, and that the vendee cannot compel him to accept the payments made and declare a forfeiture of the contract, presents no application of the law that assists us in reaching a conclusion here. That case was decided on the principle that the vendor may waive the forfeiture by continuing and acting on the contract, although time was of the essence of the contract. This clause, it is said, was for the exclusive privilege of the vendor, to be exercised or not at his option. The case at bar comes within the exception considered in a quotation from *Pomeroy on Specific Performance* (section 335), in the first-mentioned case: "Equity will thus * * * often permit a vendee in default to excuse his breach as to the time of payment, and after excuse made compel the vendor to perform, [but] it does not do so arbitrarily. The vendee must always show equitable grounds for relief before equity will interpose." It hardly requires citation of authority to sustain the view of the trial court that if the statements of the plaintiff were true, the defendant should not be permitted to lull the plaintiff into security by telling him he need not comply promptly with the time clause of the contract, and then take advantage of the delay occasioned by his own act to declare a forfeiture. Civ. Code, §§ 3512, 3515, 3516 and section 1511, subd. 3. The testimony of defendant's son that in September, 1905, he stated to plaintiff that, if he (plaintiff) was not going to do any more work (part of the payments having been made in labor), the payments would have to be made in cash, according to the contract, did not necessarily imply that the privilege of paying any time within the three years was revoked; but, if such a construction must be given to this statement, a conflict of evidence would arise, and, the trial court having accepted the plaintiff's testimony, the finding based upon it will not be disturbed by this court.

The privilege of paying at any time within three years accorded to plaintiff was formally withdrawn by defendant on July 1, 1906, and thereafter no default was made in the payment of any installment of principal, interest, or taxes. That the tender of the aggregate amount of all delinquent payments was not made to defendant by plaintiff until 10 days after such notice was given (July 1,

1906) did not render effective the declaration of forfeiture made at the same time the notice was given. Plaintiff was entitled to a reasonable time in which to make these payments. What was such reasonable time was to be determined by the trial court under the circumstances of the case. We are not prepared to say that the time accepted by the trial court was unreasonably long. The finding that plaintiff was in possession of the property, or is entitled to the possession, except as the latter follows from the execution of the decree of specific performance made in the case, is not material to the judgment, and it is unnecessary to determine whether or not it is supported by the evidence. Plaintiff was entitled to have the contract enforced whether in possession or not. While the contract remained executory, it gave no right of possession to plaintiff, but the evidence shows that he exercised some acts of ownership, over the property before the forfeiture was declared, and that he later took possession of the property.

There is no merit in the contention that the option upon lots 23 and 24 was without consideration. A contract to make a contract upon performance of certain conditions is enforceable. It is a matter of common observation that contracts to convey real estate frequently require the making of a mortgage for the security of deferred payment, and such contracts are enforced. The written agreement of the parties here expressly provides that the option to purchase lots 23 and 24 is part of the consideration for the purchase of lots 1 and 2, and the evidence shows that the former were necessary to plaintiff's proper use of the later for the purpose for which purchased, and that this matter was fully considered by the defendant before signing the contract, and was the reason for the insertion of the option in the contract. The waiver by defendant of the forfeiture which he was entitled to declare because of the failure by plaintiff to pay the installments of purchase money due on lots 1 and 2 was by express agreement, and therefore is not limited merely to that part of the contract relating to lots 1 and 2, but goes to the entire contract. The performance of the "foregoing", which was the consideration for the option, was excused by the waiver of forfeiture, as well as the payment of the installments on time. In this the case is distinguishable from one in which the waiver of the right of forfeiture is predicated upon mere acquiescence, and in which the element of actual consent is lacking. *Swift v. Occidental Co.*, 141 Cal. 161, 173, 74 Pac. 700.

The most of the exceptions reserved and presented as errors of law occurring at the trial were interposed upon the theory that the testimony introduced to show a waiver of the time clause in the contract was inadmissible, on the ground that it was an attempt to vary a written contract by parol

testimony. These exceptions are not especially presented, but we see no error in the court's rulings in this respect.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 522

JOHNSTON v. DAKAN. (Civ. 436.)

(Court of Appeal, First District, California. Dec. 15, 1908. Rehearing Denied Jan. 12, 1909; Denied by Supreme Court Feb. 11, 1909.)

1. JUDGES (§ 51*)—DISQUALIFICATION TO ACT—BIAS AND PREJUDICE.

Under Code Civ. Proc. § 170, disqualifying a judge because of his prejudice or bias, if the trial judge is convinced of the integrity of his own conduct, and that his sole desire is to see the law applied with equal justice to all, and that the object of the party who alleges the disqualification is to thwart justice, he should decline to call in another judge, but, if a reasonable person would hesitate as to whether the judge could under the circumstances act impartially, he should call in another judge.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 51.*]

2. JUDGES (§ 49*)—DISQUALIFICATION TO ACT—BIAS AND PREJUDICE.

A letter written by a judge to the Legislature, referring to charges on which it was sought to impeach him as having been made by a few cowardly and disreputable conspirators, pettifoggers, and disgruntled litigants is general, no name being mentioned, though a party's attorney was one of those seeking to have the judge impeached, there being nothing to lead to the conclusion of bias or prejudice by the judge toward such party personally does not disqualify him to sit in the action.

[Ed. Note.—For other cases, see Judges, Dec. Dig. § 49.*]

3. JUDGES (§ 49*)—DISQUALIFICATION TO ACT—BIAS OR PREJUDICE.

The fact that in a former action the judge may have erred in imposing a fine on a party on trouble occurring between him and an attorney does not necessarily show bias or prejudice by the judge against such party so as to disqualify him to sit in the action.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 187; Dec. Dig. § 49.*]

4. JUDGES (§ 49*)—DISQUALIFICATION TO ACT—BIAS OR PREJUDICE.

The fact that the judge is indebted to a bank of which the adverse party is a stockholder and one of the directors does not necessarily show bias or prejudice so as to disqualify him to sit in the action.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 187; Dec. Dig. § 49.*]

5. CONTINUANCE (§ 20*) — DISCRETION OF COURT.

Defendant had ample notice of the time of trial, and, on the case being then called and his motion to have another judge called in for disqualification of presiding judge being denied, the case was continued until the afternoon of the same day to allow him to prepare a motion for change of venue, but at that time his attorney refused to proceed with the motion, claiming that he was entitled to five days before the hearing, and left the courtroom. The court then continued the case until later in the afternoon and issued a subpoena for defendant, he not being present, and, on his appearance, suggested

that his attorney had left the courtroom, that he should employ one and continued the case until the following day to enable him to do so, at which time defendant stated that he was unable to find his attorney, but did not state that he had made any attempt to procure any other, whereupon the court proceeded with the trial. *Held*, that there was no abuse of the court's discretion in refusing to continue the case.

[Ed. Note.—For other cases, see Continuance, Dec. Dig. § 20.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by D. W. Johnston against Thomas B. Dakan. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Cassin & Lucas and Netherton & Torchiana, for appellant. Chas. B. Younger, for respondent.

COOPER, P. J. This case is here on appeal from the judgment and the order denying defendant's motion for a new trial. The complaint was filed in 1904. When the case came on for trial, October 19, 1905, the defendant claimed that the judge was disqualified under section 170 of the Code of Civil Procedure, which provides that no judge shall sit or act in any action or proceeding "when it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try a case, by reason of the prejudice or bias of such judge." It has been held that under the above quoted section the trial judge may pass upon the question of his own disqualification. *People v. Compton*, 123 Cal. 405, 56 Pac. 44. We have no hesitation in saying that in all cases where the facts established by the affidavits are such as to create in the mind of an honest litigant a sincere belief that he cannot have a fair and impartial trial before the judge in whose court the action is pending, and where the facts are such as to justify a reasonable man in such belief, the ends of justice would be subserved by calling in another judge. The judge should not only be honest and impartial, but his acts and conduct should be such that there can be no foundation for questioning his motives. It is apparent that the section may be greatly abused by dishonest litigants or unscrupulous attorneys. It is therefore the duty of the trial judge to carefully scrutinize each case to the end that the law may not be abused for sinister purposes. If the trial judge is convinced from the facts of the integrity of his own conduct and motives, of the fact that his sole desire is to see the law applied with equal and exact justice to all, and further that the object of the party who alleges the disqualification is to thwart justice, or to get the case before another judge of his own choosing, he should have the courage to act accordingly. On the

other hand, where the facts are honestly stated, and, when so stated, they point to certain conditions that would ordinarily influence men in the business transactions of life, and, when applied to the particular case, would lead a reasonable person to hesitate as to whether or not the judge could under the circumstances, considering the weakness of human nature, entirely ignore such facts, there should be no hesitation in calling in another judge, so that the fountain head of justice should be above suspicion.

In this case, applying the test as above stated upon the affidavits in the record, we are of opinion that the facts are not such as to show that the judge abused his discretion in holding that he was not disqualified. The affidavits show that in February, 1905, the trial judge wrote a letter to the assembly while the Legislature of the state was in session, referring to certain charges pending against him, by which it was sought to impeach him, which letter contains some very emphatic expressions which are not couched in the most polite language. He refers to the charges as having been made against him by "a few cowardly and disreputable conspirators, * * * pettifoggers, and disgruntled litigants, * * * vile and cowardly slanderers without reputable character or standing in the community in which they reside." Conceding that the record shows that defendant's attorney was one of the parties seeking to have the judge impeached, the statement in the letter is general, no name is mentioned, and it was evidently made under provocation and in a spirit of anger. It does not in any way refer to defendant, nor is there anything which would lead to the conclusion that any bias or prejudice or feeling has been shown by the judge toward the defendant personally.

It further appears that in a previous trial of one Forgeus against this same defendant, in the same court, and before the same judge, some trouble occurred between this defendant and Mr. Cassin, an attorney of the local bar, and the judge made an order imposing a fine upon defendant, and did not fine Mr. Cassin; while it is claimed that Cassin was the one particularly at fault. Conceding that the judge erred in this, that fact of itself does not necessarily show any bias or prejudice on the part of the judge. It may have been the duty of the judge, in order to maintain the proper respect for the court, to impose the fine, and it may also have been his duty to have imposed a fine upon Mr. Cassin. If the conduct of the defendant in said matter was such as to call upon him the imposition of a fine, it would have been the duty of the judge to impose such fine even if defendant had been his best friend. The law knows no friend, no foe, and no flinching from duty. It is not at all unusual for a litigant to become angry at the judge, and in such moment of anger to believe the judge to be partial—even to abuse him—when in fact

the judge is only doing his duty without regard to the question as to the personality of the parties.

The fact that the trial judge was indebted to the Savings Bank of Santa Cruz, of which plaintiff is a stockholder and one of the directors, is not a legal disqualification, and as a matter of law we cannot say that it shows bias or prejudice. We must presume the trial judge to be honest and solvent.

It is claimed that the court erred in denying the defendant's application for a continuance. It appears that the case was called October 19, 1905, at 10 o'clock a. m., being the time fixed for the trial, of which all parties had notice. After the court had heard defendant's motion to have another judge called in, and made an order denying it, defendant's counsel stated that he desired time to make a motion for a change of venue. The court thereupon continued the case until 2 o'clock p. m. in order to allow counsel for defendant to prepare his affidavits for use on his motion for a change of venue. Defendant's counsel prepared and served his affidavits and notice that he would move the court for a change of venue on October 27th. Counsel for plaintiff prepared and served his counter affidavits, and asked that the court proceed to hear the matter, whereupon defendant's counsel refused to proceed with the motion, claiming that he had five days under the law to give notice before the hearing. The court held otherwise, and counsel for defendant refused to present the motion, or to proceed with the trial, and left the courtroom, stating: "I leave the courtroom at this time because the court has no authority to go ahead with the trial." As the defendant's counsel had voluntarily left the courtroom, and defendant was not present, the court, upon the suggestion of plaintiff's counsel, continued the case until 4 p. m. of the same day, and issued a subpoena for the defendant. At 4 o'clock the defendant appeared, and the judge stated to him the fact that his attorney had left the courtroom, and suggested that he was entitled to an attorney, and that he should employ one, and for the purpose of enabling the defendant to secure counsel the court of its own volition continued the case until the following day, October 20th, at 10 o'clock a. m. The next morning at 10 o'clock the defendant appeared, but without an attorney, and announced that he was unable to find his attorney, Mr. Younger, Sr., but did not state that he had made any attempt to find any other attorney or to get any one to represent him. There being no further showing, the court proceeded with the trial of the case, and testimony was taken. During the trial the defendant was present in court, and at its conclusion the court asked defendant if he had any testimony to offer. He replied, in effect, that he had none, that he desired to make an affidavit in regard to the absence of his attorney, Mr. Younger. The case was thereupon sub-

mitted. Under these circumstances, we do not think that the court abused its discretion in refusing to continue the case. The defendant had ample notice of the time of the trial. His attorney, evidently in a moment of anger, left the courtroom, instead of staying at his post of duty and presenting his client's defense. The court thereupon, out of an abundance of caution, took an adjournment, and gave defendant additional time to procure counsel. As before stated, none was procured, and the case proceeded to trial.

We find no error in the record, and the judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

9 Cal. App. 511

SCOTT STAMP & COIN CO., Limited, v.
LEAKE. (Civ. 523.)

(Court of Appeal, First District, California.
Dec. 10, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 431*)—
ACTIONS—CONDITIONS PRECEDENT—PRESENTATION OF CLAIM—ACTION ON DIFFERENT CLAIM.

Where a claim presented to an administrator was rejected when acted upon, because it appeared from its face that it was then barred by limitations, the notice of claim not stating intestate's absence from the state for six months, which would take it out of the statute, a subsequent action on the rejected claim was on the claim presented, though the complaint alleged intestate's absence in order to take the claim out of the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1681; Dec. Dig. § 431.*]

2. EXECUTORS AND ADMINISTRATORS (§ 227*)—
PRESENTATION OF CLAIM—SUFFICIENCY.

A claim against an estate, presented to the administrator, should contain sufficient information to enable him to act upon it intelligently.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 811; Dec. Dig. § 227.*]

3. EXECUTORS AND ADMINISTRATORS (§ 227*)—
PRESENTATION OF CLAIM—STATEMENT OF CLAIM—SUFFICIENCY—WAIVER OF DEFECTS.

When a claim was presented to an administrator for allowance, it was not barred by limitations, either actually or apparently, but when the administrator acted upon and rejected it, about a year thereafter, it was barred on its face, the claim not stating intestate's absence from the state for a period which would take the claim out of the statute when rejected. *Held*, in view of the administrator's delay in rejecting the claim, that he could not claim that the notice of claim was insufficient because it did not show, when acted upon, that it was not barred by limitations.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 227.*]

4. EXECUTORS AND ADMINISTRATORS (§ 225*)—
PRESENTATION OF CLAIM—TIME.

An administrator cannot object that a claim against the estate was presented to him 13 days before his appointment, where he held it a year thereafter before rejecting it.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 225.*]

5. EXECUTORS AND ADMINISTRATORS (§ 227*)—
PRESENTATION OF CLAIM—SUFFICIENCY—
AMOUNT DUE.

The omission of a claim, presented to an administrator, to denominate the figures showing the amount due by the dollar sign or the word "dollars," was harmless, where the attached affidavit gave the amount due in dollars and cents.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 227.*]

6. EXECUTORS AND ADMINISTRATORS (§ 227*)—
PRESENTATION OF CLAIM—VERIFICATION—
PERSONS WHO MAY PRESENT.

Code Civ. Proc. § 1494, providing that when an affidavit to a claim against an estate is made by one other than the claimant, the reason therefor must be stated, does not apply, where the affidavit was made by an officer of a corporation claimant.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 227.*]

Appeal from Superior Court, Alameda County; Henry A. Melvin, Judge.

Action by the Scott Stamp & Coin Company, Limited, against W. S. Leake, as administrator. From a judgment for defendant, and an order denying a motion for new trial, plaintiff appeals. Reversed.

Jellett & Meyerstein, for appellant. C. H. Oatman, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from the judgment, and from the order denying its motion for a new trial.

The facts are undisputed, and are briefly as follows: On May 10, 1900, at New York, Mrs. Joseph Dunsmuir bought from the plaintiff merchandise at agreed prices amounting to \$1,482.33. June 2, 1901, she died without having paid for it. She left a will, which was admitted to probate, and letters testamentary were issued thereon on July 15, 1901. Before then, on June 27th, the claim of plaintiff was prepared and sworn to at New York, and sent out to San Francisco, where it came into the hands of the executor on July 2, 1901, who, on July 30, 1902, rejected it. This suit was commenced against the executor to establish the claim on October 9, 1902, within three months after its rejection, but more than two years after the original cause of action accrued, and more than one year after the issuance of letters testamentary. The executor afterwards resigned, and W. S. Leake was appointed administrator with the will annexed, and was substituted as defendant in his stead. The goods having been sold and delivered May 10, 1900, an action therefor, to avoid the statute of limitations, would have had to be brought, if Mrs. Dunsmuir had lived, on or before May 10, 1902. Section 339, Code Civ. Proc. But as she died, and as letters testamentary were issued on her estate July 15, 1901, the time to commence an action on this demand was extended to, and including, July 15, 1902. Section 353, Code Civ. Proc. After this date, and on October 7, 1902, this action was begun, and

it is therefore barred, unless there are saving features taking it out of the operation of said statute.

The court found that Mrs. Dunsmuir was out of the state of California for a period of six months between the date of the sale of the goods and the date of her death, and this fact is relied upon to extend the time until after this action was commenced, to wit, until November 10, 1902. The court also found that the claim as presented contained no reference whatever to Mrs. Dunsmuir's absence from the state, and therefore upon its face it was barred July 30, 1902, when the executor acted upon it. Upon these facts, and under section 1499, Code Civ. Proc., the respondent asserts that there was nothing for the executor to do but reject the claim; that, in other words, in presenting a claim against an estate, facts relied upon to prevent the bar of the statute must be set forth or referred to in the claim itself. To sustain this position he cites a number of cases, in each of which the familiar rule is laid down that when an action is commenced upon a rejected claim, it is limited to the claim presented. Or to state the principle substantially in the language employed by the supreme court, in an action upon a rejected claim against the executors of an estate of a deceased person, the plaintiff can only recover upon the claim presented and rejected, and is not entitled to recover against the executors for any other cause of action. *Lichtenberg v. McGlynn*, 105 Cal. 45, 38 Pac. 541.

In *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466, the claim presented was a simple demand for money lent, containing no suggestion regarding a trust, and the debts set out were all barred. The executors, as was their plain duty under section 1499, Code Civ. Proc., rejected the claim. In an action brought upon it the complaint, for the purpose of avoiding the statute of limitations, stated the facts in such a way as to constitute a trust. The court held that the action was founded upon a claim which had not been presented, and could not therefore be maintained. In *Etchas v. Orena*, 127 Cal. 588, 60 Pac. 45, the claim presented was simply for services by the month, and upon its face part of it was barred by limitation. In order to prevent the operation of the statute as to that part it was alleged in the complaint that the services were rendered in pursuance of a promise of the decedent to pay therefor by making a provision in her will. The claim presented and rejected was of a different nature from the one sued upon; and it was held that the claim presented to the executor was the foundation of the plaintiff's cause of action, and that she could not come into court, and allege and prove any other or different cause of action. In both of those cases, to extend the period of limitation, new facts were alleged which changed the nature of the causes of action, and it was therefore held that

the actions could not be maintained. In the present case the claim presented and passed upon is precisely the one upon which action is brought. The circumstances of Mrs. Dunsmuir's absence from the state for six months, alleged for the first time in the complaint in order to show that the statute had not run against the claim, did not change the cause of action arising upon the claim. The case of *Barclay v. Blackinton*, 127 Cal. 189, 59 Pac. 834, is like the present one in some of its features, but in an essential respect it is different. There the personal representative of the estate received a claim well within time, kept it until the statute had operated, and then rejected it, so that the claim was in fact barred when suit was brought. Here, on the contrary, the statute had not run against the claim at the time of the institution of the suit, although upon its face it appeared to have done so.

This brings us to the question of whether the claim presented afforded the executor (as it should) sufficient information to enable him to act upon it advisedly, *McGrath v. Carroll*, supra; *Etchas v. Orena*, supra; *Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24; *Landis v. Woodman*, 126 Cal. 454, 58 Pac. 857; 18 Cyc. 480. Under the circumstances of this case we think that it did. The claim itself was in the usual form, showing the nature of the claim and the amount due. Accompanying it was an affidavit complying substantially with the terms of section 1494, Code Civ. Proc., in that it averred that the claim was just, true, and correct; that the amount stated was due; that it had not been paid; and that there were no offsets or counterclaims. At the time the claim was presented, even according to its face, it was a year within the limitation of the statute; and it certainly would be contrary to the plainest principles of justice to hold—the statute in fact not having run—that the plaintiff could not maintain this action because, when the executor did ultimately act upon the claim it did not then sufficiently apprise him as to the statute of limitations. To so hold would be to allow him to take advantage of his own delay, and it would be attaching too much importance to the face of the claim.

The respondent makes a number of objections as to the form of the claim. None of them were assigned as reasons for the rejection of the claim at the time thereof, nor were any of them made by demurrer or answer, and they are all very technical. The claim was received by the executor 13 days before his appointment as such, and it was retained by him more than a year after appointment, when it was rejected. In view of these facts the point that the claim was presented before letters testamentary issued cannot be seriously considered.

The figures of the amount due are stated in the claim itself, but they are accompanied neither by the dollar sign nor by the word

"dollars." But as the affidavit attached to the claim gives the amount demanded in dollars and cents, the omission in the claim is harmless.

The affidavit to the claim is made by the treasurer of the claimant. It is alleged in the complaint, and found by the court, that the claimant was a corporation. Hence section 1494, Code Civ. Proc., providing that when the affidavit to a claim against an estate is made by a person other than the claimant, the reason therefor must be set forth, does not apply. This affidavit is not made by a third person. It is made by the corporation itself, through one of its authorized officers, which of course is the only way a corporation can act.

The judgment and order appealed from are reversed.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 491

BARRETT-HICKS CO. v. GLAS et al.
(Civ. 475.)

(Court of Appeal, Third District, California.
Dec. 7, 1908. Rehearing Denied by
Supreme Court Feb. 1, 1909.)

1. GUARANTY (§ 34*)—GUARANTOR—LIABILITY.

A seller of material could not change the contract relation of a guarantor of payment of the purchase price by charging the bill to him as the principal debtor without his consent.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 36; Dec. Dig. § 34.*]

2. GUARANTY (§ 25*)—GUARANTOR—EVIDENCE OF RELATION—SUFFICIENCY.

Evidence *held* to show that a particular person was merely a guarantor of the payment of the purchase price of material.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 104; Dec. Dig. § 25.*]

3. GUARANTY (§ 1*)—GUARANTOR—WHEN OBLIGATION ARISES.

The obligation of guarantor arises only where there is a principal debtor.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. MECHANICS' LIENS (§ 212*)—RIGHT TO LIEN—GUARANTY.

A materialman's right to a lien provided for by Code Civ. Proc. § 1183, is not affected because payment of the debt is guaranteed.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 396; Dec. Dig. § 212.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. MECHANICS' LIENS (§ 281*)—ACTION TO ENFORCE—IDENTITY OF BUYER—EVIDENCE—SUFFICIENCY.

Evidence in an action to enforce a materialman's lien *held* to show that the materials were not furnished at the special instance and request of a particular person.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 570; Dec. Dig. § 281.*]

6. MECHANICS' LIENS (§ 253*)—ENFORCEMENT—SURETIES.

In an action to enforce a mechanic's lien assigned to plaintiff, the defense that assignor was a surety on the contractor's bond, which guaranteed delivery of the building free of liens, was not defeated on the theory that defendants' pleading and the findings were insufficient to show that plaintiff could not foreclose, where the answer pleaded the bond and proof of its execution and of all facts relating to the furnishing of materials was given without objection and the liens sued on exceeded the amount of the bond.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 444; Dec. Dig. § 253.*]

7. MECHANICS' LIENS (§ 255*)—SURETY AS LIENOR—RIGHTS.

If a mechanic's lienor was discharged as surety on the contractor's bond which guaranteed delivery of the building free of liens, his assignee could enforce the lien as if there was no bond.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 449; Dec. Dig. § 255.*]

8. PRINCIPAL AND SURETY (§ 100*)—DISCHARGE OF SURETY—CHANGE.

A surety may stand on the strict terms of his bond, and where a building contract has, without the surety's consent, been materially changed, the surety is discharged.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 162-165; Dec. Dig. § 100.*]

9. PRINCIPAL AND SURETY (§ 100*)—BUILDING CONTRACTORS' BONDS—DISCHARGE OF SURETY—CHANGE IN PLANS.

A surety on a building contractor's bond for the construction of a one-story building was discharged by changes in the plans and by the addition of another story, unless he consented thereto.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 163; Dec. Dig. § 100.*]

10. PRINCIPAL AND SURETY (§ 159*)—BUILDING CONTRACTORS' BONDS—DISCHARGE OF SURETY—CHANGE IN PLANS—CONSENT—BURDEN OF PROOF.

Where a building contractor's surety claimed a discharge because of a change in the plans, the burden was on the owner to show that he consented to the change, mere knowledge thereof being insufficient.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 432; Dec. Dig. § 159.*]

11. PRINCIPAL AND SURETY (§ 161*)—BUILDING CONTRACTORS' BONDS—DISCHARGE OF SURETY—CHANGE IN PLANS—CONSENT—EVIDENCE—SUFFICIENCY.

Evidence *held* insufficient to show that a building contractor's surety consented to changes in the plans.

[Ed. Note.—For other cases, see *Principal and Surety*, Dec. Dig. § 161.*]

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by the Barrett-Hicks Company against Frank Glas, Jr., and others. Judgment for defendants. Plaintiff appeals. Reversed.

The following is the opinion handed down September 14, 1907, by Hart, J., in the District Court of Appeal, with whom Chipman, P. J., and Burnett, J., concurred, which is referred to in the opinion herein:

"This is an action for the foreclosure of several liens of mechanics and materialmen. The actions were brought separately, but were by the court, under the authority of section 1195 of the Code of Civil Procedure, consolidated, and tried as one action. Judgment went for the plaintiffs and the defendant Commercial Bank of Madera. From said judgment and the order denying their motion for a new trial the defendants Frank Glas, Jr., and W. H. Glas take this appeal.

"On the 9th day of November, 1903, the said defendants Frank and W. H. Glas entered into a written agreement with one W. J. Sircy, by the terms and covenants of which said Sircy agreed to erect upon the land of said defendants in the town of Madera in the county of Madera, 'a one-story and basement brick store building,' in 'conformity with the plans, drawings, and specifications for the same made by Julian Mourot, the authorized architect employed by the owner, and which are signed by the parties hereto.' Said Sircy, under said contract, was to 'furnish the necessary labor and materials, including tools, implements and appliances, required, and perform and complete in a workmanlike manner all the brickwork, ironwork, plastering and carpenters' work shown and described' in and by the plans, specifications, and drawings mentioned, and obligated himself to complete the entire work 'within the space of one hundred working days from and after' the date of the execution of said agreement. The consideration price agreed upon for the construction of said building was the sum of \$7,320, payable by the terms of the contract, in five distinct installments, as follows: First payment to be made when joists are all in, \$1,464; second payment to be made when ceiling joists are all in, \$1,464; third payment to be made when firewalls are completed, \$1,464; fourth payment to be made when building is completed and accepted, \$1,464; fifth payment to be made 35 days after the building is entirely completed and accepted, \$1,464. A bond was furnished by Sircy for the faithful performance of the work of erecting said building, according to the terms of said contract, and 'the delivery of said building free from all liens that may thereby be filed against the same.' One of the sureties upon said bond, it is admitted, was one C. J. Craycroft, a member of the firm of Dyer & Craycroft, who are among the plaintiffs herein. The contract, with said bond attached there-

to, was filed in the office of the recorder of Madera county on the 19th day of November, 1903. It is admitted that the plans, drawings, and specifications, in conformity with which the building was, by the provisions of the contract, to be erected, were not filed in the recorder's office with the contract nor so filed at all. On the 17th day of November, 1903, the defendants Frank and W. H. Glas borrowed from the defendant Commercial Bank of Madera the sum of \$8,000, and, as security for said loan, executed and delivered to said bank a mortgage upon all the property and premises described in the complaints herein, and said mortgage was on said 17th day of November, 1903, recorded in the office of the county recorder of said county of Madera. On the 9th day of November, 1903, according to the finding of the court upon that point, the contractor, W. J. Sircy, 'began the erection of said building' on the premises mentioned and described in the contract, and 'carried on the work of constructing said building under the same, until about the 24th day of December, 1903, when the said defendants, Frank Glas, Jr., and W. H. Glas as owners, and said W. J. Sircy, as contractor, entered into a further agreement respecting the construction of said building.' The 'further agreement' referred to was executed on said 24th day of December, 1903, and therein it was agreed that said contractor, for the sum of \$1,318, would 'construct, according to attached specifications,' a second story upon the said building which, under the original contract, was to be only one story in height. This last-mentioned agreement stipulated that the said sum of \$1,318, to be paid for the construction of said second story, should be paid to the contractor 'when the story is up ready for the ceiling joist,' and it is admitted that said agreement was not at any time filed in the office of the county recorder.

"The complaints sufficiently set forth facts necessary, under the law, to entitle the several claimants of liens upon the property and premises to a decree foreclosing said liens and for an order for the sale of said property to satisfy the same. The answers to the several complaints admit the ownership of the property upon which the building was erected, and also admit that the contract for the erection of said building as pleaded in said complaints was made and entered into by said W. J. Sircy and the defendants Frank Glas, Jr., and W. H. Glas. The loan of \$8,000 by the Commercial Bank of Madera to the defendants Glas, and the execution of a mortgage by the latter upon the property described in the complaints as security for said loan, is also admitted. It is likewise admitted, or, what is equivalent thereto, not denied, that the plaintiffs within 30 days after the completion of said building filed for record in the office of the county recorder of the county of Madera their claims of liens, duly verified, containing a statement of the demands of the plaintiffs, after deducting all just credits and

offsets, etc. The defendants, however, in their answer to the complaint of Dyer & Craycroft allege that Craycroft of said firm was one of the sureties on the bond of Sircy, the contractor; that 'all the conditions of said bond or undertaking have been violated,' and that, by reason thereof, the plaintiff Craycroft was indebted to the defendants in the sum of \$2,000; and that said claim of Dyer & Craycroft is insufficient in law because it does not contain the 'offsets and credits' to which the defendants were entitled. It is also objected that the lien of Watkins & Thurman is fatally defective, inasmuch as it improperly includes therein two distinct claims—the one on account of materials furnished by said firm and the other on account of a claim due for one-half of the cost of the party wall between the buildings of Frank and W. H. Glas and Wehrman & Melkie, said wall having been constructed by said Watkins & Thurman under a contract with said Wehrman & Melkie.

"The bill of exceptions contains the contract between Sircy and the defendants Glas, and also the mortgage, heretofore mentioned, executed by said defendants Glas to the Commercial Bank of Madera. There is very little evidence of any other nature in the bill than the documents mentioned. From the evidence and admissions, the court found in favor of the several plaintiffs and the defendant Commercial Bank of Madera upon all the material facts put in issue by the pleadings and essential to the maintenance of the several causes of action pleaded, except as to two claims (one of plaintiff Barrett-Hicks Company and the other of Watkins & Thurman), and as to these the court found that they did not constitute the basis of valid liens against the property in favor of the said parties so claiming liens therefor.

"The court, in its conclusions of law, finds that all the liens mentioned in the complaints, with the exception of the two to which we have just referred—the one of Barrett-Hicks Company and the other of Watkins & Thurman—were properly and duly filed and contained all the statements and matters required by law. The court also concluded as a matter of law that the contracts, by the terms of which the building was erected, are and were void. In its judgment the court directs that the property described in the complaints be sold, and that the proceeds thereof, after deducting expenses of such sale, be applied, in accordance with the findings of fact and conclusions of law, in the following order: (1) To payment of amount due J. A. Dyer and to Dyer & Craycroft; (2) to payment of amount due Commercial Bank of Madera; (3) to payment of amount due Barrett-Hicks Company; (4) to payment of amounts due Watkins & Thurman and to J. H. Burnett, 'proportionately as the amount due to each, with interest thereon from the date hereof, at the rate of 7 per cent. per annum, bears to the remaining surplus in said

sheriff's hands.' The judgment also orders to be dismissed, without prejudice, the cause of action of Watkins & Thurman for and on account of materials furnished for the construction of the party wall heretofore referred to.

"The theory upon which the plaintiffs proceeded was that the contracts under the stipulations of which the building was erected were void because the provisions of the statute which alone give vitality and force to such contracts were not complied with. First it is claimed that the plans, specifications, and drawings, to which by express language of the contract the contractor was required to conform in the erection and construction of the building, were not filed in the office of the county recorder with said contract, and that such omission was fatal to the validity of the contract; secondly, it is contended that the contract is invalid because it failed to provide for the withholding of the payment of 25 per cent. of the contract price until after 35 days after the completion of the building; thirdly, it is declared and not denied—in fact, as we have seen, admitted—that the 'second contract' or agreement, calling for the addition of a second story to the building for the sum of \$1,318, was not filed at all. Further consideration of the last-mentioned agreement may be dismissed, as, under the law, it is altogether without validity, so far as mechanics, laborers, and materialmen are affected thereby. And there can be no doubt that the first or original contract is void for the reasons already suggested. Section 1183 of the Code of Civil Procedure provides that " * * * In case of a contract for the work between the reputed owner and his contractor, the same 'shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars'; that said contract, or a memorandum thereof, shall, before the work is commenced, be filed in the office of the county recorder of the county where the property is situated, and that a failure to so record it shall render said contract 'wholly void.' 'In such case,' said section proceeds, 'the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof.' In construing that section of the law, the Supreme Court, in an unbroken line of decisions, has uniformly held that, where the contract itself is sought to be filed in the recorder's office, the plans, specifications and drawings, if referred to by such contract in such manner as to make them a necessary part thereof, must be annexed thereto and filed for recordation therewith; that, where such plans, specifications, and drawings are not thus filed, the entire contract is void; and that 'in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal in-

stance of the owner, and they shall have a lien for the value thereof.' Section 1183, Code Civ. Proc.; Wood v. O. & B. Transit Co., 107 Cal. 500, 40 Pac. 806; Dunlop v. Kennedy, 102 Cal. 443, 36 Pac. 765; Willamette, etc., v. College Co., 94 Cal. 229, 29 Pac. 629; Yancy v. Morton, 94 Cal. 561, 29 Pac. 1111; Pierce v. Birkholm, 115 Cal. 657, 47 Pac. 681; McMenemy v. White, 115 Cal. 339, 47 Pac. 109; West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. 533. The contract in the case at bar, it will be observed, provides that all the labor and materials shall be furnished and said building constructed 'in conformity with the plans, drawings and specifications for the same made by Julian Mourot, the authorized architect employed by the owner,' etc. Said plans, etc., consequently became and were an essential and a material part of the contract, as to which in all its important details the materialmen, mechanics, and laborers were therefore not given the notice required by the statute. It follows that the omission to annex them to and file them with the contract in the recorder's office was in violation of the requirements of the statute as construed by the courts, and rendered the contract invalid, so far as it affected the materialmen, mechanics, etc.

"In the case of Willamette, etc., v. College Co., supra, it is said: 'The insertion of this clause in the contract made the drawings and specifications an essential part thereof, as material as was the price of the work or the terms of the payment; and until they were annexed to the contract so that its entire terms could be ascertained by mere inspection, and without oral testimony, the contract was only inchoate, and could not form the basis of a recovery'—citing Worden v. Hammond, 37 Cal. 63. In the same opinion it is further said, speaking of the amendment by the Legislature of 1887 of section 1183 of the Code of Civil Procedure, providing that, instead of filing the entire contract, a memorandum thereof may be filed in the recorder's office: 'After this amendment was made, the owner or the contractor could satisfy the statute by filing either the contract or such a memorandum; but if he filed the contract, *he must still file the whole of it, including the drawings and specifications, if they were made a part thereof*; while, if he preferred to file the memorandum, such memorandum must contain all the matters which are prescribed in the statute as the equivalent of the contract.' (Italics ours.) It is not pretended here that only a memorandum of the contract was filed or attempted to be filed. It is also clearly apparent that the contract does not, as to all the terms upon which it is provided therein that the payments by installments of the price or total sum at which the building was agreed to be erected, conform to the requirements of section 1184 of the Code of Civil Procedure. That section, among other things, declares 'that at least twenty-five per cent. of the whole contract price shall be

made payable at least thirty-five days after the final completion of the contract'; and it is therein further provided that, in case such contracts do not conform substantially to the provisions thereof, 'the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof.' The contract price for the one-story building, originally contracted for, is, it will be noticed, the sum of \$7,320, payable in five different installments of \$1,464 each. The fifth and last installment, made payable 35 days after the completion and acceptance of the building, is the sum of \$1,464, which, it is at once manifest, does not meet the 35-day requirement of the section by the sum of \$366. The contract is therefore for this reason invalid. *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 203; *Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, 91 Pac. 262.

"The objection that the judgment in favor of Dyer & Craycroft, copartners, is against law, because it appears from the findings of the court that C. J. Craycroft, a member of said copartnership, was 'one of the contractor's bondsmen who guaranteed the delivery of the building free from all liens,' cannot, under the facts, be maintained. It is concededly the law that sureties upon the bond of a building contractor cannot for materials and labor furnished by themselves in the construction of the building contracted for claim and enforce liens upon such building, which, by the terms of such bond, they have undertaken shall be delivered to the owner free from all liens. *Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512; *Blyth v. Robinson*, 104 Cal. 239, 37 Pac. 904. And this is true even where a contract is void because of not having been recorded as required by the statute. *Blyth v. Robinson*, *supra*. But the situation of Craycroft, as a lien claimant and surety on the contractor's bond, presents a much different aspect from that found in the cases referred to. The court found that said 'C. J. Craycroft became a surety on said bond in his individual capacity, and not on account of said copartnership, and without any relation thereto, or connection therewith, and without the knowledge, authorization or consent of his copartner, J. A. Dyer, and subsequent to the date of the agreement between said J. A. Dyer, on behalf of said copartnership, and said W. J. Sircy, for the furnishing of brick for the erection and construction of said building.' Moreover, the condition of the bond was for the faithful performance of the terms of the contract for the erection and construction of the one-story building, the object of said original contract, and 'the delivery of said building free from all liens that may be filed on account of any claim against the contractor in the above contract.' The purpose of the bond upon which Craycroft became a

surety was, in other words, to guarantee the faithful performance of the covenants of the contract of November 9, 1903, and had no relation to the contract of December 24, 1903, providing for the erection of the additional story. He could not, therefore, be held for any default of the contractor unless the same was the result of noncompliance with the vital terms of the contract, the faithful execution of which he had guaranteed.

"But we think there is another and conclusive reason why Craycroft was discharged from his liability as a surety. The court found, as to the payments of the installments under the contract of November 9th, as follows: '* * * That the defendants Frank Glas, Jr., and Wm. H. Glas, never paid to said W. J. Sircy, contractor, on said contract and agreement of date November 9, 1903, the fourth payment of \$1,464, therein agreed to be paid when said building was completed and accepted, and never paid said fifth payment of \$1,464, therein agreed to be paid in 35 days after said building was completed and accepted.' No objection is specified against this finding. The unassailed portion of the findings also shows that the sum total of all the liens allowed by the court amounted to \$1,963.44, so it will be seen that, according to the court's findings, there was at the time of the filing of the liens in the hands of the owners of the property, and unpaid to the contractor, the sum of \$961.56 in excess of the amount requisite to satisfy all that the liens, upon their face, called for. We think, therefore, that the fact of the retention by the owners of the property of a sufficient fund out of the contract price to meet all the demands against the building for material and labor furnished therefor, and thereby to have freed said building from all liens, exonerated the sureties from any further obligation under said bond. The case of *Kiessig v. Allspaugh*, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418 et seq., was where the owner of the building had in his hands at the time of his settlement with his contractors a sufficient sum of money to satisfy all the liens mentioned in the complaint, and, instead of satisfying said liens, paid the money over to the contractors. In a suit to recover upon the bond, the judgment of the trial court in favor of the plaintiff was reversed, the court saying that the owner of the building should have applied the money so retained by him to the satisfaction of the liens. Instead of paying it to the contractors. The court proceeds: 'This balance was to be retained in his hands as an additional security against liens upon the building, and in equity he held the same also for the benefit of the sureties. It was a special fund to which they had a right to look for their indemnity, and in view of which it must be supposed that they assumed the obligation of sureties, as the original contract is referred to in the bond as the inducement or consideration for its execution, and the plaintiff was not authorized to surrender it without

their knowledge or consent; and, having done so, the appellant was discharged—citing *Bragg v. Shain*, 49 Cal. 131; *Taylor v. Jester*, 23 Mo. 244. Under the contract here the owners were in duty bound to the sureties to retain at least the sum of \$1,464 until after the expiration of 35 days after the completion and acceptance of the building, to be applied to the satisfaction of the claims, if any then existed, of materialmen and mechanics. The findings, as seen, show that as a matter of fact the owners had in their hands at the time of the trial twice that sum and more than enough to have satisfied all the liens before the commencement of these actions. The liens having been filed, the money still in the possession of the owners of the building, due under the contract, should and must be treated as retained by them 'as an additional security against liens upon the building,' and that, in equity, they 'held the same also for the benefit of the sureties.'

"Appellants contend that the effect of the judgment directing the payment of the money borrowed from the bank is to decree the foreclosure of a mortgage before the money is due, to secure repayment of which the mortgage was executed. Practically such is the effect of the judgment, it may be admitted; but that result is only a natural and necessary consequence which may, in the very nature of the proceedings here, reasonably be anticipated as incident to the mortgaging of property under circumstances from which of necessity arises notice to both the mortgagor and mortgagee that other liens, prior and subsequent thereto, may attach to the premises thus mortgaged. When the mortgage was executed, the work of constructing the building had only begun. The law gives materialmen and mechanics the right of lien for materials and labor furnished for the erection of the building, and the owners and all other persons are conclusively presumed to know the law in such case with reference to the rights of such materialmen and mechanics. Besides, the statute limits the time within which such lienholders may enforce their liens by judicial proceedings to 90 days after the recordation of the liens. To enforce their rights the lienholders, therefore, were compelled to move within that time, and to secure final relief a sale of the property, under the decree of the court, necessarily had to be directed. As there were liens which ranked in priority to that of the mortgage, the court's decree would have been an idle act had it not ordered the entire property to be sold, and directed that out of the proceeds all the liens, including that of the mortgage, be satisfied in the order of their rank. We think the proposition here is similar to that provided for in section 728 of the Code of Civil Procedure. It is therein provided that, where a debt for which a mortgage or lien is held is not all due, a sale may be had of so much of the property as will pay the amount due,

with costs, after which the sale must cease, and sales of the property may thus be conducted so often as installments fall due; 'but if the property cannot be sold in portions, without injury to the parties, the whole may be ordered sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.' In *Croskey v. Northwestern Mfg. Co.*, 48 Ill. 481, it is held that a 'decree in a suit to enforce a mechanic's lien may direct a sale of the premises in fee, though the mortgage of the lands is not then due the mortgage retaining priority to the extent of the value of the property at the time the mechanic's lien attached.' See, also, cases cited in notes 2, 3, and 4, p. 483, 20 Am. & Eng. Ency. of Law. It is apparent that, under the findings here, the court could not have done otherwise than to direct, in its decree, a sale of the whole of the property 'without injury to the parties.'

"The attack upon the finding that the construction of the building was begun on the 9th of November, instead of the 19th of that month, as the appellants contend the evidence establishes, is without merit. The time at which work of construction began is only material for the purpose of establishing the rank of the lien claimants with reference to the mortgage lien. But the defendant bank (the mortgagee) has not appealed from the judgment, and so far as is concerned the order in which the court directed its lien to be satisfied out of the proceeds of the sale of the property, it alone has the right to complain, except lien claimants, whose liens rank subsequently thereto under the decree, but they urge here no dissatisfaction with the judgment and the rank in which the liens are ordered to be satisfied. Under the ruling of the Supreme Court in the case of *Builders' Supply Depot et al. v. O'Connor et al.*, 150 Cal. 265, 88 Pac. 983, 119 Am. St. Rep. 193, the court below erred in allowing the lien claimants attorney's fees. Section 1195 of the Code of Civil Procedure, which attempts to authorize such an allowance, is in that case held to be unconstitutional and void. Although the briefs in the case at bar were filed long before the date of the filing of the opinion in the case referred to, and no point is made here as to the fees allowed to the attorneys, it is nevertheless our plain duty to order a modification of the judgment, so far as it relates to, includes, and allows attorney's fees.

"It is claimed that the court erred in its rulings, interdicting answers to certain questions propounded, on cross-examination, to the witness, W. J. Sircy. It was sought to be thus shown that Craycroft and Madary were the real contractors, and that Sircy was a mere 'figurehead.' We think that the questions called for immaterial testimony. We cannot see what difference it could make whether Sircy, who was at least the ostensible contractor, was in reality acting as such

for himself or for other parties not mentioned in the contract, so far as the rights of the lien claimants are concerned. The materials and labor were furnished to the contractor and bestowed upon the construction of the building, and the names of Craycroft and Madary nowhere appear in the contract as parties thereto.

"Most of the findings are attacked upon the ground that the 'evidence is insufficient' to support them, but, as to all of said findings which are not based upon admissions of the answers, we find no evidence or showing in the record here from which it can be determined whether or not such allegations of the specifications are true. It does not affirmatively appear from the record before us that all the evidence received or the substance thereof is presented therein. The language of the specifications that 'the evidence is insufficient to support' certain findings implies that there was in fact some evidence offered and received in support of them. There is a wide distinction between a specification that charges that 'the evidence is insufficient to support the findings' and one in which it is alleged that 'there is no evidence to support' them. In the latter case it would doubtless be the duty of the respondent to show, if he could, by amendments to the statement or bill, the evidence which it was claimed supported the assailed findings. But, where it appears from the language of the specification itself that there must have been evidence received in support of certain findings and none in relation thereto is shown in the record, we assume, as we think we have a right to do, in the absence of a showing that all the evidence or the substance thereof is presented, that there was sufficient evidence to justify the court in making said findings.

"The court below is directed to strike from the judgment that portion thereof allowing an attorney's fee to each of the lien claimants, and, as so modified, the judgment, as well as the order, is affirmed."

L. L. Cory, for appellant. G. G. Goucher and W. H. Larew, for respondent Glas. R. L. Hargrove and F. A. Fee, for other respondents.

CHIPMAN, P. J. Foreclosure of mechanics' and materialmen's liens. The detailed facts will be found stated in the consolidated action under this title shown above, and in 97 Pac. 423. Certain of the causes of action were first disposed of in this court which were later taken to the Supreme Court by transfer, where the conclusions of this court were concurred in. The present appeal, which is on a separate transcript, was taken by plaintiff, first, from that part of the judgment entered in the first cause of action set out in the complaint, adjudging that plaintiff is not entitled to the lien claimed to wit, for certain building materials fur-

nished defendants Glas through their agent, Sircy, amounting in value to \$89.10, with interest thereon at 7 per cent. per annum, from May 11, 1904; and, second, from that part of the judgment, to like effect, entered in the second cause of action, to wit, for certain work and materials furnished by one Madary, amounting to the sum of \$387.24, with interest at 7 per cent. from May 11, 1904, which said claim and lien were duly assigned to plaintiffs.

1. As to the first of these causes of action the nineteenth finding of the court is as follows: "The court finds that said building materials furnished by plaintiff, Barrett, Hicks Company, were not furnished at the special instance and request of said defendants Frank Glas, Jr., and W. H. Glas, through their said agent, W. J. Sircy, but that said materials aforesaid were furnished at the special instance and request of M. R. Madary, and were charged on the books of said plaintiff corporation to the account of said M. R. Madary, and the allegation in plaintiff's complaint in that regard is untrue, as is likewise the statement in its said notice and claim of lien, that said materials were furnished to W. J. Sircy, the contractor; that plaintiff paid out and expended for the filing and recording of said notice of lien the sum of \$1.50." The allegation of the complaint so found to be untrue was as follows: "And that during the erection and construction of said building said Barrett, Hicks & Company, a corporation, at the special instance and request of said defendants Frank Glas, Jr., and Wm. H. Glas, through their agent, W. J. Sircy, did furnish certain building materials to be used and which were actually used in the erection and construction of said brick building."

The contention of appellant is that the evidence without conflict shows that the allegation is true, and therefore the finding is unsupported, and should have been the other way. There is not much evidence upon this claim, and we quote it in its entirety. It will be borne in mind that Sircy was the contractor, and as such is spoken of as the agent of the Glas brothers.

Sircy testified as follows: "When I went to Barrett-Hicks Company to get the material, Mr. Madary did not go along with me. When I bought these goods from Barrett-Hicks Company, I did not know who they were charged to. I never saw the books. They were sold to me. I went in and made arrangements with Charley Barrett myself. Barrett-Hicks Company didn't say anything about Mr. Madary when I had my conversation with them. I told Charley Barrett when I bought the stuff that this money comes from Mr. Madary; that that was where they were to get their money from. The goods were sold to me and shipped to me here, but I don't know how the charge was made upon the books. They knew Madary was getting all the money, and that they were to be paid

through Mr. Madary. Barrett-Hicks Company told me what they would deliver the goods on the car for, and the price was mentioned; that is, I told them about how many squares there would be, and it cost so much per square. Before getting the material from Barrett-Hicks Company, I had a talk with Mr. Madary about it. I think I told Mr. Madary I could get it cheaper from them than anywhere else."

"Mr. Cory, Attorney for Plaintiff: If there is anything important in that, I am perfectly willing to state that at the time he went to Barrett-Hicks to furnish this material they talked with Mr. Madary about it, and he told them that that was all right, that he would see that their claim was paid. There is no question about that fact at all."

Madary testified as follows: " * * * All I know about guaranteeing Barrett-Hicks & Co.'s bill is that Mr. Barrett called me by 'phone and said Mr. Sircy had come there and ordered some iron for the Glas Brothers' building of Madera, and that he told them I was handling the money for the job, and Mr. Barrett wanted to know if that was so, and I told him that it was, and I asked him how much the bill was, and he told me it was \$87 and I told him it would be all right, I would guarantee the bill. I was handling the money, and I would guarantee it. I never thought of such a thing as purchasing the material. I had no use for it."

There was also introduced in evidence, without objection, a statement from the books of Barrett-Hicks Company showing that the account for the material so furnished was charged to M. R. Madary upon the books of that company. It is uncontradicted that Sircy purchased the materials from plaintiff and that he ordered them delivered to him at the building, and that they were so delivered and used in its construction. It is also uncontradicted that Madary was told "over the 'phone" by plaintiff that Sircy had "ordered some iron for the Glas Brothers' building, and that he told them" (Barrett-Hicks Company) that he (Madary) "was handling the money for the job"; that they "wanted to know if that was so" and were told it was, and, after being told the amount of the purchase, Madary said "it was all right"; that he "would guarantee the bill"; that he "was handling the money and would guarantee it" (the bill). All the parties knew that the material was for the building being erected by Sircy, as contractor, and Madary testified that he had "no use for it" and "never thought of such a thing as purchasing the material." It appeared that plaintiff charged the bill to Madary on its books, but it had no authority to do so otherwise than as guarantor and his obligation to plaintiff was that of guarantor. Plaintiff could not change Madary's contractual relation to it without his consent by an entry on its books. That Madary's relation to plaintiff was that of guarantor

conclusively appears from his testimony. He distinctly stated that he would guarantee the payment of the bill and the obligation of guarantor arises only where there is a principal debtor. *Kilbride v. Moss*, 113 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361. The evidence, without conflict, is that the materials were furnished by plaintiff at the special instance and request of Sircy for the express purpose, as found by the court, of being used in the construction of the building and were so used. Section 1183 of the Code of Civil Procedure gives any person furnishing materials so to be used and which were so used a lien therefor for their value, and where the contract for the erection of the building is void, as was the case here, for noncompliance with the provisions of the statute, the materials so furnished shall be deemed to have been furnished at the instance and request of the owner. The materials were furnished to Sircy and the notice of lien correctly so stated. There is nothing in the statute which would release the owner and the building from the operation of the lien, to which the person supplying the materials is entitled, by reason of the fact that a third person has assumed the relation of guarantor of the debt. The creditor cannot be presumed to have waived his lien by having this additional security. But it seems to us not material what Madary's liability to plaintiff is, as he was not the principal debtor to whom the materials were furnished and by whom they were to be used and were used in the construction of the building. The learned trial judge could not have denied the lien upon the ground that the materials were not furnished to be used or were not used in the construction of the building, for he found that they were so furnished and used. The theory must have been that they were furnished at the special instance and request of Madary. In this, we think, the court erred, and that the finding is not supported by the evidence.

2. The defense against Madary's lien for labor and material furnished by him was that he was one of the sureties on the bond given by the contractor to indemnify the owner. The bond provided that the sureties would answer as such for the full performance by Sircy of all the terms and conditions of the contract to be by him performed, "and jointly and severally guarantee * * * the delivery of said building free from all liens that may be filed against the said contractor in the above contract, not exceeding the sum of two thousand dollars." The eleventh finding of the court is as follows: "The court finds that on the 17th day of November, 1903, M. R. Madary and C. J. Craycroft, of Fresno, California, became sureties on the bond of said contractor, W. J. Sircy, upon the said contract of November 9, 1903, in and by which bond said sureties guaranteed the performance of said contract of said date, and the delivery of said building free from all

liens that may be filed against the same. * * * It was held in the appeals heretofore decided, on the authority of the cases there cited, that, where such a bond has been given, the surety cannot claim and enforce a lien for labor or materials furnished for a building of which the completion according to contract and delivery free from liens have been guaranteed by such surety. To avoid the force of these decisions, appellant contends, first, that the pleadings of defendant and the findings of the court are not sufficient in themselves to justify the conclusion that the assignee of Madary may not foreclose the latter's lien; and, second, that the evidence in the case shows that Madary was entitled to a lien against the building, and that, if he ever had been a surety, he was released from all liability upon the bond.

Upon the first of these points appellant relies on *Blyth v. Torre* (Cal.) 38 Pac. 639. A rehearing was granted in that case, and we have been unable to find it reported subsequently. In the course of the opinion it was said: "The case appears to have been considered as though the presentation of the bond in open court at the trial ipso facto estopped plaintiff from taking any other step in the prosecution of his action, and this, too, regardless of the amount of the bond, as compared either to the amount of plaintiff's claim or the amount of defendant's damage." Apparently in that case there was no answer to plaintiff's complaint setting up the fact as to the giving of a bond by plaintiff. It appeared in the present case that the giving of the indemnity bond was set forth in the answer of defendants. The proof of its execution and all the facts relating to the furnishing of materials went in without objection, and it appeared that the liens sued upon were in excess of the amount of the bond. We think the point now under consideration is not well taken.

Appellant grounds his second point upon changes and alterations which were made in the contract, thus, it is claimed, exonerating the surety. It is hence argued that, being discharged from liability on the bond, his right to a lien stood as though there was no bond. Appellant's conclusion, we think, is sound if his premise is not faulty. It is well-settled law that a surety may stand upon the strict letter of his bond, and that where the principal has, without the consent of the surety, materially violated the terms of the agreement for the performance of which the surety stands sponsor, the latter is exonerated from all liability upon his bond. This principle has been many times applied where the surety has guaranteed the faithful performance of building contracts. For example, where payments to the contractor have been prematurely made (*Glenn v. Jones et al.*, 146 Cal. 518, 80 Pac. 695), where the owner failed to retain in his hands 25 per cent. of the contract price as stipulated (*Bragg v. Shain*, 49 Cal. 131; *Barrett-Hicks Co. v. Glas* [Cal.] 97

Pac. 423), where the owner has retained in his hands sufficient money to pay all liens (*Kiessig v. Allspaugh*, 91 Cal. 231, 27 Pac. 635, 13 L. R. A. 418; *Burnett et al. v. Barrett-Hicks Co.* [Cal. App.] 99 Pac. 857), where there have been substantial deviations in the plans for the construction of the building (*Judah v. Zimmerman*, 22 Ind. 388; *U. S. v. Corwine*, Fed. Cas. No. 14,871; *Civ. Code*, § 2819; *Barrett-Hicks Co. v. Glas*, supra). The facts in this present case bring it clearly within the rule. There were not only several material departures from the plans in some of the parts of the original building, but there was an additional story added to it, making a two-story building, while a one-story building was originally contracted to be built. We entertain not the slightest doubt but that these changes and alterations in the building completely exonerated Madary as surety, unless it was shown that he consented thereto either by the terms of his bond or otherwise. It was said in *Tuohy v. Woods*, 122 Cal. 665, 55 Pac. 683: "When a surety has shown that the contract to which he became a surety has been changed, he has then shown that there has been an attempt to make him liable on a new and different contract; and the burden is then upon the other party to show that the surety has consented to the new contract."

Concerning these changes, Sircy testified: "In order to make these alterations and additions, I had no conference with the architect at all, he wasn't there. I and the Glas boys would make a trade, and we would have a little written agreement between ourselves and signed by ourselves; that is, one part of it, part of the work they had little extra things, and part of it was signed, and part wasn't signed by us. In some cases I would say it was before the work was done, and in others I would be going along with the work." The original contract was dated November 9, 1903. On December 24, 1903, a written agreement was entered into between Sircy and Glas Brothers to construct the second story at a cost of \$1,318. He further testified: "With most of the alterations I consulted Mr. Madary, but not all of them. Several minor things, possibly, I did not say anything about for some little time. He was my adviser, and I did not do anything without advising with him. When I say advised with Mr. Madary, I meant to say that the changes would be made, and then I advised with Mr. Madary when I came to town. I would tell him what I did, simply advised with him. I mean that these improvements or alterations, that Mr. Madary either knew of before they were started, or if they were started, and there were some that he didn't know anything about them until they were actually finished."

Madary testified: "With reference to these alterations I knew very little about them. Mr. Sircy would bring me an agreement once in a while showing that there had been a change made and that he and the Glas boys had signed. I never gave my consent, or any

authority to make any changes to any one." What Madary's business relation was to the Glas brothers or to the construction of the building does not clearly appear. He seems to have had something to do with paying out the money for the work. But that he had any supervisory authority over the work or of agreements relating to it does not appear. Sircy advised with him; but whether it was to obtain his consent to things done is not shown. On the contrary, Sircy testified that he either knew of improvements or alterations before they were made, or was told of them after "they were actually finished." Madary testified that he "knew very little about them," and he "never gave his consent or any authority to make any changes to any one." It does not appear that Madary had even knowledge of all the changes made before the work was completed. Sircy testified that there were improvements and alterations that Madary knew nothing about "until they were actually finished," and he nowhere testifies that Madary ever consented to them. We do not think that any such relation of Madary to the work is shown as would justify the inference that knowledge of all the alterations, if he had it, which is not proven, was equivalent to consent. The burden was upon defendants to prove his consent—something more than knowledge—and we do not think they successfully sustained such burden.

There remains one other view of the case to be disposed of. The contract expressly provided that "should the owners or the architects, at any time, during the progress of the work, request any alteration to or omission from this contract or the plans or specifications or either of them, shall be at liberty to do so, and the same shall in no way affect or make void this contract: but the amount thereof shall be added to, or deducted from the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed, when the work is completed in accordance with the original plans, as amended by such changes, whatever the nature or extent thereof." The bond was attached to and referred only to the contract of November 9, 1903. It seems to us that the alterations in the plans and specifications or changes to be made had reference to changes in the one-story building which was to be built; that changes and alterations in the construction of that building should not invalidate the contract, but that the "contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever the nature or extent"—that is, the work on the building contemplated by the contract. It would be unreasonable to hold that the effect of the bond was to guarantee the work done in the construction of a two-story building; for, if we

should take that view, it would follow that the owners might have converted the plans into a six-story building and increased the cost four or five fold. The change to a two-story building was not decided upon until the one-story building was well towards completion, and the memorandum was not signed until December 24, 1903. By its terms the owners were to pay \$1,311.18 in addition to all charges made for other changes, which latter amounted to \$490.22. It is uncontradicted that the owners authorized the expenditure for and have had the benefit of the labor and materials involved in this lien. We see no reason why they should escape liability or that the building should not be subjected to the lien.

The judgment as to both causes of action is reversed.

We concur: BURNETT, J.; HART, J.

155 Cal. 161

POWELL v. ALLEN et al. (L. A. 2,229.)

(Supreme Court of California. Jan. 20, 1909.

Rehearing Denied Feb. 18, 1909.)

BOUNDARIES (§ 7*)—LOCATION—MONUMENTS.

A stake was used as a starting point in subdividing a block into five-acre tracts and in running the exterior lines of two of such tracts, which were subdivided into lots some of which, including those in controversy, face on a street, but it does not appear that the stake was used in the latter subdivision. The city in surveys for street work, etc., has used a corner of the street as the controlling monument, and lot owners have used it in defining their lots. One of defendants, whom plaintiff claims had encroached on his lot, once indicated to plaintiff a monument as marking the corner of a lot held by such defendant, a monument consistent with a survey starting from the street corner. Held not error to take such street corner as the starting point, instead of the stake, in determining the boundary between plaintiff's and defendants' lots.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 58; Dec. Dig. § 7.*]

Department 2. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Ejectment by Elias B. Powell against H. M. Allen and others. From a judgment for plaintiff, defendants appeal. Affirmed.

O. B. Carter, for appellants. Haas, Garrett & Dunnigan, for respondent.

HENSHAW, J. The action is in ejectment, brought to determine the true boundary between lots 25 and 24 in block A of Hammell's subdivision of lots 31 and 32 of the Workman and Hellman subdivision of lot 2 in block 72 of Hancock's survey in the city of Los Angeles. Plaintiff claims that defendants, owners of lot 24, have encroached eight feet westerly upon his land, and of this strip eight feet wide possession is sought. Judgment passed for plaintiff, and from that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment defendants appeal, bringing up the evidence for review upon a bill of exceptions.

The facts are not in serious controversy, and there is little or no difference between the litigants as to the principles of law applicable to the question involved. The facts may be briefly summarized as follows: Under the Hancock survey a map was recorded of blocks and lots. The blocks were of large size; block 72, within which is located the land in controversy, consisting of 4 subdivisions containing approximately 35 acres each. Block 72 passed into the hands of Workman and Hellman, who caused it to be subdivided. In this subdivision certain streets were delineated and named, and the effort was made to divide the block into five-acre tracts. In turn, two of these five-acre tracts, 31 and 32, passed into the hands of Hammell, who caused them to be subdivided into lots (speaking generally) of 50 feet frontage. The map showing his subdivision is also of record. In this subdivision lots 19½ to 33, inclusive, are represented as 50-foot lots, facting southerly on Willie street. Lot 33 is the westerly of these lots. Still west of that is lot 1 (a corner lot) with a frontage on Willie street of 142 feet; its westerly frontage being on Euclid street. The record presents the testimony of the engineer, Stephenson, who made the survey and plat of the Workman and Hellman subdivision. He testifies that he took for his starting point the corner stake of the old Hancock survey which marked the common corner of blocks 2, 1, 7, and 8. This corner gave the easterly line of block 72, and consequently the easterly line of lots 31 and 32, subsequently subdivided by Hammell. He testifies also that he plotted Euclid and Willie streets, which first came into existence under the offer of dedication of his recorded map. The boundary between this easterly line of block 72 and the lands to the east were shown by an old fence, and later by a row of trees, conforming accurately to the initial point evidenced by the stake. No controversy has ever arisen between the owners of those adjacent tracts as to their true boundary line. No evidence was offered as to the method of survey adopted in the map of Hammell's subdivision other than the internal evidence upon the face of the map itself. From this it would appear that the exterior boundaries of the five-acre lots 31 and 32 were delineated by a survey which also commenced at the point indicated by the old corner stake of the Hancock survey. But this evidence goes only to the exterior lines of the tract. There is nothing to show what point was taken as the initial point for the subdivisions into 50-foot lots. Now, the result of all this is that the southerly frontage of block A shows upon the map 892 feet, while upon the ground it is 884 feet. There is thus a shortage of eight feet. Manifestly, if measurements are taken from the common corner of Willie and Euclid streets on the west and carried east-

ward, giving each lot owner the land the map calls for, it would result in throwing this shortage upon the extreme easterly lot, 19½. Upon the other hand, if the point indicated by the old Hancock stake to the east be adopted as the initial point, and the line be run westerly in like manner, it would throw the shortage upon lot 1. In precisely this way has the controversy arisen. The plaintiff running his line from Euclid street eastward, the defendant running his line from the Hancock stake westward, the former overlaps on 24, the latter overlaps on 25. Thus the whole question resolves itself into this: What shall be regarded as the true and superior monument and starting point for the running of this line? Appellant, of course, contends for the Hancock stake. If the evidence supported his contention that the Hancock stake was the original monument from which the lots of Hammell's subdivision were measured and laid off, the question would be extremely simple. *Bullard v. Kempff*, 119 Cal. 9, 50 Pac. 780. It is shown that the surveyor of the Workman and Hellman subdivision used this Hancock stake as a starting point. It is shown, as has been said, that the surveyor of the Hammell subdivision used this stake in running the exterior boundaries of the five-acre lots. The Hancock stake thus is entitled to be considered a monument of dignity and importance. But it is not shown, as has been said, that the subdivision of the lots within these exterior boundaries was made by taking the Hancock stake as the initial point of measurement. The record upon this is entirely silent. We have, then, upon the easterly boundary of the block the Hancock stake, upon the westerly another well-defined monument—the corner of Euclid and Willie streets. The court adopted this corner as the monument for running the measurements of the lots, and it may not be said that it was without justification in the evidence so to do; for it is shown that the city in its surveys for street work and the like has used this corner as the controlling monument. It is shown that the property owners upon Willie street, as well as those upon Lanfranco street, to the north of Willie street, also used this easterly line of Euclid street as the point from which to start their measurements in defining their lots, and as touching particularly this defendant Allen it is shown that, while he held title to lots 28, 27, 26, 25, and 24, he indicated to this plaintiff upon the ground a stake which he declared to mark the southeasterly corner of lot 28. Here, in a certain sense, was a declaration against interest while he held title. Code Civ. Proc. § 1849. Taking this southeasterly corner of lot 28 as the starting point, and carrying the measurements easterly from that point, it would demonstrate an encroachment by defendants of eight feet upon plaintiff's lot 25, which lot also plaintiff acquired from defendant Allen. In this situation and under these circumstances, it may

not be said that the court erred in adopting the southeastern corner of Euclid and Willie streets as the point of commencement for running the line of these lots as between this plaintiff and the defendants.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

155 Cal. 155

BROWN v. MASON. (L. A. 2,225.)

(Supreme Court of California. Jan. 19, 1909.
Rehearing Denied Feb. 18, 1909.)

BROKERS (§ 48*)—COMMISSIONS—RIGHT TO.

Under an agreement to pay a broker a commission for procuring a purchaser within a specified time, to earn the commission he must produce within such time a customer ready, able, and willing to purchase on the stipulated terms, but the commission is earned if the customer is willing to purchase on different terms and the variance is waived by the principal, or if a suitable customer is produced, but not within the time limit, owing to a delay caused by the principal; there being no implied promise to pay a commission, if at a time subsequent to the time limit the property is sold to one introduced by the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 65; Dec. Dig. § 48.*]

Department 2. Appeal from Superior Court, Los Angeles County; B. F. Bledsoe, Judge.

Action by George L. Brown against George Mason. From a judgment for defendant, plaintiff appeals. Affirmed.

Mastick & Partridge and Edward F. Treadwell, for appellant. Hanson & Heath and Edwin A. Meserve, for respondent.

MELVIN, J. This was an action for the recovery of \$15,000 as commissions which plaintiff asserted were due him for services as a broker in selling for defendant a note and mortgage for \$150,000, and all of the stock of the Pokegama Sugar Pine Lumber Company, a corporation, owning a large tract of timber land in the state of Oregon. Judgment was given for defendant, and from it plaintiff appeals.

The complaint contained three counts, the first pleading an employment of plaintiff by defendant to make a sale of the stock, note, and mortgage, and a performance of services under such employment "reasonably worth the sum of \$15,000." The second is an ordinary count on a quantum meruit, and the third is a common count in *indebitatus assumpsit*.

It appears that in 1904 the defendant, Mason, owned the stock of the Pokegama Sugar Pine Lumber Company and a mortgage for \$150,000 upon the Klamath Lake Railroad. This railroad was owned principally by one Hervey Lindley, who was very anxious to make a sale of the road in conjunc-

tion with defendant's land. Lindley sent Brown to Mason in November, 1904. An agreement was obtained whereby defendant promised to sell his stock and mortgage for \$390,000, of which \$90,000 was to be paid at once, and the balance in three yearly payments of \$100,000 each. This option was to remain in force until January 1, 1905. Mason also signed a promise to pay Brown \$15,000 if the latter should succeed in closing the sale in accordance with the terms of the option. At the request of Brown, the option was afterwards extended to the 10th day of January, 1905. On the last-mentioned date the appellant took one George L. Long, a representative of the Weyerhaeuser Timber Company, to Los Angeles, and introduced him to respondent. Mason refused to give an extension of the option, but gave Long a new option on the same property for \$400,000, good until February 11, 1905. He also agreed to pay Brown \$15,000 if this sale should be made. At the expiration of this second option, an unsuccessful attempt was made by Long to secure an extension. Negotiations between Long and Mason had apparently terminated. On March 9, 1905, the respondent wrote to appellant, telling him that the transaction was at an end. On April 11, 1905, appellant Brown wrote to Mason and spoke of the matter of his compensation. He received a reply, dated April 12th, in which the writer used the following language: "We have now taken the matter up directly with the Cooks and made a compromise deal at a greatly reduced price, which is to be net to us. I utterly fail to see how you are connected with this deal at all, certainly you were not for us." The Cooks mentioned were two brothers who had a judgment against the Pokegama company and Hervey Lindley. They secured a contract of sale from Mason for this property at \$325,000, but the negotiations failed and Mason rescinded this agreement in May, 1905. The court below found that this contract was secured at the instigation of Long, but that Mason was ignorant of that fact. During the summer of 1905 Long made an unsuccessful endeavor to secure the property, and then dropped negotiations until November, when he went to Los Angeles, secured an option on the property, and purchased it finally in December, 1905, for the sum of \$300,000.

That plaintiff's legitimate interest in the matter of the sale of this property was limited to his contract of employment there can be no doubt. When an agent procures such an agreement in which time is of the essence of the transaction, he is bound by its terms. There is no implied promise arising of necessity from the relation existing between a prospective vendor and his agent that the former will pay a commission if, at a time subsequent to the life of the written contract, the property is sold to the person

introduced by the agent. The two essentials to the broker's success under a written appointment such as Brown obtained from Mason are, first, that he should produce and introduce to the seller a customer ready, able, and willing to take the property upon the terms stipulated; and, second, that this should be done within the time limit of the option. If the purchaser is willing to take the property on different terms and the variance is waived by the vendor, the broker may still obtain his commission; or if, having produced a suitable purchaser but not within the time limit, owing to a delay caused by his principal, the broker is entitled to his commission. Wanting any of these exceptions, however, a broker is strictly held to the terms of his contract. See *Mechem on Agency*, §§ 965, 966. The rule is well expressed in *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642: "And, before a broker can be said to have earned his commission, it must also be shown that he produced a purchaser who was ready and willing to make the purchase on terms satisfactory to his employer, and that he was the efficient agent or procuring cause of the sale. *McGavock v. Woodlief*, 20 How. 221, 15 L. Ed. 884; *Wylie v. Marine National Bank*, 61 N. Y. 415. The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commissions does not accrue. *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 382, 38 Am. Rep. 441. It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he fail to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner. *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. 316; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 772."

The case of *Zeimer v. Antisell*, supra, was cited with approval in *Ropes v. Rosenfeld's Sons*, 145 Cal. 679, 79 Pac. 357, where this language is given: "The rule laid down in *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642, has never been questioned or overruled by this court, so far as we know, and must control this question." This case which we are now considering is quite similar to that of *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. 316. In that case a prospective purchaser introduced by the plaintiff to his principal within the two months mentioned in their agreement of agency promised to take the property on the terms offered, but did not do so. After the time expired, other negotiations were opened, and finally the property was purchased by the person whom plaintiff had introduced to defendant. The court in that case thus expresses the law: "It is doubtless

true that Fultz was instrumental in enabling the defendant to sell his land; but, as Fultz and Wimer had entered into written stipulations as to the terms upon which Fultz was entitled to commission, these stipulations must control. Fultz failed to find or produce a purchaser ready and willing to take the farm and pay the money within the time prescribed in the written contract or within the time that Wimer extended such contract, and Wimer was under no obligation to wait any longer that he might make further efforts. 22 Cent. Law J. 466; *Wylie v. Bank*, 61 N. Y. 415. After the extension of the contract had expired, Wimer had the right to sell to Galli or to any one else; and, under the written contract, he was not liable to pay to Fultz his commission, or any other sum, because, after the expiration of the extension of the contract, the contract had spent its force. *Coleman v. Meade*, 13 Bush (Ky.) 358; *Charlton v. Wood*, 11 Heisk. (Tenn.) 19. If the delay in closing the sale between Galli and Wimer had been caused by any negligence, fault, or fraud of Wimer, Fultz would be entitled to his commission; but the evidence shows nothing of this kind. Wimer acted in the best of faith, and was very desirous, being overanxious, for Fultz to produce a cash purchaser upon the terms prescribed in the written contract."

Appellant's counsel are apparently of opinion that the case just cited is not in consonance with the better authorities in this country, and that it is in conflict with the doctrines expressed in *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 772, but, as was indicated by the learned judge who tried this case in the superior court, *Wilson v. Sturgis*, supra, presents a different state of facts. He said: "In that case the facts show that within the time prescribed a purchaser agreed to take the property, and paid part of the purchase price down; within a day or two after the termination of the time prescribed defendant all the while retaining the purchase price first paid, the sale was actually consummated. Moreover, as the evidence in the case shows, defendant was endeavoring to defraud the plaintiff of his commission." It is to be remembered, also, that in *Ropes v. Rosenfeld's Sons*, 145 Cal. 671, 79 Pac. 354, the case of *Fultz v. Wimer*, supra, is affirmed. Appellant's counsel in their brief state their position as follows: "It will be observed that the complaint does not count upon the performance of the express contract, or upon the obtaining of a purchaser who was ready and able to purchase on the terms specified or within the time limited, but upon the implied obligation to pay a reasonable compensation which we claim the law raises against one who sells for a less sum to a purchaser obtained by the agent." But at the time of the introduction of Long to Mason by Brown the last-named individual assumed to act under the written agreement. This was shown by his efforts to

have the time of the option extended and to get a new brokerage contract for himself. It cannot be reasonably said that he was working under an express written contract if he could succeed in fulfilling its terms, and under an implied contract if he could not accomplish that desired result. He took the risks of his employment, and was subject to the results of failure or success under the provisions of his contract of agency.

It follows that the judgment must be affirmed, and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

155 Cal. 164

PEOPLE v. CARSON. (Cr. 1,437.)

(Supreme Court of California. Jan. 28, 1909.)

1. INDICTMENT AND INFORMATION (§ 15*)—SUCCESSIVE INDICTMENTS—VALIDITY—EFFECT OF HABEAS CORPUS PROCEEDINGS.

A demurrer was sustained to an indictment against a life prisoner for assaulting prison officials, and the case was ordered submitted to another grand jury. More than 30 days thereafter, on habeas corpus proceedings sued out by accused, he was taken from the sheriff, and remanded to the custody of the prison officials. *Held*, that the order in the habeas corpus proceedings did not affect the order directing a new indictment; the validity of the indictment not depending upon the custody of accused.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 15.*]

2. CRIMINAL LAW (§ 680*)—TRIAL—ORDER OF PROOF—DISCRETION OF COURT.

The order of proof is within the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1609; Dec. Dig. § 680.*]

3. CRIMINAL LAW (§ 427*)—EVIDENCE—ACTS OF CONSPIRACY—PRELIMINARY EVIDENCE OF CONSPIRACY—ORDER OF PROOF.

While it is not the best practice to permit proof of acts of alleged conspirators before the conspiracy is shown, it is not error to do so, and, in a prosecution for an assault on prison officers, evidence as to the conduct of the other prisoners at the time, engaged in the same attack, was admissible in the court's discretion, before the conspiracy and accused's connection therewith was shown; such proof being afterwards supplied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1013; Dec. Dig. § 427.*]

4. CONVICTS (§ 5*)—EVIDENCE—ACTS OF CONSPIRATORS—FURTHERANCE OF COMMON PURPOSE—ACTS NOT INDICTED FOR.

In a prosecution for an assault on prison officers in order to escape, accused being charged with assault with a chisel, evidence of a conspiracy participated in by accused, and of all the surrounding circumstances, was admissible to show the intent with which accused made the assault with the chisel, and for that purpose evidence was also admissible of an assault by the other prisoners with knives, even though under the indictment accused was not responsible for an assault made by the others with a weapon other than that he was charged with using.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 5.*]

5. CRIMINAL LAW (§ 824*)—TRIAL—RECEPTION OF EVIDENCE—LIMITING TO PARTICULAR PURPOSE.

If evidence for the prosecution in a criminal case was incompetent for other purposes than that for which it was introduced, accused should have requested an instruction limiting its consideration to that purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999; Dec. Dig. § 824.*]

6. CONVICTS (§ 5*)—CRIMINAL RESPONSIBILITY—PROSECUTION—EVIDENCE—ADMISSIBILITY.

In a prosecution for an assault on prison officers, accused being charged with assault with a chisel, and the other prisoners engaged in the same attack having used knives, evidence was admissible that a knife was found where accused was shot to show that he also might have had a knife as well as a chisel, as showing the intent of his assault with a chisel, and evidence that other knives were found where accused and the other prisoners were was admissible to show

the conspiracy and the intent with which the assault was made by all the prisoners, even though accused was not shown to have had the particular knife found where he was shot.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 5.*]

7. WITNESSES (§ 350*)—IMPEACHMENT—CONVICTION OF FELONY.

In a prosecution for an assault on prison officers, accused could be asked on cross-examination how many times he had been convicted of felony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1147; Dec. Dig. § 350.*]

8. INDICTMENT AND INFORMATION (§ 179*)—VARIANCE—MODE OF COMMITTING OFFENSE.

In a prosecution for an assault on prison guards, where accused was charged with assault with a chisel, he could not be convicted by proof that he abetted others in an assault with different weapons; proof of an assault by accused with a chisel being essential.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 550; Dec. Dig. § 179.*]

9. CRIMINAL LAW (§ 1030*)—APPEAL—PRESENTATION OF GROUNDS—THEORY IN TRIAL COURT—FAILURE TO OBJECT.

Any error in trying accused upon the theory that he could be convicted by showing that he abetted others in the commission of an assault with knives, where he was charged with assault with a chisel, need not be considered on appeal, where accused did not object to evidence or instructions based on that theory, and asked no instruction to eliminate it from the jury's consideration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2619; Dec. Dig. § 1030.*]

10. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUESTS.

Charges requested by accused, which were substantially contained in others given by the court, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. CONSPIRACY (§ 40*)—CRIMINAL RESPONSIBILITY—CONSPIRACY TO COMMIT CRIME.

Under Pen. Code, § 105, imposing a punishment upon every person, confined for a less term than life, who escapes from a state prison, and section 182, imposing a punishment upon two or more persons conspiring to commit a crime, if two persons confined in a state prison, one of whom is confined for less than life, conspire to escape, all are guilty of conspiracy to commit a crime.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 75; Dec. Dig. § 40.*]

12. CONVICTS (§ 5*)—CRIMINAL RESPONSIBILITY—PROSECUTION—INSTRUCTIONS.

In a prosecution for an assault on prison officers for the purpose of escaping, a charge that it was a crime for one confined for less than life to escape, and, if prisoners, one of whom was confined for less than life, conspired to escape, all were guilty of conspiracy to commit a crime, was proper on the question of accused's intent in making the assault; there being evidence to which it was applicable.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 5.*]

13. INDICTMENT AND INFORMATION (§ 191*)—CONVICTION OF OFFENSE INCLUDED IN CHARGE—VERDICT.

In a prosecution, under Pen. Code, § 246, punishing with death one serving a life sentence who intentionally assaults another with a deadly weapon, one under life sentence, charged with

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an assault on prison officers, could only be convicted as charged, or found not guilty, and a verdict of assault with a deadly weapon, or of simple assault, could not be returned.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 191.*]

14. CRIMINAL LAW (§ 561*) — EVIDENCE — WEIGHT OF EVIDENCE—REASONABLE DOUBT.

To justify a conviction, the evidence must prove beyond a reasonable doubt every essential element of the crime charged; and, if the jury have a reasonable doubt as to any element, they must acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

15. CONVICTS (§ 5*)—ELEMENTS OF OFFENSE—CONSPIRACY TO ESCAPE.

In a prosecution under Pen. Code, § 246, punishing with death one serving a life sentence, who intentionally assaults another with a deadly weapon, where accused was charged with an assault on prison officers, to warrant a conviction, the jury must find that accused was undergoing a life sentence in a state prison at the time, and that, with malice aforethought, he assaulted the officer with a deadly weapon.

[Ed. Note.—For other cases, see Convicts, Dec. Dig. § 5.*]

In Bank. Appeal from Superior Court, Sacramento County; E. C. Hart, Judge.

Charles Carson was convicted of assault with a deadly weapon, while confined for life in a state prison, and from the judgment, and from an order denying a motion for new trial, he appealed. Affirmed.

Henry C. Ross, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

LORIGAN, J. On December 29, 1904, a number of prisoners, including the defendant, incarcerated in the state prison at Folsom, were engaged at work at a rock crusher, operated at the prison under charge of R. J. Murphy, captain of the guard, and C. H. Jolly, his lieutenant. A conspiracy had been entered into between some of these prisoners to attempt to escape, and about 3 o'clock of the day mentioned those involved in it simultaneously made an attack on Murphy and Jolly. Most of the prisoners were armed with rude knives, fashioned surreptitiously out of iron or steel implements used about the quarry. The attack on Murphy was led by a prisoner named Finley, who assaulted him with a knife, knocked him down, and stabbed him several times in the shoulder. He was then raised to his feet, and Finley and another of the prisoners named Hill grasped him by either arm, and with knives drawn, and aided and accompanied by others of the prisoners, including the defendant, proceeded to push Murphy in front of them across a bridge towards the railroad track by which they expected to escape. The defendant was close behind Murphy, and as Finley and Hill pushed or dragged the latter along, the defendant repeatedly struck him over the head with a blacksmith's chisel, with which he was armed. At the time that

Murphy was being attacked, another attack was being made on Jolly by Morales, Quijada, and other prisoners in the conspiracy. The attack on Jolly was likewise made with knives, and he was overpowered and hurried toward the point where Murphy and his captors were attempting to cross the bridge. The obvious purpose of the prisoners in taking Murphy and Jolly with them after assaulting and overpowering them was the hope that the other guards would not fire on them for fear of injuring Murphy and Jolly. This hope was, however, delusive, because as the prisoners with Murphy and Jolly came in sight of the other prison guards, Jolly called on them to fire, which they did. Murphy and Jolly were both severely wounded, the prisoners Hill, Morales, and Quinlan killed, the other prisoners wounded, and the escape frustrated. Defendant, at the time the assault by his associates and himself was made upon Murphy, was undergoing a life sentence in the state prison at Folsom. It is provided by section 246 of the Penal Code that "every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death." The defendant was indicted under this section, tried, found guilty, and sentence of death imposed upon him. He appeals from the judgment, and from an order denying his motion for a new trial.

No question is made upon this appeal as to the sufficiency of the evidence to sustain the verdict. It is insisted, however, that the section of the Code under which appellant was indicted and convicted is unconstitutional, and if not, that, nevertheless, the judgment must be reversed, for the reason that the court erred in denying the motion of appellant to set aside the indictment returned against him, and erred also in its instructions to the jury and in its rulings as to testimony offered upon the trial. As to the constitutional objections made by appellant to the code section, on the ground that it is violative of certain provisions of the federal and state Constitutions, they are no broader in their scope than those which were urged against this same section in the case of the *People v. Finley* (Cal.) 94 Pac. 248, and *People v. Quijada* (Cal.) 97 Pac. 689. Finley was one of the "life termers" in Folsom, with whom appellant participated in the assault upon Murphy, the captain of the prison guard, and Quijada, another "life termers," who at the same time made an assault upon Jolly. They were both prosecuted under this same section 246 of the Penal Code, convicted, and sentenced to death. They appealed, attacking, as appellant now does, the constitutionality of the section, and it was held that the section was not obnoxious to any

constitutional provision, either federal or state. No additional grounds are presented by the present appellant which, in our judgment, disturb the correctness of that conclusion.

As to the other points urged for a reversal: An indictment had been presented against the appellant on April 11, 1905, attempting to charge him with the same offense of which he was subsequently convicted. A demurrer by appellant to that indictment was sustained on June 26, 1905, and an order made by the court directing that the case be submitted to another grand jury, as provided in section 1008 of the Penal Code. On August 3, 1905, appellant sued out a writ of habeas corpus to obtain his discharge from the sheriff, and to be remanded to the custody of the warden of the state prison at Folsom, which application on hearing was granted, and an order made accordingly. On August 10, 1905, a grand jury other than the one which had presented the original indictment against defendant returned another indictment against him, charging him with the same offense attempted to be charged in the indictment of April 11, 1905. This latter indictment is the one under which he was tried and found guilty, and was returned 45 days after the order sustaining the demurrer and ordering the cause submitted to another grand jury was made. One of the grounds of the motion to set aside the last indictment was that it had not been returned within 30 days after the order sustaining the demurrer to the first indictment was entered, the appellant insisting that the same principle of law (section 1382, Pen. Code), namely, that an information must be filed against a defendant within 30 days after he is held to answer, or the information must be dismissed, must be applied by legal analogy to an indictment, and that unless the indictment is returned within 30 days after demurrer sustained and order made submitting the cause to another grand jury, the indictment must be dismissed. Another ground of the motion to dismiss the indictment was that one of the members of the grand jury which indicted the appellant was disqualified to act as such because he had been discharged as a trial juror within one year previous to his being impaneled as one of the grand jurors. Section 199, subd. 3, Code Civ. Proc. Still another ground was that certain of the persons who acted as grand jurors and returned the indictment were aliens. We simply mention these various grounds urged by appellant only to say that they were all presented exactly as they are presented now, on a similar record in the case of the *People v. Quijada*, supra, were fully considered and discussed in the opinion in that case, decided adversely to the contention of appellant, and nothing further need be said relative to them. One point, however, is made now which does not appear to have been presented in the *Qui-*

jada Case. It is that the order discharging the defendant from the custody of the sheriff, and remanding him to the custody of the warden at Folsom prison, made on the petition of appellant in the habeas corpus proceeding more than 30 days after the order sustaining the demurrer to the original indictment, nullified and terminated the effect of the order of court directing that a new indictment be filed in the matter. There is nothing in this claim. All that the order made on habeas corpus operated on was the custody of the defendant. The validity of the indictment did not depend on whether the defendant was in the custody of the sheriff or the warden, or in custody at all. It depended upon the order of resubmission, which the order on habeas corpus, changing the custody of the defendant from the sheriff to the warden of the state prison, did not pretend to, nor could, effect.

This leaves for consideration only the questions as to the rulings of the court upon the admission of evidence, and the action of the court upon the instructions.

As to the rulings of the court: While the prosecution was presenting evidence as to the conduct of the prisoners, other than the defendant, at the time the general assault was being made upon the officers of the prison, the defendant objected to its introduction before evidence had been preliminarily introduced showing a conspiracy in which defendant was engaged. The court overruled the objection, admitted the evidence, and appellant assigns it as error. This is the only assignment of error made as to the admission of this evidence, and the point as made is not well taken. The order of proof is within the discretion of the court; and, while the practice is not to be commended of permitting testimony of the declarations and acts of an alleged conspirator before proof of the conspiracy is made, it is not error to do so. *People v. Van Horn*, 119 Cal. 323, 330, 51 Pac. 538; *People v. Donnelly*, 143 Cal. 394, 398, 77 Pac. 177. There was sufficient evidence in the case to warrant the jury in finding that there was a conspiracy among the prisoners to effect an escape through an assault on the officers of the prison with deadly weapons, and that the defendant was a party to it. For this reason the court also properly denied the motion of the defendant, made at the conclusion of the evidence in chief, for the people to strike out all evidence bearing on the question of conspiracy as insufficient to establish its existence. Nor was the evidence subject to a motion to strike it out on the ground that, as defendant was charged in the indictment specifically with an assault on Murphy with a particularly designated deadly weapon—a chisel—he could not be convicted by proof that an assault was made by the other prisoners on Murphy with knives, notwithstanding he was a party to

the conspiracy with them to escape from prison by making an assault with deadly weapons upon the officers of the prison. Conceding that under the specific language of the charge against him in the indictment he could not be held criminally responsible for the conduct of his co-conspirators in their assault on Murphy with knives, but only for the assault made by him with the weapon he was charged to have used, still that did not render the evidence originally inadmissible and subject to be stricken out. Evidence of a conspiracy to attempt an escape from prison, participated in by defendant, and all the circumstances surrounding the effort to accomplish the purpose of the conspiracy, were competent for the purpose of showing the intent with which the appellant, in furtherance thereof, made the particular assault with the chisel that is charged against him in the indictment. For this purpose the evidence was competent, and if incompetent for any other purpose, the only right which the defendant had was to ask for, or tender to the court, an instruction to be given to the jury limiting their consideration of such evidence to the question of the intent with which the defendant made the particular assault charged against him, if they found such assault was made by him.

Complaint is also made by appellant of the admission of evidence over his objection of seven certain knives—one found at a spot on the bridge where the defendant fell when shot by one of the guards as he was making his way back to the quarry after the shooting first commenced—the other six knives picked up near the railroad track where defendant and the other prisoners with the captured officers were gathered when the first shots were fired. We perceive no ground for holding the admission in evidence of these knives improper. It was not essential to the admission in evidence of the knife found where defendant fell that it should have been proven by direct evidence that the defendant had had the knife in his possession. Nor is it of any consequence that the defendant was charged with an assault with a chisel and not with a knife. The proof being that many of the co-conspirators of appellant were armed with knives which were being actually used by them in making the assault upon the prison officers, the finding of the knife in the vicinity where the defendant fell would have warranted the jury in concluding that the defendant was also in possession of a knife, although the particular assault made by him was with a chisel. The possession of the chisel, which the defendant had picked up as he and the others were passing the engine house in the vicinity of where the assault took place, was not incompatible with possession by him also of a knife, and possession by defendant of both weapons was a circumstance to be considered by the jury as bearing on the

question of the intent with which he had made the assault on Murphy with the particular weapon with which he is charged in the indictment as having done so. Aside from this, however, the knife found where defendant fell, together with the other knives found, all in proximity to where the defendant and the other prisoners were gathered when the firing on them by the guards took place, were admissible in evidence, together with all the circumstances accompanying the assault, as bearing on the question of the conspiracy charged to exist among all of the assailing prisoners, including the defendant, and also as evidence of the intent with which the assault in general was made by all the prisoners. This would be true independent of any possession by the defendant of the particular knife found where he fell. The fact that it was found at that place would be but an incidental circumstance which could not, however, affect its admissibility in evidence for the purposes we have indicated.

Another error assigned is that the court permitted the defendant, a witness in his own behalf, to be asked on cross-examination, over objection, how many times he had been convicted of a felony. The inquiry was entirely proper. *People v. Eldridge*, 147 Cal. 782, 787, 82 Pac. 442.

The other errors assigned as to rulings upon the admission of testimony have been fully examined, are without merit, and no particular mention need be made of them.

Appellant next claims that the court erred in its action relative to instructions, such alleged errors consisting of the giving of certain instructions by the court of its own motion, the refusal to give instructions asked by appellant, and the modification of others tendered by him. The defense interposed by the appellant on his trial—he was a witness in his own behalf—was that he had not entered into a conspiracy with the other prisoners to attempt an escape, or to commit an assault upon the prison officers with that object in view, nor did he commit any assault at all; that he was working at the rock crusher with the other prisoners, and when he saw some of them assaulting the officers and rushing them to the bridge to effect an escape, he took advantage of the apparent opportunity to escape, and followed the other prisoners with a view of doing so; that the chisel he had he picked up as he and the others were passing the engine house in the vicinity of where the assault took place, but that he did not use it at all in striking Murphy, but simply carried it with him. The theory of the prosecution was that appellant, with the other prisoners engaged in the assault, had entered into a conspiracy to escape, and had armed themselves for that purpose with deadly weapons with which the officers, particularly Murphy, were assaulted; that even if the appellant was not a party to the conspiracy between the other

prisoners, the evidence showed that he had aided and abetted them in their assault on Murphy with a deadly weapon, and, aside from this, was himself an assailant of Murphy with a similar weapon. We do not perceive what place the theory of the prosecution that appellant might be convicted as an aider and abettor of his co-conspirators in their particular assault with knives on Murphy had in the case. The defendant was not charged generally with an assault with a deadly weapon upon Murphy, but with an assault made by himself with a particular deadly weapon, to wit, with a steel blacksmith's chisel having a long wooden handle. Had he been charged generally with an assault with a deadly weapon, undoubtedly he might have been convicted by proof that he had aided and abetted the other prisoners in such an assault with such a weapon upon the officers with intent to escape from prison. As an aider and abettor, he would then have been in law a principal in the commission of said crime, although he actually made no assault with a deadly weapon himself. Pen. Code, § 31. But as he was charged with an assault with a weapon of specific character, he could only be convicted by proof of an assault made by him with the weapon charged, and the theory of responsibility as an aider and abettor in an assault made by the other prisoners with other weapons was neither tenable nor permissible under the indictment against him. But as appellant does not make any complaint on this appeal as to this theory—that is, presents no assignment of error, either as to any evidence admitted, which might have any relation to it, or complains of any instruction of the court respecting it, and did not ask the court for any instruction which would have eliminated its consideration by the jury—it is unnecessary to further discuss the proposition. Counsel for appellant doubtless considered this theory of little moment, as the evidence of appellant was that he joined the other prisoners in an attempt to escape; that he was armed with the deadly weapon with which he is charged to have assaulted Murphy, denying only that he was a party to any conspiracy with the other prisoners to escape or to assault the officers with a deadly weapon to effect that purpose, or that he in fact assaulted Murphy with the chisel.

Now as to the instructions of which appellant does complain: It is clear from the record that some of the instructions tendered by the appellant and refused by the court were substantially contained in other instructions given by the court. Hence appellant has no ground of complaint as to their refusal. This applies to a number of instructions tendered by appellant and refused for that reason.

Appellant complains because the court instructed the jury that it was made a crime by our statute for a person, undergoing a sentence in a state prison for less than life,

to escape therefrom, and that if persons confined in a state prison, one of whom is confined for a term less than life, conspire together to escape from such prison, all are engaged in the conspiracy to commit a crime. This instruction was correct as matter of law. Pen. Code, §§ 105, 182. There was evidence pertinent to which it might be applied, and it was proper that the court should instruct the jury as to the criminality of a conspiracy to effect an escape as bearing on the question of the intent with which the defendant, if found to be a party to the conspiracy, made the assault with which he was charged.

There was no error committed by the court in refusing to instruct the jury, at the request of appellant, that they might return any of four verdicts, namely, guilty as charged in the information, guilty of assault with a deadly weapon, guilty of simple assault, and not guilty. Under the Penal Code section authorizing prosecutions against "life termers" for assault with a deadly weapon with malice aforethought, it could not have been in the contemplation of the Legislature that the rule applying to prosecutions for assault with intent to commit murder where the deadly weapon with which the assault was committed is specified or described in the information should apply to prosecutions under the section of the Penal Code here under consideration; that in a prosecution, such as is had under this particular code provision, the jury might be warranted in finding the defendant guilty of assault with a deadly weapon or of simple assault, and that the court should instruct them to that effect. Nothing could be accomplished by requiring a jury, under such a prosecution, to return a verdict of either of these lesser degrees of crime against one already serving a term of life imprisonment, because no punishment whatever could be meted out to him as a penalty on such conviction. The punishment for simple assault could only amount to a term in the county jail. As a punishment upon conviction of assault with a deadly weapon, at the option of the trial court, the defendant might be sentenced for a limited time to the county jail or the state prison. But where a defendant is already undergoing a life sentence, it would be idle, even absurd, to say that the Legislature ever contemplated, in a prosecution under section 246 of the Penal Code, the return of verdicts upon which no possible punishment could be meted out to the defendant, and which, for all practical purposes, would be equivalent to a verdict, at least as far as any punishment thereon is concerned, of not guilty. It is true that the court, upon conviction of either of the lesser degrees of crime, might under the law impose a fine on the defendant enforceable on execution, but it is hardly worth seriously considering that the Legislature intended to permit a return of such verdicts in contemplation solely of an ex-

treme possibility of enforcing the payment of such fines.

We think that under a reasonable construction of section 246 of the Penal Code it was never contemplated that any verdicts should be returned in a prosecution under it save either a verdict of guilty as charged in the information, or a verdict of not guilty, and that instructions to that effect are all that should be given to a jury. If the evidence in a prosecution under this code section would only warrant a verdict of assault with a deadly weapon, or of a simple assault had the prosecution been under another section which permits the return of such verdicts, then it would be the duty of the jury to return, not any of such verdicts, but a verdict of not guilty. The proof must measure up beyond a reasonable doubt to the exact charge as contained in the information, and unless it does so, the defendant is entitled to a verdict of not guilty. In order to warrant the jury in the case at bar in returning a verdict against the defendant it was essential that the jury should find, first, that the defendant at the time of the commission of the alleged assault was a prisoner undergoing a life sentence in the state prison; secondly, that while undergoing such sentence, he, with malice aforethought, made an assault upon Murphy; and, thirdly, that the defendant made such assault with a deadly weapon. The finding of all these elements beyond a reasonable doubt was essential to a conviction. If the jury entertained a reasonable doubt as to any or all of them, they should have returned a verdict of not guilty. The court so instructed the jury, and we are satisfied that these instructions as to the verdicts they might find were, under a proper construction of the section, the only verdicts, either of which they could return.

We have examined other instructions of which the appellant complains, and, without discussing them, are satisfied that the action of the court in giving or refusing them was correct.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

7 Cal. Unrep. 360

PEDLEY v. WERDIN et al. (L. A. 2,154). (Supreme Court of California. Jan. 20, 1909.)

1. APPEAL AND ERROR (§ 347*)—TIME TO APPEAL.

Under Code Civ. Proc. § 939, fixing the time within which to appeal from a judgment after the entry of judgment, the time to appeal begins to run from the moment of the actual entry of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1897; Dec. Dig. § 347.*]

2. APPEAL AND ERROR (§ 337*)—TIME TO APPEAL.

An appeal, taken before the judgment is entered of record, as required by Code Civ. Proc. § 668, is premature, and must be dismissed, though the judgment entered after the notice of appeal was entered nunc pro tunc as of a date prior thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1877, 1878; Dec. Dig. § 337.*]

3. APPEAL AND ERROR (§ 338*)—TIME TO APPEAL.

Code Civ. Proc. §§ 941a-941c, as amended by Laws 1907, p. 753, c. 410, providing for a new method of appeal, did not take effect, by reason of Pol. Code, § 323, until 60 days after the date of approval by the Governor, and an appeal taken during the 60 days was not affected thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1880; Dec. Dig. § 338.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by W. H. Pedley, administrator of H. M. Praeb, deceased, against E. R. Werdin and others. From a judgment for defendant the Pacific Electric Railway Company, rendered after sustaining a demurrer to the complaint, plaintiff appeals. Dismissed.

Wm. J. Danford, for appellant. Bicknell, Gibson, Trask, Dunn & Crutcher, for respondent.

MELVIN, J. Respondent has moved to dismiss the appeal herein on the ground that it was prematurely taken. The record shows that the demurrer of the Pacific Electric Railway Company (a corporation), the respondent here, was sustained on December 17, 1906; that upon plaintiff's declaration that he did not desire to amend, it was ordered that plaintiff take nothing as against said corporation; that plaintiff filed a notice of appeal on April 16, 1907; and that judgment was not entered until October 18, 1907. Appellant contends that the motion should be denied because the order of October 18, 1907, was entered nunc pro tunc as of December 17, 1906. The fact is of no importance in determining this motion. The time to appeal begins to run from the moment of the actual entry of the judgment. Code Civ. Proc. § 939; Coon v. United Order of Honor, 76 Cal. 354, 18 Pac. 384. In the case of the Home for the Care of Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119, the following language was used: "This court has uniformly held that an appeal taken before the judgment is entered of record (see Code Civ. Proc. § 668) is premature and must be dismissed." The same rule is stated in McHugh v. Adkins, 117 Cal. 228, 49 Pac. 2, in Bell v. Staacke, 137 Cal. 307, 70 Pac. 171, and in More v. Miller, 129 Cal. xviii, 53 Pac. 1077, 54 Pac. 263.

It is unnecessary to discuss the question whether or not sections 941a, 941b, and 941c of the Code of Civil Procedure, as amended

by Laws 1907, p. 753, c. 410, would apply to a motion like this, because those sections were not in effect on April 16, 1907, the date of the filing of the notice of appeal. Although these enactments providing for a new method of appeal had been approved by the Governor on March 20, 1907, they did not become operative until 60 days after the date of approval. Pol. Code, § 323.

The motion to dismiss the appeal is granted.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.

9 Cal. App. 538

WESTERN MEAT CO. v. SUPERIOR
COURT OF SACRAMENTO COUN-
TY et al. (Civ. 510.)

(Court of Appeal, Third District, California.
Dec. 19, 1908. Rehearing Denied by Su-
preme Court Feb. 16, 1909.)

1. PROHIBITION (§ 9*)—EXCESS OF JURISDICTION.

Prohibition lies to a court only to determine whether it has acted in excess of its jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 35-37; Dec. Dig. § 9.*]

2. PROHIBITION (§ 3*)—EXISTENCE AND ADEQUACY OF OTHER REMEDY.

Prohibition cannot be invoked to restrain the trial of a corporation, upon the ground that it had not been proceeded against in accordance with Pen. Code, §§ 1390-1397, inclusive, prior to the filing of the information; for, under section 995, that question may properly be brought to the attention of the court, in the first instance, by a motion to set aside the information, and if error occur at the hearing of such motion, the remedy is by appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.*]

Original application for a writ of prohibition by the Western Meat Company, to be directed to the Superior Court of the County of Sacramento and Charles N. Post, judge thereof. Writ denied.

Jesse Lillenthal, L. T. Hatfield, and J. B. Devine, for petitioner. E. S. Wachhorst and F. F. Atkinson, for respondents.

HART, J. This is an application for a writ of prohibition, for the purpose of restraining the respondents from trying the petitioner upon an information charging it with the violation of certain provisions of an act of the Legislature of 1907 (St. 1907, p. 984, c. 530), entitled "An act to define trust and to provide criminal penalties and civil damages, and punishment of corporations, persons, firms, and associations, or persons connected with them, and to promote free competition in commerce and all classes of business, in the state."

The petition shows these facts: That the petitioner is a corporation, organized and doing business under the laws of the state of California, engaged in the wholesale meat business; that on the 1st day of June,

1908, the district attorney of Sacramento county filed an information in the superior court in and for said county, jointly charging petitioner and one J. O'Keefe with the crime of forming a combination and conspiracy with a certain organization, known as the "Sacramento Butchers' Protective Association," for the purpose of circumventing free competition in the business of buying and selling meats in the city of Sacramento; that on the 2d day of July, 1908, counsel for the petitioner and said O'Keefe appeared before the respondents for the purpose of arguing a "motion to set aside the information and 'entry of plea' of Western Meat Company and J. O'Keefe, two of the defendants in the above-entitled cause," when the court "thereupon ordered a separation of action so far as the Western Meat Company and J. O'Keefe are concerned, and stated it would first consider the plea of the Western Meat Company to the information heretofore filed against it and the other defendants"; that the petitioner, upon being asked by the court to enter its plea to the information through its managing agent, J. O'Keefe, declined to do so, counsel for the latter expressly declaring that they were in court representing O'Keefe individually, and that they appeared for no other defendant; that thereupon, after informing petitioner, through its said managing agent, that it was entitled to counsel at all steps of the proceeding, and the petitioner "remaining silent and making no response," the court directed that a plea of "not guilty" be entered by the clerk in behalf of said petitioner; that thereafter the petitioner, by its attorneys, served upon the district attorney a notice of intention to move to set aside the plea of "not guilty" so ordered by the court to be entered in behalf of petitioner; that said motion subsequently came on for hearing, and was denied by the court, and that an order was thereafter made by the court setting the cause down for trial on the 14th day of September, 1908. It is further alleged in the petition that "neither the respondent, said superior court, nor Hon. Chas. N. Post, presiding therein, or any other judge of said court presiding therein, has ever at any time had any jurisdiction over the person or corporate entity of your petitioner in any manner whatever, and is at all the times herein mentioned, and has been, without any authority to make or enter any of the orders described herein, and your petitioner has never been legally examined before any magistrate upon any charge whatever; neither has your petitioner ever been committed for trial by any magistrate," etc. There are some other allegations in the petition to which we do not regard it necessary to refer for any purpose. The simple question presented here, as must always be true, in a proceeding of this character, from the very nature of the only remedy afforded

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thereby, is whether or not the respondents remained within their jurisdiction in the matter complained of. This question is raised by the demurrer interposed by the respondents to the petition.

The point mainly pressed by counsel for the petitioner, both in their oral arguments and their briefs, grows out of the allegation in the petition that prior to the filing of the information the petitioner had not been legally committed by a magistrate for the crime charged in said information. Hence no valid information could be filed against petitioner. From this follows the argument that the respondents were without authority to order to be entered the plea of "not guilty" for the petitioner, as authorized by section 1396 of the Penal Code, upon its refusal to plead to the information when arraigned thereupon. We think that the mere statement of the facts, as discovered by the petition, is sufficient to demonstrate that the respondents did not exceed their jurisdiction in the proceeding of which complaint is here made. The point that the petitioner had not been, previously to the filing of the information, legally committed by a magistrate proceeds from the alleged fact, as it is made to appear particularly clear from the briefs of counsel, that said petitioner had not been proceeded against and brought before the magistrate purporting to have examined the charge against it in accordance with the requirements of the statute relating to cases in which corporations are charged with the commission of public offenses. Sections 1390-1397, inclusive, Pen. Code. Section 1390 of said Code provides: "Upon an information or presentment against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge, the time to be not less than ten days after the issuing of the summons." The sections following provide that the summons must be served at least five days before the day fixed for the appearance by delivering a copy thereof and showing the original to the president or other head of the corporation, "or to the secretary, cashier, or managing agent thereof"; that at the appointed time the magistrate must proceed to investigate the charge in the same manner as in the case of a natural person, so far as the proceedings are applicable; that after hearing the proofs the magistrate must certify upon the depositions, either that there is, or is not, sufficient cause to believe the corporation guilty of the offense charged, and must return the depositions and certificate, as prescribed by section 883. It is then provided that, upon the return by the magistrate of a certificate that there is sufficient cause to believe the corporation is guilty of the offense charged, "the grand jury may proceed, or the district attorney file an information thereon, as in case of a natural

person held to answer." Section 1396 reads: "If an indictment is found, or information is filed, the corporation may appear by counsel to answer the same. If it does not thus appear, a plea of not guilty must be entered, and the same proceedings had thereon as in other cases."

We are not required, nor authorized, by this proceeding, as before suggested, to inquire whether the petitioner was legally committed by the magistrate by whom the charge against it was examined; but we may say in passing that we think that there is scarcely any room for doubting the proposition that, unless the procedure prescribed by the provisions of the Penal Code, in cases in which corporations are charged with the commission of public crimes, is substantially complied with, an order by a magistrate committing a corporation to trial under such circumstances would be voidable, or not a legal commitment, and would be set aside, under a sufficient showing, on motion. In other words, the magistrate can only acquire authority or jurisdiction to act in such case by following substantially the procedure prescribed for proceeding against and bringing a corporation before him to be examined on the charge preferred against it. But, as stated, the question thus referred to is altogether beside the proposition submitted in this proceeding. Did the court act in excess of its jurisdiction in the matter of the arraignment of the petitioner? This is the only question which we are at liberty to review. It is a fundamental principle that errors of law cannot be reviewed, in a proceeding of the character of the one before us, where there is an adequate remedy at law for the correction of such errors. If, therefore, the petitioner was arraigned on an information not founded on a proper commitment, or was otherwise not properly or legally arraigned, the law affords ample remedy for the correction of the error. It appears from the petition that the attorneys representing O'Keefe, the managing agent of petitioner, and who was, as an individual, committed upon the same charge as that preferred against said petitioner, explicitly stated to the court that they appeared for O'Keefe in his individual character only, and not for the petitioner, when the latter was called on to plead. It does not appear that any other attorneys appeared for the petitioner at that stage of the proceedings, and it is to be presumed that it did not then appear by or have an attorney from the fact that the court ordered a plea of "not guilty" to be entered for it. Under section 1396 of the Penal Code it was the duty of the court, upon the refusal of petitioner to enter a plea to the information, it having no attorney in court to make an answer of any kind for it, to order a plea of "not guilty" to be entered for it. So far as the averments of the petition disclose the proceeding was regular, and in accordance with the explicit mandate of the statute. If the petitioner was not legally committed, the law

plainly points out the procedure by which such question may be raised and determined.

The act of filing an information by the district attorney in the superior court, charging a party with a crime of which that court has jurisdiction, presupposes, as a predicate of the order of commitment upon which such information is based, a preliminary examination of the charge by a magistrate. Or, in other words, upon the filing of an information the presumption arises that the accused has been given the preliminary hearing by a magistrate upon the charge preferred against him, required by the Constitution as an indispensable prerequisite to the filing of such information. Section 8, art. 1. This presumption may, however, be rebutted, and section 995 of the Penal Code points out how it may be done. It is therein provided, among other things, that an information must be set aside by the court in which the defendant is arraigned upon his motion, if it appears "that before the filing thereof the defendant had not been legally committed by a magistrate." If, therefore, the petitioner was brought before the magistrate or proceeded against by that officer upon the charge alleged in the information without observance by said officer of the essential or jurisdictional steps made requisite by the law in order to clothe him with authority to proceed to examine a criminal charge against a corporation, it follows that the petitioner was not "legally committed," and that question may properly be brought to the attention of the court, in the first instance, only through a motion to set aside the information, and if error occur at the hearing of such motion, the remedy is by appeal. *Murphy v. Superior Court*, 58 Cal. 520; *Levy v. Wilson*, 69 Cal. 105, 10 Pac. 272; *Spect v. Superior Court*, 59 Cal. 319. In short, in all cases the only proceeding authorized by the law in which the question of whether a party against whom an information has been filed has or has not been legally committed by a magistrate before the filing of such information is a motion to set aside the same on that ground; and, when such motion is made, the superior court entertaining it has jurisdiction to make such ruling thereon as its judgment dictates, whether such ruling involves or is founded on error or not, and the decision must stand unless reversed on appeal. Counsel for petitioner have cited many cases, with the conclusions in which the result reached here does not conflict. There is absolutely no question but that there must be, by the express command of the Constitution, a preliminary hearing by a magistrate of a felony charge, or of a charge commonly called an "indictable misdemeanor," precedently to the making of an order of commitment by which alone an information can be supported.

We gather the impression from the arguments of counsel that a motion to set aside the information against the petitioner is now

pending before the respondents, having been filed, as we understand it, after the plea for the petitioner was ordered entered by the court. In this connection we shall take occasion to suggest that, under all the circumstances shown here, the court should allow the motion to be pressed, if petitioner so desires. In order to do this it would, obviously, be necessary to first set aside the plea ordered entered for the petitioner by the court. This is, as must readily be understood, only a suggestion which the respondents may or may not adopt, according as they may view the matter. But it is clear, as we think we have shown, that the respondents, by reason of the filing of the information, have jurisdiction of the offense charged, and of the person of the petitioner, and that the latter has an adequate remedy in the ordinary course of law for the correction of the errors, if any have been made by the court, occurring thus far in the proceedings involving the charge against the petitioner.

The prayer for a writ of prohibition is accordingly denied, and the alternative writ discharged.

We concur: CHIPMAN, P. J.; BURNETT, J.

9 Cal. App. 553

SCUDDERS-GALE GROCERY CO. v.
GREGORY FRUIT CO. (Civ. 568.)

(Court of Appeal, Second District, California.
Dec. 21, 1908. Rehearing Denied by Supreme Court Feb. 18, 1909.)

1. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admitting parol evidence in explanation of an unambiguous contract is immaterial, where it did not change the meaning of the contract, and could not have prejudiced appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4168; Dec. Dig. § 1051.*]

2. EVIDENCE (§ 457*) — PAROL EVIDENCE — MEANING OF TERMS.

Parol evidence is admissible to explain the meaning of the term "slightly processed," as applied to the condition of a shipment of fruit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2105; Dec. Dig. § 457.*]

3. SALES (§ 52*)—COMPLETION OF CONTRACT—EVIDENCE.

Where plaintiff claims a completed contract by correspondence for the purchase and sale of fruit, evidence is admissible as to the three different ways such fruit is sold in that market, as tending to show the materiality of plaintiff's offer to buy, as a modification of defendant's offer to sell.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 52.*]

4. SALES (§ 52*)—COMPLETION OF CONTRACT—EVIDENCE.

Evidence held insufficient to show a complete contract by correspondence for the sale and purchase of fruit.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 52.*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the Scudders-Gale Grocery Company (a corporation) against the Gregory Fruit Company (a corporation). From a judgment for defendant, plaintiff appeals. Affirmed.

C. B. Morris and C. C. Haskell, for appellant. Leonard & Surr, F. A. Leonard, and Frank C. Prescott, for respondent.

ALLEN, P. J. Appeal by plaintiff upon a bill of exceptions from a judgment rendered in the superior court of San Bernardino county in favor of defendant.

Plaintiff corporation, doing business at St. Louis, Mo., claims to have made a contract with defendant corporation, doing business at Colton, Cal., for the purchase of certain peaches, and that on account of defendant's default in delivery thereof damage resulted, for which it demands judgment. The principal question involved upon this appeal relates to the sufficiency of the evidence to support the finding of the trial court that the defendant did not enter into the agreement as alleged by plaintiff. There is evidence in the record tending to show that one Evans was authorized by defendant to quote prices of peaches to plaintiff, which he did at St. Louis, Mo., on or about May 18, 1905. These prices quoted were not acceptable to plaintiff, and it submitted to Evans a counter proposition at a lower figure, which counter proposition Evans wired to defendant, and was in the words following: "Scudder offers for delivery Sept. 10, f. o. b. common point, 400 50-lb. boxes choice yellow peaches 5¼c.; 400 50-lb. boxes choice peaches, Muirs, slightly processed, 5½c. Brokers here offering same." Defendant upon receipt of such counter proposition wired Evans as follows: "Regarding your wire 17, confirm, Scudder, subject approval sample time shipment." And on the day following wrote Evans as follows: "Per our wire of the 17th, we have confirmed on following order: Scudder-Gale Grocery Co. 400 50-lb. boxes choice yellow peaches, 50-lb. boxes 5¼c. 400 50-lb. boxes choice Muir peaches, 50-lb. boxes, 5½c. Slightly processed shipment by Sept. 10th. Subject approval sample time shipment. We will get car out as specified, upon approval sample." This letter Evans showed to plaintiff's president, who requested permission to retain it, saying: "We will keep this as a sale ticket"—Evans replying that he had no objection to the plaintiff retaining possession of the letter, and further said: "I would like to have you take the matter up with the Gregory Fruit Company—any further negotiation with regard to this matter—as I myself will not be here." Plaintiff did not communicate further with defendant in regard to the transaction until September 13th, when it wrote defendant asking that the samples be sent to St. Louis. This was followed by other com-

munications in which plaintiff claimed the contract was completed and demanded shipment. Defendant made no reply to these letters. On October 7th plaintiff purchased peaches of the kind and character specified in the proposition in the open market, and was required to pay therefor an advanced price.

While, aside from the words "slightly processed," there appears to be nothing in the communications uncertain or ambiguous, nevertheless the court permitted evidence tending to show that the words "subject approval sample time shipment" meant in the custom of the business that the samples should be examined at the shipping point before shipment was made; that the custom in such sales was for the representative of the buyer to inspect samples before shipment. In view of the fact that the proposition of defendant was that they would get the car out only upon approval of the sample, which sample should be approved at the time of the shipment, it seems to us apparent that the proposition of defendant was that some one representing the plaintiff should approve of a sample of the fruit at the time of the shipment upon which approval the car would be forwarded. The evidence admitted, however, only being in line with what seems to us the plain meaning, could not in any wise have prejudiced plaintiff. Evidence was also offered, under plaintiff's objection, to the effect that, where peaches were slightly processed, they would be in a different condition at the time of their arrival from that shown by the sample at time of shipment; the tendency of processed fruit being to dry out and lose weight in transit. This testimony was admissible as tending to show what was meant by the term "slightly processed," and what was understood between the parties by its use. Evidence was further introduced by the defendant tending to show that under the custom of the trade goods of this character were sold in three different ways: (1) A general sale for a specified price; (2) by sample delivered and approved upon receipt at place of delivery; and, (3) upon examination and approval of sample by purchaser at time and place of shipment. We think this was admissible as tending to show the materiality of the modification of plaintiff's offer as contained in the letter of May 18th. The offer from Evans was a general purchase of a certain character of fruit at a fixed price without reference to sample. This offer was not accepted by defendant, except as to the price per pound for the specified varieties, as to which it was confirmed; but defendant imposed another condition not incorporated in plaintiff's offer, which was that the goods were to be sold by sample, examined, and approved by the purchaser at time and place of shipment. This modified proposition of defendant's was not accepted to defendant's knowledge by plaintiff; nor can plaintiff well

say that it was intended by it to be so accepted by reason of its retention of the letter as a sale ticket, for, at the time when plaintiff asked to retain the letter as such ticket, Evans stated to plaintiff that further negotiations must be taken up directly with defendant, which could not have been understood by plaintiff in any way other than as a statement by Evans on behalf of defendant that the negotiations were not ended, but required some affirmative act upon plaintiff's part to conclude the same. We do not see anything in the record from which it can be said that defendant by any act is estopped to deny this contract. As we read the record, the great weight of the evidence is to the effect that there was no contract, that the minds of the parties did not meet, and that no definite agreement was ever entered into between them in connection with the sale and purchase of this property, and the finding of the court complained of has ample support in the testimony. This finding being supported, the finding of the court with reference to the relation which Evans bore to defendant is of no consequence.

We perceive no error in rejecting testimony as to the character of the original offer made by Evans to plaintiff, which was rejected. Such offer is not shown to have had any connection with the subsequent proposition and counter proposition, which were in writing, and under which plaintiff claims.

The finding that there was no contract supports the judgment, which should be affirmed; and it is so ordered.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 534

NELLES v. MACFARLAND. (Civ. 555.)

(Court of Appeal, Second District, California.
Dec. 19, 1908. Rehearing Denied by Supreme Court Feb. 16, 1909.)

1. PRINCIPAL AND AGENT (§ 38*)—RELATION—TERMINATION—REVOCATION BY PRINCIPAL—WRITTEN NOTICE.

A principal's letter to his agent, stating that it is necessary to terminate the contract of agency, "notice of which is hereby given," is a sufficient exercise of the principal's right to terminate the agency by giving written notice.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 38.*]

2. INSURANCE (§ 84*)—AGENTS—COMPENSATION—COMMISSION ON RENEWALS.

Defendant, the general agent of a life insurance company, employed a special agent, and obligated himself to pay the agent an agreed percentage of such renewal premiums as might be paid upon policies procured by the agent, provided such renewals should be paid "during the continuance of this contract." The contract provided that it was to terminate upon the termination of defendant's contract with the company, and the latter contract terminated before any renewal premiums were paid. *Held* that, by giving effect to every part of the contract, as required by Civ. Code, § 1641, the agent's

right to commission on renewal premiums ceased on the termination of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 112; Dec. Dig. § 84.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by L. G. Nelles against A. F. MacFarland. From a judgment for defendant, plaintiff appeals. Affirmed.

Taylor & Forgy, for appellant. J. W. McKinley, for respondent.

SHAW, J. On September 15, 1903, the defendant, who at the time was general agent of the Prudential Insurance Company of America, but in his individual capacity, entered into a contract with plaintiff's assignors, whereby the latter were appointed special agents in certain territory for the purpose of procuring applications for insurance in said company, and upon whom, by the terms of said contract, were imposed certain incidental duties connected with such employment. The contract consists of 14 clauses inserted in numerical order, and all of which consisted of printed matter, except clause 13, which was inserted in writing before the execution of the contract. We refer to those parts of the contract which we deem material to a consideration of the case. By clause 6 of the contract it was provided that such special agent should be allowed, for its services, the "compensation only" as fixed by a schedule made a part of the contract (but not included in the record), which was a commission of the first year's premiums collected in cash on policies of insurance procured through the efforts of such agent. By its terms no time was fixed for the termination of the contract, but clause 4 provides that either party thereto may, either with or without cause, upon giving seven days' notice in writing to the other of its intention so to do, terminate the same; and it was by the provisions of said clause 4 further expressly provided that in any event the contract should terminate upon the termination of the contract then existing between the company and said agent, the defendant herein. Clause 7 of the contract provides that, in case of a termination thereof "for any cause whatever," the compensation which shall then have been paid to the agent, together with amount then due under the contract, shall be in full settlement of all claims and demands, and all further compensation which a continuance of the agency might have secured to him shall be waived and forfeited, except as may be hereinafter provided. Clause 8 provides for the payment to the agent of a commission on any deferred first year's premiums when it shall be collected on policies procured by the agent, and which may remain unpaid at the time of the cancellation of the contract, subject, however, to

the agent being in good standing at the time of the termination of the contract, and that he shall thereafter conduct himself honorably towards the company and the general agent. Clause 13 is as follows: "(13) If the agent shall establish and pay for \$12,000 of insurance issued by this company during 1903 on the annual premium participating plans, the general agent agrees to allow the agent nine renewals of 7½% each on such business as the premiums are paid and accepted at this agency, according to the rules of this company during the continuance of this contract, provided, however, that this contract may be terminated when the agent shall not produce during any calendar year after 1903 at least \$25,000 of insurance for this company on the above plans." It is admitted that the special agent did procure \$12,000 of insurance in accordance with the plans specified. The second finding of the court is, in substance, that on April 19, 1904, the parties made a new agreement, the effect of which was to fix the agent's compensation at a flat, graded rate of 70 per cent. of the first year's premiums, collected in cash upon the business thereafter written. The cause of action is based upon the provisions of clause 13, and is to recover the 7½ per cent. upon renewal premiums alleged to have been paid upon policies of insurance procured prior to April 19, 1904, by plaintiff's assignors. It appears from finding 5 that in January, 1905, all contracts theretofore entered into and existing between the parties were terminated, canceled, and annulled; by finding 6 that all contracts between the Prudential Insurance Company and defendant as general agent thereof, as well as the contract dated September 15, 1903, between defendant and plaintiff's assignors, were terminated in the month of May, 1905. By finding 3 the court finds "that during the time of the continuance of the contract set forth in plaintiff's complaint, and alleged in full in paragraph 1 of defendant's answer [the contract of September 15, 1903], no renewal premiums in any amount whatever were received or accepted by said Prudential Company, or defendant, in any amount whatsoever, or at all." Judgment went for defendant, and plaintiff appeals therefrom upon a bill of exceptions.

Appellant contends that the judgment is based upon an erroneous interpretation of the contract, and that certain findings, particularly the third and fourth, find no support in the evidence, of which the contract constitutes the chief part. It appears that defendant, on December 23, 1904, wrote a letter to the agent, which was duly received, wherein, among other things, he stated, "It is, of course, necessary to terminate your present contract to produce new business for me on December 31, 1904, notice of which is hereby given," to which plaintiff's assignors replied on December 27, 1904, expressing sor-

row at severing the old relations. Under the provisions of clause 4 we think this notice was a sufficient exercise of defendant's right therein given to terminate the contract of September 15, 1903, as well as that of April 19, 1904, so far as he could exercise such power, and that it was so intended and understood by both parties. This finding, however, became immaterial, in view of the fact that the contract of September 15th was terminated when defendant severed his relations with the company, which the court finds occurred in May, 1905. The court finds that during the continuance of the contract of September 15, 1903 (and it may be assumed that it continued to May, 1905) no renewal premiums in any sum whatever, or at all, were received by said defendant, or by the company. Two exhibits, stipulated to be correct, were filed, which it is claimed showed the business written prior to April 19, 1904, and renewal premiums paid thereon, together with time of payment, but as they are not included in the record, there is no evidence disclosing that any renewal premiums whatever were paid prior to May, 1905, at which time the court finds that all contracts between defendant and the agent were terminated.

Whether these findings, 5 and 6, as to the termination, annulment, and cancellation of the contracts are supported by the evidence depends upon the interpretation given to clause 13. The language of this clause of the contract appears to be plain and unambiguous, and means just what its language imports, namely, that defendant obligated himself to pay the agent 7½ per cent. of such renewal premiums as might be paid upon policies of insurance procured by the agent, provided such renewals should be paid "during the continuance of this contract." The allowance of this 7½ per cent. upon renewal premiums was in express and positive terms made conditional upon their being paid during the continuance of the contract, the right to terminate which was by like express terms reserved unconditionally to either party, but according to the provisions of the contract it was in any event to terminate upon the termination of the defendant's contract with the company. This latter contract terminated in May, 1905, prior to which time no renewal premiums were paid. By section 1641, Civ. Code, it is made the duty of the court, in the interpretation of contracts, to give effect to every part thereof, if reasonably practicable. In no other way than as thus interpreted can effect be given to the words, "during the continuance of this contract." To accept plaintiff's interpretation that the agent is entitled to the agreed percentage on nine renewal premiums upon all business procured prior to April 19, 1904, irrespective of the time when the same may be paid, is to ignore that part of the contract constituting an ex-

press condition, upon performance of which the agent's right to recover must be predicated.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 545

PEOPLE v. VASQUEZ. (Cr. 93.)

(Court of Appeal, Second District, California.
Dec. 21, 1908.)

1. JURY (§ 67*)—SUMMONING JURORS—OFFICERS WHO MAY SUMMON.

A deputy sheriff possesses only the powers of his principal, as provided by Pol. Code, § 865, and, if the sheriff is disqualified from summoning jurors, the deputy cannot execute the venire, though not otherwise disqualified himself.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 300; Dec. Dig. § 67.*]

2. JURY (§ 67*)—SUMMONING JURORS.

By the provisions of Pol. Code, pt. 4, tit. 2, § 4173 (St. 1907, p. 403, c. 6), and Code Civ. Proc. § 226, the power of the court to appoint an elisor to execute an order for summoning the jury is limited to those cases wherein the disqualification extends both to sheriff and coroner; the sheriff's duty in the first instance being always cast upon the coroner when the sheriff is disqualified.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 300; Dec. Dig. § 67.*]

3. JURY (§ 67*)—SUMMONING JURORS.

Though there is no express provision in the Code whereby the duties of the sheriff are cast upon the coroner, except in cases where the sheriff is a party, as provided by Pol. Code, pt. 4, tit. 2, § 4172 (St. 1907, p. 403, c. 6), the court on sustaining a challenge to the panel on the ground that the sheriff, by reason of bias, was disqualified, under Pen. Code, § 1064, from summoning jurors, should exercise its common-law power conferred by Pol. Code, § 4468, and direct the coroner, unless also disqualified, to execute the new venire, the coroner being the sheriff's substitute at common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 301; Dec. Dig. § 67.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

David Vasquez was convicted of rape, and he appeals. Reversed.

S. V. Wright and Chas. A. Palmer, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of rape, committed upon a female child under the age of 16 years. He appeals from the judgment and an order denying his motion for a new trial.

The sheriff, under an order for a special venire, summoned a panel of 35 men from which to select a jury to try the case. Defendant, upon the ground specified in section 1064 of the Penal Code, interposed a challenge to the entire panel. Thereupon an examination was had and evidence introduced, from which it appeared the sheriff had formed and expressed an opinion adverse to

defendant, whereupon the court allowed the challenge and discharged the jury. Immediately thereafter the court made a minute order as follows: "There being no jury in attendance on this court to try this cause, in consequence of allowing said challenge interposed by the defendant, it is ordered that the sheriff summon in the manner provided by law 20 good and lawful men to be and appear in this court on August 13, 1907, at 2 o'clock p. m., to act as trial jurors in this cause." Pursuant to said minute entry, an order directed to the sheriff was duly issued out of the clerk's office commanding such sheriff to summon 20 men to appear at 2 o'clock of that day to act as trial jurors in said case. The sheriff upon the same day made return to the said writ certifying the names of 20 men so summoned to act as jurors, 19 of whom were identical with those theretofore discharged from the panel under defendant's challenge thereto. This return was made and signed by: "Y. McFadden, Sheriff. By J. L. Walsh, Under Sheriff." Thereupon defendant interposed a challenge to this entire panel upon the grounds of bias and prejudice of the officer who summoned said jurors, and the fact that such officer had formed and expressed an opinion unfavorable to defendant. Upon the evidence introduced, and it being stipulated that the sheriff in person had not summoned any of said jurors, the challenge was denied. A second and third panel of jurors were summoned under like orders and with like return, to both of which defendant interposed a like challenge, and the same was by the court denied. Defendant exhausted all peremptory challenges to which he was entitled.

The court found that the sheriff, by reason of his having formed and expressed an opinion adverse to the defendant, was disqualified under the provisions of section 1064 of the Penal Code from summoning jurors to try the case, notwithstanding which fact it issued an order commanding him to summon a second special venire from which to select a jury to serve in the trial thereof. In so doing, and in denying the defendant's subsequent challenge to the special panel summoned under the order directed to the sheriff and executed and returned by said sheriff, through his deputy or under sheriff, the court erred.

The fact that the evidence fails to show that such deputy was disqualified is immaterial. He is not the officer to whom the writ was issued, and, although the person, he is not the officer who executed and made return thereof. Such officer was the sheriff whom the court had found to be disqualified to act. The right of the deputy to act was by virtue of the authority which the law vests in the sheriff in whose name he acts. Since the sheriff was without warrant, it was impossible for him to confer such authority upon his deputy. "In all cases not otherwise

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal." Pol. Code, § 865. To justify the action of the deputy in executing the writ is to endow him with powers which his principal did not possess. The act of the deputy is the act of the sheriff. *Hirsch v. Rand*, 39 Cal. 315; *Foley v. Martin*, 142 Cal. 256, 71 Pac. 165, 75 Pac. 842, 100 Am. St. Rep. 123.

Moreover, the subject is one of statutory regulation. Whether it be a drawn or special panel, it is the duty of the sheriff in the first instance to execute the order of the court in serving the summons. Code Civ. Proc. §§ 225, 226; *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341. When other than a drawn jury, defendant may challenge the entire panel on account of the bias and prejudice of the officer by whom the summons is served. Pen. Code, § 1064. When such officer is the sheriff and the challenge is allowed, the duty of summoning the jury must necessarily devolve upon some other officer, or some person appointed by the court as an elisor. When the sheriff is a party to the action, process or orders therein must be served and executed by the coroner, or, in certain cases, by a citizen of the United States over the age of 18 years, as provided by the Civil Code. Pol. Code, § 4172, tit. 2, pt. 4, as enacted in 1907; St. 1907, p. 403, c. 6. If both sheriff and coroner are disqualified, or for any cause both are unable to act, the court must appoint an elisor. Section 4173, same citation. By the provisions of this last section, construed with section 226 of the Code of Civil Procedure, the power of the court to appoint an elisor to execute an order for summoning a jury is limited to those cases wherein the disqualification extends to both sheriff and coroner. *People v. Fellows*, 122 Cal. 233, 54 Pac. 830. There is no express provision of the Code whereby the duties of the sheriff in cases wherein he is disqualified are cast upon the coroner, except where the sheriff is a party to the action or proceeding. Some one, however, must perform such duty. Conceding an absence of any statutory provision designating who shall act in place of the sheriff in such cases, we must look to the common law of England for a rule of decision under which to determine the question. Pol. Code, § 4468; *Sesler v. Montgomery*, 78 Cal. 486, 21 Pac. 185, 3 L. R. A. 653, 12 Am. St. Rep. 76. According to the common law, the venire in case the sheriff was disqualified was directed to the coroner, who was regarded as a substitute for the sheriff. 3 Blackstone's Comm. 354; *May v. Walters*, 2 McCord (S. C.) 470. Though the point was not at issue in the case of *People v. Fellows*, supra, the court, in holding that the power to appoint an elisor exists only in cases where both sheriff and coroner are disqualified, said: "When the sheriff is disqualified, the

duty in the first instance is always cast upon the coroner."

It has been held in this state that where the court errs in disallowing a challenge to a juror for cause, and such obnoxious juror is by defendant excused under a peremptory challenge, the jury being completed without defendant using all of his peremptory challenges, such error will not be reviewed on appeal because of the fact that the rights of the accused are not prejudiced thereby. *People v. Durrant*, 116 Cal. 195, 48 Pac. 75. It is unnecessary to decide whether this principle is applicable to cases where, under the provisions of section 1064 of the Penal Code, the challenge is made to the entire panel, and erroneously denied. Assuming, but not holding, that it does apply, it is not applicable to the case at bar, for the reason that it appears defendant in selecting the jury from the three special panels to each of which he had interposed his challenge exhausted all of his peremptory challenges to the individual jurors of such disqualified panels. It cannot therefore be said that he failed to avail himself of all other means afforded by law for securing a dismissal of the jurors constituting these special panels, each of which should have been, by the court, discharged under his challenge thereto.

When the court found the sheriff disqualified, it should then have made an order directing the coroner, unless also disqualified, to summon the jury to try the case. Failing to do so constituted error for which the judgment and order appealed from must be reversed.

We deem it unnecessary to consider other points discussed by counsel.

The judgment and order are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 549

DADMUN v. CITY OF SAN DIEGO et al.
(Civ. 557.)

(Court of Appeal, Second District, California.
Dec. 21, 1908.)

1. MANDAMUS (§ 154*)—PROCEEDINGS—PETITION.

An allegation, in the petition for mandamus to a city to compel the auditing committee of the city to allow, and order paid, a certain claim of plaintiff for services as a special prosecutor, that "he performed each and every act required of him" cannot be construed as alleging that any particular act was required or performed.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 300; Dec. Dig. § 154.*]

2. MUNICIPAL CORPORATIONS (§ 131*)—CREATION OF OFFICE — SPECIAL PROSECUTOR — "LITIGATION OF THE CITY."

San Diego City Charter, c. 5, art. 3, § 2, provides "that the common council shall have control of all litigation of the city, and may employ other attorneys to take charge of any such litigation, or assist the city attorney therein." Held, that the term "litigation of the city" applies to actions of a civil nature only, and that

the council has no power to appoint a special prosecutor to prosecute criminal violations of ordinances, so that no liability results from such an appointment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 305; Dec. Dig. § 131.*]

3. MANDAMUS (§ 154*)—PROCEEDINGS—PETITION.

San Diego City Charter, art. 6, c. 2, § 1, creates an auditing committee, whose duty it is to allow or reject all claims against the city, except monthly salaries of city officers, and provides that the auditor shall not draw a warrant for any bill until approved by a majority of the auditing committee. Section 2 forbids the allowance of any demand unless any debt of the claimant to the city is first deducted. *Held*, in mandamus to compel the auditing committee to allow and order paid a certain claim of plaintiff, that a petition which did not allege that petitioner was not indebted to the city was insufficient when tested by demurrer, for the board may be compelled to act by mandamus only, where no facts are to be determined by the board, and there is only a question of legal liability under agreed facts.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 154.*]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

L. E. Dadmun asked that a writ of mandamus issue to the City of San Diego and others. A demurrer to the petition was sustained, and petitioner appeals. Affirmed.

L. E. Dadmun, in pro. per. George Puterbaugh, City Atty., and J. W. Puterbaugh, Deputy City Atty., for respondents.

ALLEN, P. J. Appeal by plaintiff from a judgment rendered by the superior court of San Diego county upon an order sustaining a demurrer to a petition for a writ of mandate. The petitioner applied to the superior court for a writ of mandate requiring the auditing committee of the city of San Diego to allow and order paid a certain claim of plaintiff. In his petition plaintiff sets forth an ordinance, duly passed by the city council of the city of San Diego, creating the office of special prosecutor, fixing the salary and reposing the appointment thereof in the common council, and the appointment of petitioner by such city council. It is averred in said petition that under such ordinance the city employed petitioner to perform certain services at such salary; that he accepted the employment, performed the services, and as a consequence there became due and owing to him the amount of such salary, which remains unpaid; that he presented for allowance his claim, duly verified, to the auditing committee of the city council, and that it disallowed and denied the same.

It is conceded by all parties that petitioner was not an officer of the city of San Diego, either duly appointed or qualified. Petitioner's contention, however, is that, the demurrer admitting the request for, and the performance of, the services at a fixed price, a contract of employment resulted, under which

his demand in a fixed sum became payable. There is nothing in the petition from which it appears that any specified services were performed other than those connected with criminal prosecutions. "That he performed each and every act required of him" cannot be accepted as an allegation that any particular act was required or performed. The charter makes it the duty of the city attorney to prosecute, on behalf of the people, all criminal cases arising upon violations of city ordinances. "If the city attorney is to prosecute all cases of this character, none can remain which are to be conducted by the prosecuting attorneys." *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620. In other words, under the charter of the city of San Diego the city council cannot relieve a charter officer of the city from the duties devolving upon him by the charter, and designate another to perform such duties. The proviso in section 2, c. 5, art. 3, of the city charter does not undertake to confer this power upon the city council. It only provides "that the common council shall have control of all litigation of the city, and may employ other attorneys to take charge of any such litigation, or to assist the city attorney therein"; and under section 40, c. 2, art. 2, a limitation is imposed as to the extent of expenditure which the council, under the proviso, may make in any fiscal year. We think that the term "litigation of the city" was intended only to apply to actions of a civil nature in which the city is interested, and not the mere prosecution for criminal violations of city ordinances. It follows, then, that the action of the city council in appointing a special prosecutor, whose duty it should be to prosecute criminal violations of ordinances, was unauthorized and void, either as an attempt to create an office, or a liability by employment. In addition, it may be said that under any view which may be taken of the power of the city council to employ petitioner for any kind or character of service, the complaint is insufficient in an important particular.

The charter of the city of San Diego (article 6, c. 2, § 1) provides:

"There is hereby created an auditing committee. * * * It shall be the duty of this committee to examine, allow and order paid, or reject and disallow, all claims, demands, and bills of whatever nature (except monthly salaries of city officers, as fixed by this charter), which may be presented against the city, and the auditor shall not draw a warrant for any bill unless the same has been approved by a majority of the whole auditing committee.

"Sec. 2. All demands, bills, and claims which may arise against the city * * * (except salaries of city officers fixed by this charter), shall be duly verified * * * and filed with the secretary of the auditing committee. * * * No demand upon the treas-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ury shall be allowed by the auditing committee in favor of any officer or other person, or any of their assigns, who is in any manner indebted to the city, without first deducting therefrom the amount of such indebtedness."

It will be observed that one of the questions of fact to be heard and determined by the auditing committee, whenever a claim is presented to it other than one for the salary of a charter officer, is as to the condition of account between the city and the claimant; that if any indebtedness of any kind exists in favor of the city and against the claimant, the amount thereof should be deducted before the auditing committee may allow the claim. "Whether the claim is a proper town or county charge, in a case where it is doubtful and rests upon disputed evidence, * * * the statute commits to the determination of the board of audit; and, however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction, and acts in good faith, its audit cannot be overhauled, but is final, as well to the taxpayers as to the claimant." *Sullivan v. Gage*, 145 Cal. 766, 79 Pac. 537. This is not the rule where it is made to appear that no facts are to be determined by the board, but such board is simply called upon to determine a question of legal liability under agreed facts, in which cases, if the board of audit denies a plain, legal right, mandamus may be resorted to. *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, 9 Am. St. Rep. 249; *Valle v. Shaffer*, 1 Cal. App. 183, 81 Pac. 1028. Petitioner in the case under consideration does not allege in his petition that he was not indebted to the city, which, if alleged and admitted by the demurrer, would have removed from consideration any question of fact, and would have brought his claim under the rule of *Wood v. Strother*, supra. The auditing board having rejected the claim, no duty devolved upon the auditor in respect thereto.

We see no error in the ruling of the superior court, and its judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 574

KINGSBURY v. NYE, State Controller.
(Civ. 573.)

(Court of Appeal, Third District, California.
Dec. 24, 1908.)

1. MANDAMUS (§ 163*) — PETITION — ADMISSIONS BY DEMURRER.

A general demurrer to the petition for a writ of mandate admits the truth of the averments therein.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 341-343; Dec. Dig. § 163.*]

2. CONSTITUTIONAL LAW (§ 9*)—AMENDMENTS—CERTIFICATE OF SECRETARY OF STATE—CONCLUSIVENESS.

The certificate of the Secretary of State showing that a majority vote was cast in favor of a proposed constitutional amendment is in a

collateral proceeding conclusive that the amendment was ratified.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 7; Dec. Dig. § 9.*]

3. CONSTITUTIONAL LAW (§ 22*) — AMENDMENTS.

An amendment to the Constitution goes into effect on its adoption and ratification, and it must be given effect thereafter unless some restriction has been put on its operation, either by the terms of the amendment or by implication derived therefrom.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 18; Dec. Dig. § 22.*]

4. CONSTITUTIONAL LAW (§ 26*)—LEGISLATIVE POWER—CONSTITUTIONAL LIMITATION.

The power of the Legislature is within its sphere unlimited except as restricted by the Constitution, and a restriction of legislative power is directed to the Legislature, and not to the people.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 30; Dec. Dig. § 26.*]

5. CONSTITUTIONAL LAW (§ 13*)—CONSTRUCTION.

The object of construction as applied to the Constitution is to give effect to the intent of the people in adopting it, gathered from the instrument itself; it being presumed that language has been employed with sufficient precision to convey such intent.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 9, 10; Dec. Dig. § 13.*]

6. CONSTITUTIONAL LAW (§ 22*) — AMENDMENTS—TIME OF TAKING EFFECT.

Const. 1879, art. 5, § 19, provides that enumerated state officers shall receive compensation which shall not be increased or diminished during their term of office, fixes the salaries, and provides that the Legislature, after the expiration of the two terms after the adoption, may diminish the compensation, but shall not increase the same. The amendment, ratified in 1908, provides that the enumerated state officers shall receive a compensation which shall not be increased or diminished during their term of office, fixes the salaries of such officers, and provides that the Legislature may diminish their compensation, but shall not increase the same above the sums fixed. *Held*, that the amendment became operative from the date of its ratification, and a state officer elected in 1906 for a term of four years was, after the ratification of the amendment, entitled to the salary therein fixed.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 18; Dec. Dig. § 22.*]

Petition for writ of mandate by W. S. Kingsbury against A. B. Nye, Controller of the state of California, to compel respondent to issue to petitioner a warrant on the Treasurer of the state. Writ issued.

White, Miller & McLaughlin, for petitioner. R. T. McKissick, for respondent.

CHIPMAN, P. J. Mandate. The petition shows that at the general election held in this state on November 3, 1906, petitioner was duly elected to the office of Surveyor General for the term of four years from and after the first Monday in January, 1907; that he duly qualified and thereupon became such officer, entered upon the discharge of his duties as such, ever since has been and now is the duly elected and qualified Surveyor

General, and now is entitled to receive the salary and emoluments of the said office; that at the regular session of the Legislature, commencing January 7, 1907, an amendment to section 19 of article 5 of the Constitution of this state was proposed by the Senate, and on March 14, 1907 (St. 1907, p. 1364), a resolution entitled "Chapter thirty-seven, Senate Constitutional Amendment number fourteen, a resolution to propose to the people of the State of California, an amendment to the Constitution * * * amending section nineteen of article five of said Constitution, relating to the compensation of state officers," was duly passed by both houses, which said proposed amendment was in words and figures following:

"Sec. 19. The Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney General, and Surveyor General shall at stated times during their continuance in office, receive for their services, a compensation which shall not be increased or diminished during the term for which they shall have been elected, which compensation is hereby fixed for the following officers, as follows: Governor, ten thousand dollars per annum, Lieutenant Governor, four thousand dollars, the Secretary of State, Controller, Treasurer, and Surveyor General, five thousand dollars each per annum, and the Attorney General, six thousand dollars per annum, such compensation to be in full for all services by them respectively rendered in any official capacity or employment whatsoever, during their respective terms of office; provided, however, that the Legislature may, by law, diminish the compensation of any or all of such officers, but in no case shall have the power to increase the same above the sums hereby fixed by this Constitution. No salary shall be authorized by law for clerical services in any office provided for in this article, exceeding eighteen hundred dollars per annum for each clerk, employed. The Legislature may, in its discretion, abolish the office of Surveyor General; and none of the officers hereinbefore named shall receive for their own use any fees or perquisites for the performance of any official duty."

The petition then sets forth the various steps taken in certifying said proposed amendment by the Secretary of State, the publication thereof and the necessary legal proceedings by which the said proposed amendment was submitted to a vote of the electors of the state on the 3d day of November, 1908, and shows that the said proposed amendment received 92,558 votes in favor thereof and 92,556 votes against the same; also states with much detail the subsequent proceedings by which, under the provisions of law, the vote was duly canvassed and return of the result made by the Secretary of State, and by him duly certified and transmitted to the Governor of the state, which said certificate was duly filed in the office of the Governor and Secretary of State

on December 12, 1908, and that "said certificate showed upon the face of the comparison an estimate of the votes cast in said state of California, at said general election on November 3, 1908, that 92,558 votes had been cast in the state of California, at said election for the approval and ratification of said proposed constitutional amendment No. 14, and that 92,556 votes had been cast * * * against the approval and ratification of such proposed constitutional amendment No. 14." It is then set forth that by virtue of said amendment petitioner became entitled to receive as salary the sum of \$416.66 per month from and after the said 3d day of November, 1908; that on December 14, 1908, petitioner demanded of respondent that he draw his warrant on the State Treasurer in favor of petitioner for the sum of \$149.99, being the unpaid balance due petitioner for the month of November, 1908, calculated at the rate of \$416.66 per month, but was refused by the said respondent. The prayer is for a writ of mandate directed to respondent as Controller of the State, commanding him to forthwith issue to petitioner a warrant on said Treasurer for said sum of \$149.99. Respondent interposed a general demurrer to the petition which admits the truth of the averments in the petition and raises the sole question, namely: Does the amendment of the Constitution, as adopted November 3, 1908, operate to increase the salary of the present incumbent of the office held by petitioner, or is its operation to commence at the expiration of the present term of that office? The certificate of the Secretary of State is conclusive of the fact that the amendment was duly ratified. *County of Yolo v. Colgan*, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41.

In support of the demurrer, respondent relies upon certain rules of construction which are not controverted. The contention of petitioner is that they do not lead to the conclusion claimed for them. The principal points upon which respondent rests his contention may be thus summarized: That section 19, art. 5, Const., since its adoption in 1879, contained precisely the same prohibition against increasing or diminishing salaries as that which is found in the amendment, and that under established rules of construction the prohibitory clause referred to is not to be regarded as having been repealed and re-enacted in the present form, "but the portions which were not altered are to be considered as having been the law from the time they were originally enacted and the new provisions are to be considered as enacted at the time of the amendment"—citing *Pol. Code*, § 325, and numerous cases illustrative of the rule. That this prohibitory clause has frequently been before the Supreme Court in cases where the Legislature has directly or indirectly attempted to increase the salaries of officers then in office, and in every case the court has held such attempt to be invalid

—citing many cases which so hold. That, while these cases are examples of legislative action, the principle applies to the amendment in question as the contention of petitioner if approved would lead to the violation of the previous policy of the people, which should not be allowed in the absence of proper language indicating such intention. "This," it is claimed, "is precisely the course which was adopted in connection with the amendment to section 17, art. 6, in relation to the compensation of justices of the Supreme Court and the District Courts of Appeal." It is further contended that the amendment must be given a prospective operation, and that to give it effect as urged by petitioner would make it necessarily retroactive "to the extent of increasing the salaries of the present incumbents for something more than one-half of their respective terms in express contravention to the provisions of the section as it stood before the ratification of the amendment and as it stood immediately subsequent thereto," and thus "the people are put in the inconsistent attitude of doing that which, by their fundamental law, they expressly prohibited and at the same instant continue the prohibition in force." Resulting from these views, it is contended that "the amendment must be deemed to have a prospective operation and to apply to the offices enumerated, upon the expiration of the terms of the present incumbents, and not before."

Reference to the section of the Constitution for which the amendment in question is substituted will show that the provisions are the same in both except as to the amount of the salaries fixed for the various officers, and except that the former section restricted its operation "for the two terms next ensuing the adoption of this Constitution"—a provision whose force has departed by limitation of time. The amendment, therefore, must be held to absolutely repeal the old and substitute in its stead the new provision. It is beyond dispute that the amendment went into effect upon its adoption and ratification. Speaking of the amendment to fix the salaries of justices of the Supreme Court and of the District Courts of Appeal, then about to be submitted (St. 1905, p. 1069, c. 37), the Supreme Court said in *Harrison v. Colgan*, 148 Cal. 69, 72, 82 Pac. 674, 675: "The salary of each justice is, and without such amendment will continue to be during his present term, \$6,000 a year. The amendment, if adopted, will change it for the time elapsing after its adoption, but not before." The old provision ceases to have effect from the time the substituted provision commences to operate (In re Oliver, 21 Cal. 415), and operates prospectively (Cooley's Const. Lim. p. 97 [7th Ed.]). Mr. Cooley says: "Where a Constitution is revised or amended, the new provisions come into operation at the same moment that those that they take the place of cease to be of force; and, if the new instru-

ment re-enacts in the same words provisions which it supersedes, it is a reasonable presumption that the purpose was not to change the law in these particulars, but to continue it in uninterrupted operation." "This," he says, "is the rule in the case of statutes, and it sometimes becomes important, where rights had accrued before the revision or amendment took place. Its application to the case of an amended or revised Constitution would seem to be unquestionable." Cooley's Const. Lim. p. 96. Conceding, as is claimed by respondent, that the provisions of section 19, art. 5, must be regarded "as the law all along," it ceased to be the law upon the adoption of the amendment. The utmost that can be claimed is that the clause "shall receive for their services a compensation which shall not be increased or diminished during the term for which they shall have been elected" is to be given the same construction as should have been given the same clause in the old law had the question arisen under it. But the former provision was by express words made applicable "for the two terms next ensuing the adoption of this Constitution," so that there was left no room for construction as to when the provision took effect in anywise different from that which must be given to the amendment.

Let us consider for a moment, if we may, the probable reason or policy underlying the restriction as to increasing salaries of incumbents and what was probably in the minds of those proposing the restriction or voting for it. Was the principal reason, or was it a reason at all, that it was unwise or impolitic to so increase compensation under any circumstances to incumbents, or was it not rather because it was thought unwise to leave the discretion with the Legislature? The recent amendment increasing the salaries of the justices of the Supreme Court and making the increase applicable to the then incumbents is sufficient evidence that the people do not regard the increase to officers during their term as unwise. Many considerations might, however, be suggested why it would be unwise to intrust this discretion to the Legislature in respect of the officers created by the Constitution, and why the people reserve to themselves that power. In the instances now before us, involving the salaries of the most important officers connected with the executive department, no reason can be suggested, growing out of the character of the office or the duties to be performed, why the increase should not take immediate effect. Indeed, every reason for increasing the salaries at all applies with full force to the incumbents.

The policy has been, we think, not that salaries may not be increased during the term of the incumbent, but that the Legislature shall not exercise the power. When section 17, art. 6, relating to the salaries of judicial officers, was in 1905, proposed and later

adopted (St. 1905, p. 1069, c. 37), that section of the Constitution provided that the compensation there fixed for the officers named "shall not be increased or diminished during the term for which they shall have been elected." The amendment provided also that "the salaries of the judges of the superior court, in all counties having but one judge, and in all counties in which the terms of the judges of the superior court expire at the same time, shall not hereafter be increased or diminished after their election, nor during the term for which they shall have been elected. Upon the adoption of this amendment the salaries then established by law shall be paid uniformly to the justices and judges then in office." As to the justices of the Supreme Court and District Courts of Appeal, their salaries were definitely fixed at stated amounts to take effect on and after January 1, 1907. Notwithstanding the inhibition of section 17, art. 5, Const., the justices then in office, whose terms expired on the first Monday after the 1st day of January, 1907, were paid the additional compensation to January 7th. In the proposed amendment the Legislature stated in a whereas, as among the reasons for proposing the amendment, that it was "impracticable to change the salaries of the justices and judges of the same court, where the terms expire at different times, under the present restriction that such salary shall not be increased or diminished during the term for which they were elected." Why was it impracticable? Not because the power did not rest in the people to do the very thing desired, but because the Legislature could not do it. That the people, by the amendment in question to their Constitution, had plenary power over the whole subject, cannot for a moment, be doubted. The people had taken from the Legislature the power to increase or diminish the salaries during the term of the office, but they never surrendered the power that resided in themselves, nor could the people who adopted the Constitution of 1879 limit the power of the people afterwards to alter or amend that Constitution. The court said in *Harrison v. Colgan*, supra: "Such salary could, of course, be changed at any time by means of a constitutional amendment." The amendment under review having gone into operation from the date of its adoption, it must be given effect thenceforward unless we can say that some restriction has been put upon its operation, either by the terms of the amendment or by implication derived from the terms so used. We can find nothing in any of the terms and nothing is claimed to be found therein except the provision as to the increase or diminution of the compensation, which we hold was addressed to the Legislature alone. Had such intention dwelt in the minds of the proponents of the amendment, it would have been easy and simple to restrict its effect, and withhold its benefits from present incumbents.

Under our system of government the power residing in the people is, for convenience of exercise, confided to three co-ordinate departments. With only one of these—the legislative—are we concerned. Within its sphere of action it is omnipotent, save only as its power is restricted by the Constitution. This body of organic law, called the Constitution, is framed for the guidance of the various persons or bodies by it designated to carry out the details of the government established by the Constitution; and its provisions are intended to either compel or prohibit the performance of enumerated acts by the agents of the people who, for the time being, are chosen to administer the functions of government. When, therefore, we find a limitation or restriction of legislative power, it is directed to the Legislature, and not to the people, the source of all power. The restrictive provision in question is to be interpreted as though it read: "The Legislature shall not increase or diminish the compensation of the officers named during the term of their office." And it will be observed that, subject to this limitation, the section provides that the Legislature may decrease the compensation, showing, we think, that the proponents of the amendment were addressing themselves to the Legislature alone. Section 19, article 5, as it stood in the Constitution of 1879, provided, as we have seen, that the salaries therein mentioned should not be interfered with for two terms of the officers referred to therein. Can it be doubted that the people might have withdrawn that provision by amendment of the Constitution and committed the entire subject of compensation to the Legislature? If there was no restriction placed upon the Legislature, no one would question its power to increase or diminish the compensation of officers created by the Constitution during their term of office. This results from the power residing in the Legislature as the depository of the power of the people, and it seems to us further shows that the section under examination is addressed alone to the Legislature. "The object of construction," says Judge Cooley, "as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and, unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it." Cooley's Const. Lim. p. 89. A slight transposition of the language used in the amendment will assist in disclosing what indeed seems clear enough without such aid. We may read the amendment thus: The Governor and other officers named shall receive for their services at stated times during their continuance in office a

compensation as follows—stating the several salaries—"which shall not be increased or diminished during the term for which they shall have been elected" by the Legislature, provided, however, that the Legislature may diminish the compensation to take effect after the term shall have expired for which any such officer has been elected. The increase thus given could, under the construction contended for by respondent, be entirely nullified should the Legislature at the coming session place the salaries back where they stood before. In such case neither the incumbents nor their successors could receive the increased compensation to which the people have said they were entitled. It is reasonable to presume that the people in voting the increase had in mind the present duties and responsibilities of these officers and intended to make suitable provision for their adequate compensation. It is not reasonable to suppose that the people intended to fix the compensation and at the same time intended to so fix it that it should not go into operation until after the Legislature had been given an opportunity to reduce it to the former amount. Rather it would seem reasonable to presume that the intention was to give immediate operation to the amendment, leaving it with the Legislature, after time had been given to test by experience the wisdom of the increase, the power to diminish the compensation.

The point made that the rule requiring that the amendment be given a prospective effect necessarily postpones its operation until after the present terms expire and that any other view would be to give a retroactive effect to the amendment we think cannot be sustained. The amendment, as we apply it, is in no sense given a retroactive operation. It is simply given force from and after its ratification, and it operates prospectively thenceforward. If, as we have held, the amendment took effect upon its ratification, and operated, as respondent admits, prospectively, we know of no authority for holding that its operation must be postponed until the terms of the incumbents have expired.

It is ordered that a peremptory writ issue as prayed for. It is further ordered that, pursuant to stipulation of the parties made in open court, remittitur issue forthwith.

I concur: HART, J.

BURNETT, J. I concur in the judgment and generally in the opinion of the presiding justice.

It seems to me there is no escape from the conclusion that the "compensation" which, it is provided, "shall not be increased or diminished during the term for which they shall have been elected," is the "compensation"

fixed by the amendment. Grammatically the amendment is substantially the same as though it provided: "The Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney General and Surveyor General shall at stated times during their continuance in office receive for their services the following compensation: Governor, ten thousand dollars per annum; Lieutenant Governor, four thousand dollars; the Secretary of State, Controller, Treasurer and Surveyor General, five thousand dollars per annum; and the Attorney General six thousand dollars per annum, which compensation shall not be increased or diminished during the term for which they shall have been elected." There is nothing whatever in the language used to indicate the intention of the people that the amendment should not take immediate effect; but, *ex industria*, they have specified that this increased compensation shall not be changed so as to affect the incumbents of these various offices. This restriction, of course, cannot limit the power of the people themselves to change at any time the compensation, though it may have been thought otherwise by those proposing the amendment and by those adopting it. The application we have made of the expression "which shall not be increased or diminished during the term for which they shall have been elected" renders the amendment tautological, at least as far as "increased" is concerned, because it is subsequently provided that the Legislature "in no case shall have the power to increase the compensation above the sum fixed by the Constitution." But this is not a sufficient reason for giving the amendment a construction which is directly opposed to the ordinary and perspicuous signification of the terms employed.

As the only question before us is as to the time when the amendment takes effect, and as there is nothing to indicate an intention on the part of the people to make inapplicable the general rule, I think the conclusion is inevitable that the writ should issue.

9 Cal. App. 584

SCHACK v. SUPREME LODGE OF THE
FRATERNAL BROTHERHOOD.
(Civ. 417.)

(Court of Appeal, First District, California.
Dec. 28, 1908. Rehearing Denied by
Supreme Court Feb. 25, 1909.)

1. INSURANCE (§ 719*)—FRATERNAL INSURANCE—CHANGE OF BY-LAWS—EFFECT.

A fraternal association issuing a certificate of membership in accordance with the constitution and laws in force, or that may thereafter be made by the Supreme Lodge of the order, may not, by a subsequent change in its by-laws, impair the contract rights of the member without his consent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

2. INSURANCE (§ 817*) — FRATERNAL INSURANCE—"SUICIDE."

A beneficiary, suing on a fraternal benefit certificate stipulating that the member committing suicide shall forfeit all benefits which his beneficiary would otherwise have, and providing that on it being established that the member was a lunatic, and recognized as such, and the secretary of the order notified thereof, his suicide shall not operate as a forfeiture of the benefits, and that the burden of proof shall be on the beneficiary, must, on showing that the member committed suicide, prove that he was at the time a lunatic, and prior thereto recognized as such; the word "suicide" including an act committed by any one, whether sane or insane, though ordinarily the word when used in a contract of insurance does not include a case of suicide by an insane person.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1999; Dec. Dig. § 817.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6764-6769; vol. 8, p. 7899.]

3. INSURANCE (§ 719*) — FRATERNAL INSURANCE—BY-LAWS—AMENDMENTS—EFFECT.

Where a fraternal benefit certificate made the constitution and by-laws of the order in force at the time of its issuance a part of the contract, and the order subsequently amended the by-laws, the amendment operated only prospectively, and did not affect the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

4. INSURANCE (§ 815*) — FRATERNAL INSURANCE—ISSUES.

Where, in an action on a fraternal benefit certificate, the complaint set forth the certificate, which in terms referred to the constitution and laws of the order then in force, and made them a part of the contract, and alleged a compliance with the conditions of the contract, and the order alleged in its answer that the member had committed suicide, and that plaintiff's right to recover was subject to the suicide clause of the constitution and laws, the order might rely on the failure of plaintiff to prove a compliance with the by-laws in force at the time of the issuance of the certificate, notwithstanding a subsequent change therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1998; Dec. Dig. § 815.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Harry M. Schack against the Supreme Lodge of the Fraternal Brotherhood. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Charles G. Nagle, for appellant. Bert Schlesinger and E. N. Chappelle, for respondent.

HALL, J. Plaintiff, as the beneficiary, brought this action against defendant, as the insurer, upon an insurance policy upon the life of Jans A. Schack, father of plaintiff and member of the Fraternal Brotherhood. At the close of plaintiff's case the court granted a nonsuit upon the motion of the defendant, and this is an appeal from the judgment of nonsuit entered accordingly.

The policy of insurance is in the form of a certificate of membership in the Fraternal Brotherhood, as well as a contract of insurance. It is set forth in the complaint, and by its terms appears to have been issued in

accordance with "the provisions of the constitution and laws of the order now in force, or that may hereafter be made by the Supreme Lodge of the Fraternal Brotherhood which are hereby referred to and made a part of this contract." The policy was dated and issued October 2, 1900. The complaint does not set forth the provisions of the constitution and laws of the order relating to insurance.

At the trial, however, plaintiff proved that the constitution and by-laws of the order, at the date of the contract sued on, contained, in section 258 thereof, the following provisions:

"258. (a) Any member of the order who commits suicide shall ipso facto forfeit all benefits of whatsoever kind which his beneficiary or beneficiaries or personal representative or personal representatives would otherwise have been entitled to receive, under the constitution and laws, from the Supreme Lodge or from the Subordinate Lodge of which the deceased was last a member.

"(b) If, however, it is established to the satisfaction of the executive council or the Supreme Lodge that the deceased was a lunatic or person of unsound mind, and that prior to the act he was known and recognized as such, and the supreme secretary duly notified thereof, and provided further that the act of suicide alone shall not constitute sufficient grounds for declaring that such person was a lunatic, or person of unsound mind, and entitled to the benefits of the order, and that such insanity was not due to nor caused by the intemperate, immoral, evil habits or misconduct of the deceased, then in such case the benefit shall not be forfeited, as provided in this section.

"(c) The burden of proof of the fact set forth in subsection (b) above shall be upon the beneficiary or beneficiaries, or personal representative or representatives of the deceased. * * *

That subsequently in March, 1902, said section 258 was amended so as to read as follows: "Any member of the order who commits suicide, whether sane or insane, within five years of the date of becoming a beneficiary member of the order, shall ipso facto forfeit all benefits of whatsoever kind which his beneficiary or beneficiaries or personal representative or representatives would otherwise have been entitled to receive, under the constitution and laws, from the Supreme Lodge or from the Subordinate Lodge of which the deceased was last a member." It was admitted that Jans A. Schack never personally consented to the change in the by-laws above set forth, and that he died December 4, 1903, by committing suicide while insane.

The motion for nonsuit was made, both under the provisions of section 258 of the

amended constitution and laws of the order, and the provisions of the same section as it existed at the date of the issuing of the policy or certificate. The motion was granted in general terms, without specifying which section the court regarded as controlling the decision. It must be held that the amended by-law did not affect the contractual rights of the insured or his beneficiary. Beneficial associations may not, by a subsequent change in their by-laws, impair the contractual rights of their members without their consent. *Bornstein v. District Grand Lodge, etc.*, 2 Cal. App. 624, 84 Pac. 271. But it is clear that the motion was properly granted because of the provisions of said section 258 as it stood at the time of the issuing of the policy or certificate sued on. Ordinarily the word "suicide" when used in a contract of life insurance does not include a case of self-destruction by an insane person, at least where the mind of the person is so far diseased as to be incapable of understanding the nature and effect of the act committed. 19 Am. & Eng. Ency. of Law, 75, and cases there cited. But the language of the contract or policy may be such as to indicate that the word was used in the broader sense of any case of intentional self-destruction. The words "sane or insane," following the word "suicide," are most frequently used for this purpose, but other words or provisions may just as clearly show that the word was used in its broader sense. In the case at bar the provisions of subdivision "b" of section 258 of the constitution and laws as said section stood when the policy in suit was issued clearly show that by the words "who commits suicide" it was intended to include any one who commits suicide, whether sane or insane, for otherwise it was quite unnecessary to except the case of insane coming within the provisions of subdivision "b." The by-law in question first lays down in subdivision "a" a general rule that includes all cases of suicide, using the word in its large and perhaps usual sense, and then in subdivision "b" excepts from the operation of the general rule laid down in subdivision "a" cases of suicide by such insane as are brought within the provisions of subdivision "b." By the terms of the policy it was issued subject to the provisions of the constitution and laws of the order "now in force," which were in express terms made a part of the contract. The provisions of section 258 as it then stood were as completely made a part of the contract as though such provisions had been written into the body of the policy or benefit certificate issued to the insured. The subsequent amendment of the section did not strike from the contract any provision thereof. The amendment was prospective in its operation only, and did not affect existing contracts. When the plaintiff showed that

the deceased had committed suicide, he brought the case within a general peril not insured against, to wit, death by suicide. By the very terms of the contract (subdivision "c") the burden of proof was then upon the plaintiff to bring the case within the exception provided for in subdivision "b." This he made no attempt to do. The facts proved and admitted clearly show that, under the policy issued to deceased, plaintiff was not entitled to recover.

Appellant, however, urges that defendant is precluded from relying on the provisions of section 258 as it stood when the policy was issued, because in its answer it specially pleaded the section as it was subsequently amended, and did not specially plead the section as it originally stood. In answer to this it is sufficient to say that plaintiff's complaint set forth the policy, which in terms referred to the constitution and laws then in force, and made them a part of the contract, and alleged a compliance with the conditions of the contract. Defendant in its answer alleged that the insured had committed suicide, and alleged generally that plaintiff's right to recover was subject to the suicide clause of the constitution and laws of defendant, and denied that either Jans A. Schack or plaintiff had performed all the conditions of said policy of insurance on their part. The suicide clause, as it existed in October, 1900, was a part of the contract sued on, and if plaintiff had correctly set it forth, the contract should have been pleaded by him. This he did not do, except by the general reference thereto in the body of the policy, but he did, however, put it in evidence, and then failed to prove that he or the insured had complied with the conditions thereof. Under these circumstances we think it cannot be said that the defendant was precluded from relying upon plaintiff's failure to prove a compliance with the conditions of the contract as proved by himself. There is no dispute about the facts, and the case could not be varied on a new trial. *Foster v. Carr*, 135 Cal. 83, 67 Pac. 43.

We have not been aided by any brief from respondent in this case. The brief originally filed by respondent was destroyed in the conflagration of April, 1906, and though counsel were, by directions of this court, notified after the submission of this cause in October last that respondent had no brief on file, they have up to this date neither supplied the court with a copy of their original brief, nor taken any steps to have the submission set aside to the end that they might prepare and file a new brief.

The judgment should be affirmed, and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

LILLIS v. URRUTIA et al. (Civ. 499.)

(Court of Appeal, Third District, California.)

Dec. 21, 1908. Rehearing Denied by

Supreme Court Feb. 18, 1909.)

1. BOUNDARIES (§ 3*)—IMPORTANCE OF CONFLICTING ELEMENTS — MONUMENTS AND COURSES AND DISTANCES.

Under Code Civ. Proc. § 2077, providing that "when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount," established monuments must prevail over courses and distances when there is any conflict, but if the line of a survey is conclusively delineated, the monuments called for may be disregarded.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 18, 28; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 10*)—FIELD NOTES—"TRUE LINE."

The term "a true line," used in a surveyor's field notes in describing the line between two sections, means a straight line.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 10.*]

3. BOUNDARIES (§ 3*)—IMPORTANCE OF CONFLICTING ELEMENTS — PLAT AND FIELD NOTES.

Where a plat of a survey is made from field notes, if there be any inconsistency between the notes and the plat as to the location of a section line, the notes must prevail.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 37; Dec. Dig. § 3.*]

4. BOUNDARIES (§ 3*)—IMPORTANCE OF CONFLICTING ELEMENTS.

In the determination of a boundary line, a monument can be of no avail unless identified, and, if destroyed, its position must be accurately located, and if not definitely identified or located, it must give way to a more certain method of locating the line, under Code Civ. Proc. § 2077, providing that "where there are certain, definite and ascertained particulars in the description, the addition of others which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by the first-mentioned particulars."

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 14-19; Dec. Dig. § 3.*]

5. BOUNDARIES (§ 37*)—SUFFICIENCY OF EVIDENCE.

In an action to quiet title, the evidence as to the location of a line separating two sections held to show that the line as established by the United States survey is a straight line.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 37.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by S. C. Lillis against Antonio Urrutia and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank H. Short and F. E. Cook, for appellants. H. H. Welsh and Southerland & Barbour, for respondent.

BURNETT, J. The action is to quiet title to the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 27, in township 18 S., range 13 E., M. D. B. & M. The defendant Antonio Urrutia was in the possession of and working a certain quicksilver mine, known as the "Mexican

Mine," and claimed by him to be in section 22 in said township and range, immediately north of said section 27. It is admitted that plaintiff is the owner of the whole of said section 27, and the only vital point in dispute is as to the location of the boundary line between these two sections, the plaintiff claiming that the portion of the mine upon which Urrutia was working is south of said line, and in said section 27, and Urrutia claims, as we have seen, that it is north of said line, and therefore in section 22. The solution of the controversy depends upon the determination of the question whether said boundary is a straight line, or departs from a straight course between the section corners by reason of certain monuments called for in the surveyor's notes. If the said line be straight, it is conceded that plaintiff must prevail, but it is insisted by appellant "that where, as in this case, the government survey calls for monuments, whatever their character may be, so long as they are substantial objects, this court is not at liberty to reject these more stable and certain evidences of the true boundary, and, because of the difficulty sometimes and generally existing of determining the boundary in accordance with such monuments, to have recourse to the easy, but incorrect, presumption that notwithstanding the call for the location of, and the indication of, such monuments upon the plat, the line was straight from one known corner to another." The particular monuments upon which appellant relies in this connection are a miner's cabin and a certain blazed tree, and importance also is attached to the circumstance that upon the plat the "Mexican Mine" appears delineated in section 22. On the other hand, it is the contention of plaintiff that the evidence as to the cabin and blazed tree is too uncertain to be a safe guide, and that the representation upon the plat must give way to the field notes, which latter reveal clearly that a straight line was run between the corners.

The law seems to be well settled that monuments, when established, must prevail over courses and distances when there is any conflict, as the former are more stable and certain, and are less liable to be mistaken. In *Spreckels v. Ord*, 72 Cal. 83, 13 Pac. 159, it is said: "It was for the jury, or court sitting as a jury, to find as fact where was the head of the arroyo, and where was the blazed tree; and, inasmuch as the tree actually blazed by the parties to the deed, or adopted by them as the point of commencement, was a more certain object than the head of the 'arroyo'—a place somewhat indefinite and perhaps shifting—it was the duty of the court to determine, as matter of law, that such tree (if clearly identified) was the controlling monument." In *Hubbard v. Dusy*, 80 Cal. 283, 22 Pac. 215, the following

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

instruction was upheld: "Monuments left by the United States survey on the ground are the best evidence as to where the land should be, and any monument so established can only be antagonized by evidence of other monuments. As between different monuments, the jury should look to the evidence identifying them, and those monuments best identified should prevail, independent of anything even in the field notes of the original or any subsequent survey." Code Civ. Proc. § 2077, provides that "the following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it. (1) Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first-mentioned particulars. (2) When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount." These rules, obviously, are conventional aids for the determination of the intention of the parties to conveyances, and to assist in locating the ground as actually surveyed. If otherwise that intention is made clear or the survey is conclusively delineated, even monuments called for may be disregarded, for the reason, as the Code has it, that the construction is not doubtful, and there are "other sufficient circumstances to determine it." In *Harrington v. Boehmer*, 134 Cal. 199, 66 Pac. 215, 489, it is said: "Of course, where there is a discrepancy between field notes and a plat, the latter being made from the former, and the former being the better evidence as to where the line was run in the field, the plat must give way to the field notes. The question in all cases similar to this, Where were the lines run in the field by the government surveyor? A government township lies just where the government surveyor lines it out on the face of the earth. These lines are to be determined by the monuments in the field." In *County of Yolo v. Nolan*, 144 Cal. 448, 77 Pac. 1007, the Supreme Court declares: "The field notes should be taken, and from the courses and distances, natural monuments, or objects, and living trees described therein, the surveyor should endeavor to fix the line precisely as it is called for by the field notes. He should endeavor to retrace the steps of the man who made the original survey. If by so doing the line can be located, it must be done, and, when so located, it must control. He is not authorized to correct what the government has done. The line as surveyed and described in the field notes is the description by which the government sells the land."

The field notes here, as far as necessary to quote, are as follows: "East on a random

line between sections 22 and 27, variation 16° east. Descend 14.40 on side of the Fresno Quicksilver Mine, commonly called the 'Mexican Mine.' Miner's cabin 20-40 links south. 36.20 cross deep cañon, course N. E. 40.00 set temporary $\frac{1}{4}$ section corner. 40.50 cross ravine course north and ascend. 51.10 top of ridge bears north and descend. 62.00 cross ravine course north. 78.20 cross trail to corn field. 80.10 intersect north and south line 25 links south of corner to sections 22, 23, 26 and 27 from which corner I run S. 89° 48' W. on a true line bet. secs. 22 and 27, Va. 16° E. 40.50 set post 4 in. dia. 1 ft. in earth 1 ft. above stone mound 4 ft. in dia. at base by 2 ft. in height for $\frac{1}{4}$ sec. cor., 80.10 the cor. to sec. 21, 22, 27 and 28." The field notes show that the government surveyor had already located the two corners mentioned—the northwest corner of section 27 by running north between sections 27 and 28 and the northeast corner of said section 27 by running north between sections 26 and 27. He then runs a random line east from said northwest corner, as we have already shown, calling for the miner's cabin, and strikes the north and south line 25 links south of the northeast corner of said section 27, and then he definitely locates the boundary between said sections 22 and 27 by running a true line S. 89° 48' W. from said northeast corner to the northwest corner of said section 27. A "true line" is undoubtedly a straight line, and there is nothing in the field notes to show that the line as located between said northeast corner and the said northwest corner of section 27, which is the dividing line in controversy, is anything else than a straight line. There is no monument whatever called for, and we would not be tracing the line as described and located by the surveyor if we should inject into the problem the miner's cabin or the blazed tree. The latter is not mentioned at all, and the former is referred to only in running the random or trial line, and can have no controlling influence in the determination of the question what the surveyor meant when he said he ran a true line S. 89° 48' W. from one corner to the other. The random line, it is true, deviates but slightly from the true line, and its eastern terminus was found to be only 25 links south of the northwest corner of said section 27, but it must be apparent from the field notes that it was intended as an experimental effort to verify the location of said corner, or of the eastern boundary of said section 27, and was preliminary to the establishment of the straight line between the corners as the boundary between said sections 22 and 27.

Reference is made by the appellants' learned counsel to the plat as a "daguerreotype" of the situation, and it is argued that since by this picture the mine is shown to be in section 22, it must have been so determined by the survey. But the plat also shows the boundary to be a straight line, and it would be difficult to determine which of these cir-

cumstances is entitled to the greater weight. But this is not a case where reference is made in a deed or patent to a map which is thereby made a part of the conveyance. The plat is made from the field notes, and if there be any inconsistency the notes must prevail.

But if we view the miner's cabin, the so-called monument, as entitled to consideration in the location of the boundary line, contemplating the evidence in the light most favorable to the trial court's determination, we reach the conclusion that the reference in the field notes to "miner's cabin 20-40 links south" is too indefinite and uncertain to be made the basis for a finding. We deem it unnecessary to set out the evidence in this regard, but it is practically agreed by the surveyors that the call "20-40 links south" is meaningless; and, while it appears that at the time of the survey there was a miner's cabin not far away, it has long since disappeared, and its location and identification are a matter of grave doubt and conjecture. In the determination of a boundary line a monument, of course, can be of no avail unless identified, and if destroyed its position must be accurately located. If not identified or located definitely, it must give way to the "certain-definite and ascertained particulars," as provided in said section 2077, Code Civ. Proc. The rule is undoubtedly correct, as stated in *Christenson v. Simmons*, 47 Or. 184, 82 Pac. 807: "It is a rule of law that where there is a conflict or disagreement in the courses and distances on the one hand, and lines and monuments on the other, the latter will control. In other words, calls in the survey for any objects or marked lines and corners prevail over calls for courses and distances. This must be taken with a grain of qualification—that calls of the former character must be clearly and definitely established, and when so established, the rule applies. If, however, the evidence is of a character to lead to the conclusion that the mistake is in the calls for natural or artificial objects, and not in those for courses and distances, the rule is the reverse."

Two surveyors testified as experts. Mr. Scott McKay, the county surveyor of Fresno county, located the boundary as a straight line between the corners. Mr. George L. Hoxie agreed with the county surveyor as to the location of said corners, but attaches more importance to the call for a miner's cabin and endeavors to follow this random line as the true boundary line, although he does say: "I don't say that is the line they call for on their field notes. The line that I had established there is not the line called for in these field notes. The line that I have established is simply a line that I have placed on account of the location of the cabin and other evidences; that is, on account of the call for the descent in the line to that point,

and on account of the blazed tree." However, the witness gives certain reasons for believing that the boundary is not a straight line, but substantially as he located it, which would throw the mine in section 22.

We think, though, the court was justified in agreeing with the county surveyor that the boundary as established by the United States survey is a straight line; and, as that is decisive of the controversy, the order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 527

BOTTLE MIN. & MILL. CO. v. KERN.

(Civ. 561.)

(Court of Appeal, Second District, California.
Dec. 17, 1908.)

1. CORPORATIONS (§ 175*)—ASSESSMENT OF PAID-UP STOCK.

Under Civ. Code, § 331, authorizing corporate directors, after one-fourth of the capital stock has been subscribed, to levy assessments upon the subscribed stock to pay expenses, conduct business, or pay debts, and section 332, limiting an assessment to 10 per cent. of the amount of the capital stock named in the articles of incorporation, and section 333, providing that no assessment shall be levied while any portion of a previous one remains unpaid, an assessment may be levied upon fully paid-up stock, and there is nothing contained in sections 586-590, inclusive, relating especially to mining corporations, to take such a corporation out of the general rule.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 654-656; Dec. Dig. § 175.*]

2. CORPORATIONS (§ 90*)—ASSESSMENTS OF STOCK—WAIVER OF SALE—ACTIONS TO RECOVER.

Under Civ. Code, § 349, providing that on the day specified for declaring stock delinquent for nonpayment of an assessment, or at any time subsequent thereto and before the sale of the delinquent stock, the directors may elect to waive further proceedings for the sale of the stock and to proceed by action to recover the assessment, to sustain an action for an assessment there must have existed at the time of the election to bring it a right to sell the stock for nonpayment of the assessment.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 90.*]

3. CORPORATIONS (§ 90*)—ASSESSMENTS OF STOCK—ACTIONS—COMPLAINT—CONSTRUCTION.

An allegation in an action to recover a delinquent stock assessment that notice of the assessment was mailed forthwith must be construed to refer to the time of the passage of the resolution in pursuance of which the notice was given.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 90.*]

4. CORPORATIONS (§ 89*)—ASSESSMENTS OF STOCK—NOTICE—PUBLICATION AND SERVICE.

As Civ. Code, § 336, providing for service of notice of an assessment of corporate stock, fixes no particular time prior to either the date of delinquency or the date of sale when the notice must be published, publication at the places and for the required time is sufficient, irrespective of when it was made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 376; Dec. Dig. § 89.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. CORPORATIONS (§ 90*)—ASSESSMENTS OF STOCK—ACTIONS—COMPLAINT—CONSTRUCTION—"THEREUPON"—"FORTHWITH."

Construing the words "upon making the resolution as aforesaid," in an allegation, in an action to recover a delinquent stock assessment, that upon the making of the resolution as aforesaid, the secretary of the corporation caused notice of the assessment to be published, as including the element of time, they may be held to have been used in the sense of "forthwith" or "thereupon," both of which words, when used in reference to time, are generally construed to mean without delay or lapse of time, and the complaint is not altogether lacking in the statement of a fact from which the inference may be drawn that the notice was published at the time of the passage of the resolution in pursuance of which it was given. [Citing Words and Phrases, vol. 8, p. 6954.]

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 90.*

For other definitions, see Words and Phrases, vol. 3, pp. 2916-2925; vol. 8, p. 7665.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Bottle Mining & Milling Company against Charles Kern. Judgment for plaintiff, and defendant appealed to the Supreme Court, whence the cause was transferred to the Court of Appeal. Affirmed.

See, also, 97 Pac. 25.

Haas, Garrett & Dunnigan, for appellant. B. J. Bradner and Charles S. Burnell, for respondent.

TAGGART, J. This appeal comes to this court by transfer from the Supreme Court. The appeal was taken to that court on the theory that the "assessment," the validity of which is attacked, was such as to give that court appellate jurisdiction in the case. 97 Pac. 25.

The action was brought by the plaintiff corporation to recover from the defendant, who is the holder of 50,000 shares of its capital stock, the sum of \$350, the unpaid balance of an assessment levied upon such shares of stock. At the time said assessment was levied 462,000 out of its 500,000 shares of stock of the par value of \$1 each had been subscribed, and certificates therefor issued to its stockholders as fully paid-up stock. The necessity for the levy of the assessment upon which this action is based is stated in the complaint as follows: "Said corporation was in debt to bona fide creditors in the sum of \$5,000, and that it was necessary for said corporation to expend about \$500 more for the maintenance and operation of its mining claims, and to procure the performance of the necessary assessment work thereon required by law, * * * and for other necessary expenses essential to the conducting of its business and paying of its debts, and that the corporation was without means to pay said indebtedness, present or prospective, and it was necessary to raise the sum of \$5,500 in order to pay the same."

Judgment was entered by default for fail-

ure to answer, after demurrer overruled, and the question of the validity of the assessment is before us, to be determined on the sufficiency of the complaint. The assessment was made on September 28, 1906, and October 30, 1906, and November 15, 1906, were named respectively as the dates when unpaid assessments would be delinquent and the sale of delinquent stock be made. By reason of a failure to properly publish the assessment notice, in accordance with law and the resolution passed, another meeting of the directors was held on December 6, 1906, at which a resolution was passed vacating all proceedings subsequent to the levy of the assessment, and fixing new dates when the stock would become delinquent and sold respectively, to wit, delinquent January 15, 1907, and sold February 4, 1907. There was no personal service of notice, and the allegation as to the publication of the notice of the time fixed for delinquency and date of sale is merely that the notice was published once a week for four successive weeks (giving papers); but it is not stated when such publication was made, either by dates or time of commencement of the publication. The only language used which can be construed to refer to time of the commencement of the publication is the allegation: "That upon making the resolution aforesaid, the secretary of the corporation caused to be published," etc.

The contention of appellant that an assessment cannot be made upon fully paid-up stock or collected by personal action in this state cannot be sustained. As said in *Son on Corporations in California*, p. 227, the two great distinguishing features of the California law as to calls and assessments are (a) that each of them can be collected by forced sale of the stock; (b) that assessments can be collected by personal action at law. *Santa Cruz Co. v. Spreckels*, 65 Cal. 193, 3 Pac. 661, 802; *Spurgeon v. Santa Ana Co.*, 120 Cal. 71, 52 Pac. 140, 39 L. R. A. 701; *Green v. Abientine Medical Co.*, 96 Cal. 328, 31 Pac. 100. That such was not the case at common law is asserted by the same authority, and that the rule is different in most of the states is also declared by most of the text-writers on the subject. *Cook on Corporations*, vol. 1, § 241; *Clark & Marshall, Private Corporations*, §§ 402-404; *Purdy's Beach on Private Corporations*, § 336; 26 Am. & Eng. Ency. of Law (2d. Ed.) 923.

As said in the last-cited work, the general rule is well established that corporations have no implied power to levy assessments on stock which has been fully paid up. The stockholder becomes such by virtue of his contract with the company, and is entitled to stand upon his rights under it. When the amount called for in it has been paid, he cannot be required to contribute an additional amount, unless the power to levy such an assessment is expressly conferred by the char-

ter of the corporation or by a statute in force at the time the stock was issued. When there is such a statute, it becomes a part of the stockholder's contract with the corporation as much as if its provisions were set out in such contract, subject only to the rule of construction that where the power is given by statute the mode provided must be strictly pursued.

Assessments are authorized by the Civil Code for the purpose of paying expenses, conducting business or paying debts, and may be levied any time after one-fourth of the capital stock has been subscribed. Section 331. The last provision is complied with by the issuance of, and full payment for, certificates for more than one-fourth of the stock. *Bell v. Quicksilver Co.*, 146 Cal. 706, 81 Pac. 17. The sections providing the limitations placed upon the power to levy an assessment (sections 332, 333) indicate that, except in respect to the amount that may be levied, there is no distinction between an assessment upon unpaid stock and one upon fully paid-up stock. The procedure for levying and collecting an assessment, and for the sale of delinquent stock, is the same whether it be a "call" for subscription or an "assessment" on paid-up stock to pay debts and expenses which is under consideration. The provisions of sections 331 to 349 are alike applicable. And, although appellant lays some stress upon the fact that plaintiff is a mining corporation, there is nothing in the sections of the Civil Code relating especially to such corporations to take them out of the general rule. Sections 586 to 590. The opinion in the federal case of *In re South Mountain*, etc. (C. C.) 14 Fed. 347, relied upon by appellant, expressly distinguishes the collection of an assessment by personal action, where the levy was voluntarily made by the directors of the corporation, from the case before it (page 350), and it is therefore not necessary to say that the distinction there made between mining and other corporations in respect to collecting assessments and calls is, or is not, approved.

Section 349 provides that on the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action, etc. This waiver must be made at a time when the power to exercise the right waived is in existence, as there can be no waiver of a right that has been lost. Unless there are two existing remedies, both open to the corporation at the time, there can be no election. *San Bernardino v. Merrill*, 108 Cal. 494, 41 Pac. 487. In order to sustain the personal action here, it must appear from the complaint that the plaintiff could have, on January 16, 1907, proceeded to make a valid sale of the stock because of an assessment on

it which had been properly levied and was then delinquent for nonpayment. *Shively v. Eureka*, 129 Cal. 296, 61 Pac. 939.

If there was a proper service of the notice of assessment which was made a part of the complaint, the pleading is good against the objections made by appellant. For, if the notice was given, the stock became delinquent on January 15, 1907, the sale was noticed for February 4, 1907, and a waiver on January 16, 1907, still left time to comply with the requirement of sections 337-339 as to publication of notice of sale of the stock. The proceeding to sell was alive and going when the election was made.

If the sufficiency of the service of the notice mentioned was presented to the trial court, two theories suggest themselves to us upon which the court might have held that there was a proper showing that the notice was published as required by section 336. The resolution which was passed, and in pursuance of which the notice was given (presumably under the provisions of section 346), vacated and abrogated all steps theretofore taken, except the levying of the assessment, and left only the last notice to satisfy the requirement that a notice of assessment must be personally served upon each stockholder or served by mailing, and by publication for four successive weeks. The mailing of this notice is alleged to have been done forthwith, which must be construed to refer to the time of the passage of the resolution.

Since the statute provides no particular time prior to either the date of delinquency or the date of sale when the notice of assessment must be published, the allegation of the complaint that it was published at the places and for the duration of time required by the statute is sufficient. The ordinary requirement that the notice be given so many days before a date or time mentioned is lacking, but the apparent defect in the statute cannot be supplied by the courts. That notice was given as provided by the statute is all that is necessary to support the plaintiff's right to sell. The allegations of the complaint show this was done, and in the absence of any showing, such as might have been made by answer, that no service of notice was actually made on the defendant, and that he was without actual knowledge of the proceedings taken by plaintiff, we cannot indulge in any presumption to this effect, for the purpose of reversing the judgment of a trial court. The complaint is not altogether lacking in statement of fact from which the inference might be drawn that the notice was published as promptly as it was mailed. Construing the words, "upon making the resolution as aforesaid," as including the element of time, and they may be held to have been used in the sense of "forthwith" or "thereupon"; the latter of which words, like the former, when used in reference to time, is generally construed to mean without delay or lapse of time. *Words and Phrases*, vol. 8, p. 6954.

If the decisions, statutes, and provisions of the Constitution relating to the personal liability of a stockholder to the creditors of the corporation, and the principles upon which they are based, could be considered here, and the matter were an open question, we should have grave doubts of the right of the directors to collect by personal action any assessment levied to pay a debt of the corporation which was not alleged to have been created during the time the person sued was a holder of stock in such corporation. But the right of the corporation to proceed and sell stock in cases of delinquency has so often been held to be an entirely separate and distinct right from the personal liability of a stockholder to the creditors of the corporation because of his ownership of stock in the company, that we do not regard the question open for consideration here. *People's Home Savings v. Stadtmuller*, 150 Cal. 110, 88 Pac. 280.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 564

WATTS v. MURPHY et al. (Civ. 497.)(Court of Appeal, Third District, California.
Dec. 22, 1908.)**1. MASTER AND SERVANT (§ 102*)—ACTION—INSTRUCTIONS—MASTER'S DUTY.**

In an action for decedent's death while operating defendant's elevator in the course of his duties as janitor, an instruction that persons maintaining an elevator in a building are common carriers, and, though not insuring the absolute safety of passengers or operators, they must use the utmost care and diligence in providing safe machinery, etc., was erroneous, in that it required the same degree of care by defendant toward decedent who was operating the elevator as toward passengers; both Civ. Code, § 1971, and the general rule of law making an employer liable to employes only for loss caused by his want of ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 102.*]

2. TRIAL (§ 296*) — ERROR IN INSTRUCTION CURED BY ADDITIONAL INSTRUCTIONS.

In an action for decedent's death while operating defendant's elevator in the course of his duties as a janitor, an instruction that persons maintaining an elevator in a building are common carriers, and, though not insuring the safety of passengers or operators, they must use the utmost care to provide safe machinery, etc., and are responsible for the slightest neglect, being erroneous in imposing the same degree of care toward employes as toward passengers, and being pertinent to the particular facts, was not cured by a correct charge as to the master's duty toward employes; it being impossible to tell which instruction the jury followed.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

3. APPEAL AND ERROR (§ 928*) — PRESUMPTIONS—VERDICT—INSTRUCTIONS UNDERSTOOD.

It must be presumed that the jury understood the meaning of instructions given.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 928.*]

4. DEATH (§ 10*)—RIGHT OF ACTION—ACTION BY HEIRS.

If there was no breach of the master's duty so as to warrant a recovery by a servant had he lived, his heirs cannot recover upon his death; the statute giving an action to heirs not changing the substantive law.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. § 10.*]

Appeal from Superior Court, City and County of San Francisco; T. F. Graham, Judge.

Action by Mattie C. Watts against Eugene P. Murphy and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appealed. Reversed.

Van Ness & Redman, for appellants. Franklin P. Bull and L. A. Wittenmyer, for respondent.

HART, J. This is an action for damages for the death of the husband of plaintiff through the alleged negligent acts of the defendants. The jury assessed the damages at the sum of \$5,000, and judgment was thereupon entered for that amount. This appeal is from said judgment and from the order declining to grant the defendants a new trial.

The deceased, Daniel Watts, husband of plaintiff, was on the 28th day of March, 1902, the day on which the accident occurred resulting in his death, and had been for two years prior thereto, employed by the defendants as janitor of their building, situated on the northeast corner of California and Kearny streets, in the city of San Francisco. Said building was used as an office building and as such occupied by tenants of the defendants, and, for the purpose of carrying passengers and freight from one floor to another in said building, the defendants maintained an elevator propelled and operated by means of electricity. It had been the custom of the deceased to transport himself and his implements from floor to floor during the course of his work as janitor. Between the hours of 12 and 1 o'clock each day, when the person regularly in charge of the elevator was absent, the deceased operated the same and carried passengers to the various floors. In addition to the duties ordinarily incident to the position of janitor, the deceased was required under the terms of his employment to see that the elevator was at all times kept in running order, and, whenever repairs thereof were necessary, either to attend to the matter himself (he claimed, according to the defendant, E. P. Murphy, to have some skill and experience as a machinist, although, as we understand the evidence, made no pretensions to knowledge of electrical mechanism) or otherwise have the same attended to by an electrician. The evidence discloses that some time before the accident the insulation of the lever handle, by means of which the elevator was operated, had become worn, the result of which was that the operator would occasionally receive a shock from the electricity, not severe enough, however, to do any serious damage. This defect, according to the testimony of Frank Walton, who was the regular operator of the elevator on the day the accident happened, was known to the deceased for a considerable time before he met his death. The accident occurred between the hours of 8 and 9 o'clock

in the morning. No one was in the elevator with the deceased at the time he lost his life.

The witness Amark testified that just before half past 8 o'clock he "climbed up" the stairs to the fifth floor. When he entered the building, he saw and saluted Watts, who was then engaged in mopping the first floor. After reaching the fifth floor, Amark returned by the stairway to a point between the fifth and fourth stories, where there was a landing on which he was resting and waiting for some one he desired and expected to meet, when the elevator came up to the fourth story and "stopped for a second, and then flew up" and stopped at the fifth floor. This witness on making an inspection saw blood running from the direction of the fifth floor down to the fourth. He hastened to the fifth floor and found the body of the deceased lying in the elevator, with his head wedged in between the fifth floor of the building and the shaft of the elevator. There is no evidence in the record, and presumably, from the circumstance that Watts was alone in the elevator none was available from which the precise manner in which the accident and consequent death of Watts occurred can or could be determined. It is the theory of the respondent, however, that while engaged in operating the elevator for the purpose of transporting himself from one floor to another for the purpose of performing his duties as janitor the deceased received an electric shock of sufficient force to throw him to the floor, and, as the elevator was ascending, his head was in such position as to have been caught between the elevator shaft and the fifth floor of the building, thus producing a fracture of his skull, from the effects of which death followed.

The appellants complain of certain instructions which were read to the jury by the court, and further contend that, inasmuch as there is evidence showing that the deceased was fully aware of the defect in the machinery of the elevator which was the cause of the accident resulting in his death, he assumed the increased risk occasioned by such defect. It is also urged that as there was no duty resting on the deceased within the scope of his employment to operate the elevator for the purpose of transporting passengers at the time at which the accident occurred, and, as he was using it, when he met his death, for his own personal convenience, he was, therefore, a mere licensee, and as such assumed all risks attending its operation. But it will be unnecessary to consider in detail all the errors which are assigned and all the questions arising therefrom. I think the court committed serious and prejudicial error by the giving of the following instruction: "I instruct you that persons maintaining an elevator in a building are common carriers, and the same duties and responsibilities rest upon them as to care and diligence as on the carriers of passengers by

railways. Though they are not insurers of the absolute safety of the passengers or operators [*italics ours*], they are bound to use the utmost care and diligence of very cautious persons in providing proper and safe machinery as far as human care and foresight can go, and are responsible for injury occasioned by the slightest neglect against which human prudence and foresight might have guarded. The responsibility is proportioned to the danger, and is of the highest character in the care of those who operate elevators for lifting persons from one level to another." Thus the jury were told that the liability of a common carrier to an employé suffering injury while engaged in operating a contrivance or vehicle for the transportation of passengers was the same as its liability to passengers; or to state the proposition in a different way, that a common carrier is bound to the same degree of care in the matter of the protection of employés against injury or loss as is required of it with reference to passengers. The instruction states the law correctly as to passengers, but, as to operators or employés, it is not only opposed to the rule as declared by the text-writers and the courts, but is in plain conflict with the express provision of our statutory law upon the subject.

Section 1971 of the Civil Code reads: "An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care." The rule is thus stated by Shearman & Redfield in their work on Negligence: "The master is bound to use ordinary care, diligence, and skill for the purpose of protecting his servants from unnecessary risks in his service; but he is not bound to use any higher degree of care. A railroad company, for example, although bound to use the utmost care and diligence for the protection of its passengers from injury, owes no such duty to its servants, although they may be exposed to the same perils. * * *" See *Dolan v. Sierra Ry. Co.*, 135 Cal. 435, 67 Pac. 686; *Brymer v. S. P. R. R.*, 90 Cal. 496, 27 Pac. 371; *Smith v. St. Louis, etc., R. R.*, 69 Mo. 32, 33 Am. Rep. 484; *Warner v. Erie R. R.*, 39 N. Y. 471; *Sappenfield v. Main St., etc., R. R. Co.*, 91 Cal. 48, 27 Pac. 590. In the last-mentioned case the plaintiff, while employed on one of the defendant's street cars, met with an accident in which he sustained personal injuries. The court instructed the jury as follows: "It is the duty of one who employs another in his business to furnish to such employé such tools, implements, appliances, and machinery as may be needed in the work to be done for the employer, in good order, of sound material, and in safe condition for use, such as will be reasonably best calculated to insure safety in their use by the employé, and such as combine the greatest safety with practical use. * * *" The Supreme Court, speaking of and condemning this instruction, as applied in that case, says: "This instruction was erroneous

in declaring that the obligation upon the master required him to furnish such appliances 'as combine the greatest safety with practical use.' By this the jury were told that the appliances required must be such as in practical use will be found to afford the greatest safety; that is, those appliances which from experience are found to combine all the provisions for safety that are capable of being used. The instruction is substantially the same as one given in the case of *Treadwell v. Whittier*, 80 Cal. 574, 20 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, which was approved by this court; but the circumstances which rendered such instruction proper in that case do not exist here. The court in that case was defining the duties of the proprietor of a passenger elevator, and likening them to the duties imposed upon the carrier of passengers, which required him to keep pace with modern improvement and invention, and adopt such newly invented appliances as will secure the safety of those whom he carries. The relations of the defendant to the plaintiff in this case differ materially from those existing between the carrier and its passengers; for, instead of being in any respect an insurer of his safety, the defendant held to the plaintiff only the ordinary relations of a master to his servant. The relative liability of a carrier to its passengers and to its employés is stated by the Court of Appeals in New York, in *Warner v. Erie Railway Co.*, 39 N. Y. 471, as follows: "We are not now dealing, it must be remembered, with the liability which a railroad corporation assumed in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an employé, and which is answered if the care bestowed accords with that reasonable skill and prudence which men exercise in the transaction of their accustomed business." It is true that the court in the case at bar in another part of its charge instructed the jury correctly as to the duty and degree of care due from a master to a servant; but, as the Supreme Court says in the case from which I have just quoted: "The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and, if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict. *Brown v. McAllister*,

39 Cal. 573; *Chidester v. Ditch Co.*, 53 Cal. 56."

Counsel for the respondent do not seriously undertake to defend the criticised instruction for which in my judgment a reversal of the judgment and order is demanded; but they say that it involves only an abstract statement which could not have been treated by the jury as throwing any light on the law applicable to the case. I cannot so view it. An abstract statement of a legal proposition is only a declaration in a general way of certain principles of law which have no particular or special bearing upon the issues and facts of a particular case; but when a principle, which may on some occasions be stated abstractly, happens to have particular and peculiar relevancy to the conditions which the evidence discloses exist in a case in which it is declared, then it assumes a concrete form, and, if erroneous, must be considered for the purpose of determining whether it was prejudicial or innocuous in its effect upon the party against whom it was given. The instruction under consideration was, it seems to me, peculiarly applicable to the facts of this case. The deceased was the operator of the elevator on the occasion of the accident through which he came to his death. Whether the use of the elevator in the early morning hours before the regular operator assumed charge thereof was essentially within his rights as janitor of the building, or his use of the same was that of a mere licensee, in which case he assumed all the risks attending his operation of the elevator, is not material to the consideration of this instruction, for the evidence shows that he had habitually used and operated the elevator in the discharge of his duties as janitor, so using it at the time he was killed, and the instruction under review treated and assumed him to be the operator. If the jury understood the instruction, and it must be assumed that they did (*Henderson v. Los Angeles Traction Co.*, 150 Cal. 697, 89 Pac. 976), then certainly they must have understood the court to declare that as a matter of law the degree of care and diligence required to be exercised by the defendants towards the deceased, who was operating the elevator when he was killed, was the same as that required to be exercised by them towards passengers transported from floor to floor by means of said elevator.

Counsel declare, however, that there is a distinction in the application of the principle enunciated by section 1971 of the Civil Code, *supra*, between actions by servants for personal injuries sustained by them and actions for damages for the death of servants. But, as is said by counsel for the defendants, "appellants are not liable at all unless there has been a breach of some legal obligation. The obligation in this case was founded on the relationship existing between the appellants

and the deceased janitor—that is, the relationship of master and servant. If there was no breach of duty warranting recovery by the servant had he lived, then it must follow that appellants committed no tort, and are not liable to his heirs. The statute, in permitting a recovery by the heirs of the deceased, has not changed the law respecting negligence"—citing *East Tennessee, etc., R. R. v. Maloy*, 77 Ga. 238, 2 S. E. 945, and other cases.

The point that there is not before us a sufficient record on which to review the action of the lower court in refusing a new trial does not possess sufficient merit in my opinion to require special notice.

For the reasons herein stated, the judgment and order are reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

9 Cal. App. 640

VALENTINE v. STREETON. (Civ. 583.)

(Court of Appeal, Second District, California.
Dec. 31, 1908.)

SPECIFIC PERFORMANCE (§ 49*)—ADEQUACY OF CONSIDERATION.

Under Civ. Code, § 3391, providing that performance cannot be enforced against a person if he has not received an adequate consideration, or if the contract is not as to him just, the executor of the lessee of premises is not entitled to performance of a contract by a landowner made to the lessee in his lifetime to convey the premises for a sum specified, which is admitted to be only about one-third the actual value of the premises, though the excess in value above the price stipulated was intended as a gift.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 151; Dec. Dig. § 49.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Samuel T. Valentine against Joseph Streeton, executor of the last will of James N. Hyde, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

F. E. Davis and J. W. Cochran, for appellant. E. W. Sargent and William G. Cooke, for respondent.

ALLEN, P. J. Appeal by defendant from a judgment rendered in favor of plaintiff and against defendant in an action to quiet title, and from an order denying a new trial.

The record discloses that in April, 1904, Herbert Valentine, then owning certain premises described in the pleadings, executed to one Hyde a lease of said premises for a term of 10 years at the annual rental of \$180, in addition to which the lessee was to pay all taxes assessed against said premises during the life of the lease, together with certain insurance premiums; it being stipulated in the lease that upon default in

payment of rent or other covenant for a period of 30 days after the same became due the possession of the premises should be surrendered to the lessor. Contemporaneous with this lease an option was given by the lessor to the lessee through which the lessee was entitled, during the life of the lease, upon 30 days' notice, to purchase said premises for \$3,600, provided that all indebtedness, either for rent or on account of any other obligation between the parties, should be fully paid before date fixed by the notice as the time of election to purchase. The lease and option were made nonassignable. Hyde entered into possession of the premises and so continued until the time of his death. Afterwards Herbert Valentine died, and his estate, including the premises in controversy, was, on January 3, 1907, distributed to plaintiff as devisee under the last will of said Valentine. It further appears that pending the settlement of the estate of Herbert Valentine, and before distribution, plaintiff, as such devisee, on March 12, 1906, wrote to Hyde a letter in which he called his attention to the large indebtedness due the estate and his default in payment of rent and taxes, and the effect thereof upon his right under the lease, but concluded the letter with a proposition by which he agreed to sell the premises to Hyde for \$2,000; and, further, that he would return to Hyde all of the notes theretofore executed by Hyde to Herbert Valentine and which were due the estate, but on the condition that such proposition was unassignable, and within one month a letter must be forwarded to plaintiff from some one willing to advance to Hyde the necessary \$2,000. In the letter plaintiff says: "This offer will take the place of all previous offers which I have suggested and will be a final settlement between us, and will be to my mind a gift by me to you of a considerable sum." It is agreed that at this date the property was worth from \$5,000 to \$6,000. Hyde procured a building and loan association to forward a letter to plaintiff within the specified time, in which such association agreed to pay the \$2,000 upon deposit of a deed with the Title Guarantee & Trust Company. Plaintiff upon the receipt of such letter again wrote to Hyde agreeing to forward such deed, which, however, he failed to do. Hyde before and after the receipt of these letters made improvements upon the premises exceeding in value \$1,000. Just what value should be attached to those made subsequent to the receipt of the letters is not made clear. They consisted in the construction of a bottling house, changing the location of a barn, laying out a new road across two acres, and making an excavation where he expected to build a bungalow. What was the cost, or to what extent this enhanced the value of the property, is not made to appear; nor is it shown that any of these improvements were based upon the

agreement of purchase or the proffer of the gift, or placed thereon upon the faith thereof, and the court in its general finding 6 upon the issue raised as to the improvements being made upon the faith of the gift and purchase finds against defendant and in plaintiff's favor. Appellant, being appointed the executor of the will of Hyde, undertook negotiations looking toward the closing up of the contract. Plaintiff, however, refused to carry out his proposition made in the letter on the ground that it was a personal matter purely with Hyde and not for the benefit of his creditors or personal representatives. The complaint is in the ordinary form for quieting title. Appellant, as executor, filed an answer denying the allegations of the complaint and setting up by way of cross-complaint the facts hereinbefore set out, and prayed the court that specific performance of the agreement to convey to Hyde be decreed. Upon the trial defendant disclaimed any right under the original lease, or option, but rested his claim to an interest in the premises and the right to have the contract with plaintiff specifically enforced solely upon the letters above referred to. The trial court found that defendant had no right, title, or interest in the land, and that the title to the same at the commencement of the action was in plaintiff absolutely. These findings are attacked by appellant as having no support in the evidence.

Assuming that the cause of action claimed was one which survived or continued, which we do not decide, the right claimed or interest which defendant as executor had in the premises under the letters which constituted the contract must be measured by his right to have such contract specifically enforced, for, if that relief did not exist, he had no interest in the premises, and his only right of action, if any, was one for damages. That specific performance could not be decreed under section 3391, Civ. Code, is apparent. That section provides that specific performance cannot be enforced against a party: First, if he has not received an adequate consideration for the contract; second, if it is not as to him just and reasonable. The rule is well established that the allegations of the party seeking specific performance must be such as to satisfy the conscience of the chancellor in respect of the justness and reasonableness of the contract. The allegations of appellant in his cross-complaint are not within this rule, but, on the contrary, assert that the premises so contracted for were, at the date of the contract, worth nearly threefold the contract price. This admission as to the inadequacy of the price is sufficient to defeat appellant's claim for specific performance. It matters not that the excess of value above the price stipulated was promised or intended as a gift. As such, and to that extent, no other facts intervening, the prom-

ise is not enforceable. "The allegations and evidence as to improvements being placed upon the land by plaintiff do not tend to obviate or cure the defects in plaintiff's case already pointed out." *Windsor v. Miner*, 124 Cal. 494, 57 Pac. 386. It will be observed that the features presented in the case of *Burlingame v. Rowland*, 77 Cal. 316, 19 Pac. 526, 1 L. R. A. 829, are wanting here. In that case and those relied upon for its support a gift was tendered and promised, upon the faith of which possession was taken and improvements made. In the case under consideration possession was held under a lease, the forfeiture of which had not been claimed or decreed and under which lease Hyde continued to hold until his death, and the finding of the court negatives the fact that the improvements were made relying upon the promise of a gift.

The findings of the court on account of which error is claimed are supported by the evidence. There is nothing in the evidence even tending to show that appellant as the personal representative of Hyde had or owned any interest in the premises in controversy.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 622

PEOPLE v. COLLINS. (Cr. 106.)

(Court of Appeal, Second District, California. Dec. 31, 1908. Rehearing Denied by Supreme Court March 1, 1909.)

1. FORGERY (§ 4*)—ELEMENTS OF OFFENSE.

The essential ingredients of forgery are the making of some instrument, a fraudulent intent, and liability to injure another if the writing is genuine.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 1; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2900-2909; vol. 8, p. 7665.]

2. FORGERY (§ 12*)—DEFENSES—ILLEGAL INSTRUMENT.

It was no defense to an information for forging a clearing house certificate by raising its amount from \$1 to \$10 that the issue of such paper was contrary to public policy.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 30, 31; Dec. Dig. § 12.*]

3. WORDS AND PHRASES—"PUBLIC POLICY."

The term, "public policy" is not limited to matters which are expressly forbidden by statute for reasons of public policy, but extends to matters, though not expressly stated, which are within the reason declared by the statute.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5813-5814; vol. 8, p. 7773.]

4. INDICTMENT AND INFORMATION (§ 196*) — SEPARATE OFFENSES—DUPLICITY.

Where an information was not demurred to as charging two offenses, the verdict could not be attacked on the theory that the information was duplicitous.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 635; Dec. Dig. § 196.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Gilbert E. Collins was convicted of forgery, and he appeals. Affirmed.

Wm. Rex and G. W. Crouch, for appellant. U. S. Webb, Atty. Gen., and Geo. Beebe, Deputy Atty. Gen., for the People.

TAGGART, J. Appellant was convicted of the crime of forgery. The information charged the offense to have been committed by altering and changing from \$1 to \$10 a certain duebill, writing obligatory and clearing house certificate issued by the Los Angeles clearing house, and the form of the verdict of the jury was guilty as charged. It is contended in support of this appeal: (1) That the instrument alleged to have been forged is void; and (2) that the information charges both forging and uttering of a forged instrument, and that a verdict of guilty as charged leaves in doubt the question which of the two crimes was committed.

It is not necessary to pass upon the question of the legality or illegality of the "scrip" issue in order to sustain the judgment from the first attack. As said by the Supreme Court of this state in *People v. Munroe*, 100 Cal. 664, 670, 35 Pac. 326, 328, 24 L. R. A. 33, 38 Am. St. Rep. 323: "As to what contracts are against public policy, or ultra vires, or void as creations under unconstitutional statutes, we think matters entirely foreign to a prosecution for forgery. In the examination of such grave and abstruse questions, the criminal element of the case would soon be lost to view." Again, in the same opinion, it is said: "It is apparent that the character of the writing is quite insignificant when placed in the balances opposite the other element—the intent to defraud. * * * The essential ingredients of the crime of forgery are: (1) A false making of some instrument; (2) a fraudulent intent; (3) if genuine, the writing might injure another. The third element stated is expressly recognized by this court to be the true test as to the nature of the writing." The language used in some of the cases "to the effect that the writing, if genuine, must be sufficient to form the basis of a legal liability, * * * is not the true test. * * * A forged contract, even though it covers a subject-matter which makes it void, as against public policy, upon its face may present such an appearance that, if genuine, it might injure another, and such a one satisfies the test which we have laid down." The same rule is laid down in *People v. James*, 110 Cal. 155, 42 Pac. 479. In the opinion in that case appears a further quotation from the *Munroe* Case which answers another position taken by appellant: "The question is whether upon its face it will have the effect to defraud those who may act upon it

as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, or that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over."

In the consideration of the term "against public policy," as used in the decisions quoted from, we see no reason to draw any distinction between those matters which the statute forbids to be done for reasons of public policy, without expressly so stating, and those particular matters as to which the reason is declared by the statute. Forgery, or the making or uttering of a forged instrument, is forbidden, and the illegal issuance of bills as money is prohibited, purely, for reasons of public policy, so that the language used in *People v. Munroe* is clearly applicable to the case at bar. The alteration of the certificate with intent to defraud is the gist of the crime charged.

The demurrer to the information did not raise the objection that two offenses were charged, and the verdict cannot now be attacked on the ground of the duplicity of the information. We see no error in the record.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 610

JOSHUA HENDY MACH. WORKS v. GRAY et al. (Civ. 487.)

(Court of Appeal, First District, California.
Dec. 31, 1908.)

1. ARBITRATION AND AWARD (§ 6*)—SUBMISSION AGREEMENT—CONTENTS—NAMES OF ARBITRATORS.

Code Civ. Proc. §§ 1283-1285, requires a submission to arbitration to be in writing, and that the clerk, on the submission being filed with him, shall enter the names of the arbitrators in his register. *Held*, that a submission agreement naming two of the arbitrators, and providing that, in the event of their being unable to agree, they should choose a third, and the award of two or more should be binding, was fatally defective for failure to name all the arbitrators.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 27; Dec. Dig. § 6.*]

2. ARBITRATION AND AWARD (§ 1*)—JURISDICTION—COMPLIANCE WITH STATUTE.

Jurisdiction in arbitration proceedings is special and exists only when there is a substantial compliance with all the requirements of the statute.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Arbitration between the Joshua Hendy Machine Works and George P. Gray and another, doing business as Gray Bros. Judgment for the latter, and the former appeals. Affirmed.

E. B. Young (Garoutte & Goodwin, of counsel), for appellant. Fisher Ames, for respondents.

KERRIGAN, J. The parties to this action entered into an agreement in writing to submit a certain matter in dispute between them to the arbitration of two persons named, who, in the event of their inability to agree, were authorized to choose a third arbitrator, and the award of the three arbitrators, or of any two of them, was to be binding upon the parties. The two arbitrators failed to agree, and they appointed a third. Thereafter, under the submission, a final award was unanimously made in favor of appellant and against the respondents, upon which judgment was entered. Subsequently, upon motion of the respondents in the court below, an order was made and entered perpetually staying the issuance of any execution upon the judgment, upon the ground that the judgment was void and of no effect.

This case has two of the defects discussed in the case of *Kreiss v. Hotaling*, 96 Cal. 617, 31 Pac. 740, and upon which the submission in that case was held to be void. Here, as there, the agreement of submission stipulates that the award of the arbitrators shall be final and conclusive, and that neither side shall have the right of appeal; nor does this agreement to submit to arbitration contain the names of all the arbitrators. As the Code (Code Civ. Proc. § 1283) requires a submission to arbitration to be in writing, and as the clerk of the court must, upon a submission being filed with him, enter the names of the arbitrators in his register (Code Civ. Proc. § 1285), it is plain that the Legislature intended to prescribe (as was held in the above cited case of *Kreiss v. Hotaling*) that all the arbitrators must be named in the submission agreement.

Jurisdiction in arbitration proceedings is a special jurisdiction, and it is only by a substantial compliance with all the requirements of the statute that it attaches. In *re Abrams & Brennan*, 2 Cal. App. 237, 84 Pac. 363. Upon the authority of the case of *Kreiss v. Hotaling*, supra, the order appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 590

PEOPLE v. LEE. (Cr. 164.)

(Court of Appeal, First District, California.
Dec. 30, 1908.)

CRIMINAL LAW (§ 1084*)—APPEAL—CERTIFICATE OF PROBABLE CAUSE—STAY OF EXECUTION.

One convicted and sentenced to the state prison is entitled, on the refusal of the trial judge to give a certificate of probable cause, to a reasonable time in which to prepare the record and present to the Court of Appeal the question as to whether or not there is probable cause for

the appeal, and in the meantime the execution of the sentence should be stayed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1084.*]

Benjamin B. Lee was convicted of manslaughter, and he petitions for certificate of probable cause and for stay of execution of the judgment. Granted.

E. H. Wakeman, for petitioner.

COOPER, P. J. It appears that the defendant was convicted of manslaughter and sentenced to a term of five years in the state prison; the sentence being imposed on December 18, 1908. He has since appealed to this court and has prepared, served, and presented to the trial judge his bill of exceptions, which bill of exceptions has not yet been settled. The trial judge has refused to give him a certificate of probable cause, and has further refused, and now refuses, to stay the execution of sentence pending the settlement of the bill of exceptions, or for such reasonable time as may be necessary for the settlement of the same.

Defendant desires to apply to this court for a certificate of probable cause, and, in order to pass upon the question as to whether or not he is entitled to it, it is necessary for this court to have the record and the settled bill of exceptions before it. The due administration of justice and the spirit of the law and the settled practice of the Supreme Court of this state requires that the defendant should be given a reasonable time in which to prepare the record and present to this court the question as to whether or not there is probable cause for the appeal, and that, in the meantime, the defendant should not be incarcerated in the state prison. In re Adams, 81 Cal. 163, 22 Pac. 547; People v. Gallanar, 144 Cal. 656, 79 Pac. 378.

It is therefore ordered that the execution of the sentence herein be stayed pending the settlement of the proposed bill of exceptions, and for such reasonable time thereafter as will enable the defendant to present the matter to this court, or until the further order of this court.

9 Cal. App. 644

PEOPLE v. SMITH. (Cr. 144.)

(Court of Appeal, First District, California.
Jan. 7, 1909.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

While evidence of the commission of other offenses by accused not connected with the offense charged is inadmissible for the purpose of raising an inference or increasing the likelihood that he committed such offense, yet evidence directly throwing light on the facts of the issue being tried is admissible, though it also proves another offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 823; Dec. Dig. § 369.*]

2. HOMICIDE (§ 166*)—EVIDENCE.

Where, in a trial for murder, it appeared that previous to the morning of the killing there had been no ill will between defendant and deceased, but that on such morning defendant quarreled with an employé of deceased, snapped a pistol at him, ordered him from the premises occupied by deceased, and stated that if the latter came there he (defendant) would blow deceased's head off, evidence concerning the quarrel was admissible as throwing light on the motives and subsequent acts of defendant in his difficulty with deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 321; Dec. Dig. § 166.*]

3. WITNESSES (§ 277*)—CROSS-EXAMINATION OF ACCUSED—SCOPE.

An accused testifying in his own behalf may be properly cross-examined fully about any testimony that he has given on his direct examination, but not about new matter.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 982; Dec. Dig. § 277.*]

4. WITNESSES (§ 301*)—CROSS-EXAMINATION OF ACCUSED—SCOPE.

Where, in a trial for murder, the prosecution proved that prior to the killing accused, in a quarrel with an employé of deceased, snapped a pistol at him, and also proved that he shot deceased with a shotgun, and these weapons, which had been identified and placed in evidence, were the only ones mentioned in any of the testimony, it was error to permit the prosecution to draw from accused on cross-examination that he had another loaded revolver on the premises where the shooting occurred; accused being thereby forced, in violation of his constitutional right, to give evidence against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1043; Dec. Dig. § 301.*]

5. HOMICIDE (§ 163*)—EVIDENCE—CHARACTER OF ACCUSED.

Where, in a trial for homicide, accused offered no evidence of good character for peace and quietness, it was improper to permit the prosecution to ask a witness whether accused was not a man of violent temper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 310; Dec. Dig. § 163.*]

6. HOMICIDE (§ 163*)—EVIDENCE—CHARACTER OF ACCUSED.

In a prosecution for homicide, evidence that accused was in the habit of having women in his rooms at all hours of the night drinking liquors was inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 310; Dec. Dig. § 163.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Joseph Smith was convicted of murder, and from the judgment and from an order denying his motion for a new trial he appeals. Judgment and order reversed, and case remanded for a new trial.

Theodore J. Roche and D. J. Murphy, for appellant. U. S. Webb, Atty. Gen., and Wm. H. Langdon, for the People.

HALL, J. Defendant was charged by information with the crime of murder for the killing of one Joseph McGowan on November 26, 1904. Upon his trial he was convicted of murder in the second degree. In due time he

made a motion for a new trial, which being denied, he was sentenced to imprisonment for the term of 17 years. This is an appeal from the judgment and the order denying his motion for a new trial.

It is not contended that the evidence is not sufficient to support the verdict, but appellant relies for a reversal upon errors of law committed upon the trial. The homicide was committed on certain premises designated as No. 2969 Mission street, in the city and county of San Francisco, owned by defendant, but theretofore leased by him to Matthew McGowan, the father of Joseph McGowan. Though the lease was taken in the name of Matthew McGowan, it seems to have been taken for the benefit of Joseph McGowan; at least Joseph McGowan took charge of the premises and carried on a business there. The premises consisted of an inclosed yard, used for the storage of brick, sewer pipe, and like material used in the business carried on by deceased. There was a house upon the premises in which defendant resided. One James Beatty, on the date of the homicide, and for some time prior thereto, was in the employ of Joseph McGowan, and slept in the house occupied by defendant. The homicide occurred between 9 and 10 o'clock on the morning of November 26, 1904. At about 6 o'clock on the same morning defendant became involved in a quarrel with James Beatty. Joseph McGowan was not present during this quarrel, and did not arrive at the premises until after 9 o'clock a. m. During the quarrel with Beatty defendant ordered him to leave the premises, and snapped a pistol at him. Beatty told defendant that he would telephone for McGowan, to which defendant replied that if McGowan came he would blow his head off. Active hostilities and quarreling between Beatty and defendant finally ceased, and defendant left the premises for a half hour or more and returned with two other persons. McGowan arrived at the premises at about 9 o'clock, but as defendant had locked the gate he could not enter until the gate was unlocked by defendant, which he did after some parleying, whereupon hostilities between McGowan and defendant promptly began. The evidence is conflicting as to who struck the first blow, but evidence was given that defendant upon opening the gate went upon the sidewalk and there attacked McGowan with his fist. Certain it is that they fought with one another, and during the fight defendant was knocked down by McGowan several times; the last time striking his head upon some pieces of marble or stone. McGowan then went into a shed, where he attended to some business with Beatty. While McGowan was in the shed defendant went into the house where he resided, and got a shotgun, and instantly killed McGowan as he came out of the shed. McGowan was a young man in his twenties, while defendant was 70 years of age. The foregoing is but a general outline

of the testimony, but is sufficient for our present purpose.

The first point urged by appellant is that the court erred in allowing evidence to be given, over the objection of defendant, of the quarrel between Beatty and defendant, which occurred several hours before the arrival of McGowan upon the premises. Appellant is quite correct in his statement that the prosecution cannot prove the commission of other offenses by the accused, not connected with the offense charged, for the purpose of raising an inference or increasing the likelihood that he committed the offense charged. Where, however, the offered testimony is relevant to the issue being tried, the mere fact that it shows threats against or quarrels with a person other than the deceased, or the commission of other offenses by the defendant, is no legal objection to its admission. Where the proffered evidence directly throws light upon the facts of the issue being tried, it is admissible, although it proves another offense as well. *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093; *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *People v. McKay*, 122 Cal. 630, 55 Pac. 594; *People v. Rogers*, 71 Cal. 565, 12 Pac. 679; *People v. Miller*, 121 Cal. 343, 53 Pac. 816. In the case at bar it is impossible to read the testimony concerning this homicide without believing that the difficulty between McGowan would never have occurred had there been no previous quarrel that morning with Beatty. The quarrel and fight with McGowan followed as a consequence of the quarrel with Beatty. Previous to this morning there had been no ill will between defendant and McGowan. Beatty was the employé of McGowan. Defendant quarreled with Beatty, and ordered him from the premises occupied by McGowan in his business. In this connection Beatty testified: "Mr. Smith ordered me out of the yard. He also asked me about the same time if I had telephoned to McGowan, and I told him I had, and that Mr. McGowan would be out there in a few minutes; and he told me that Mr. McGowan was a God damned cur and coward, and didn't dast to come out there, and if he did come out there he would blow his head off. After this conversation Mr. McGowan came to the premises." There is evidence that upon Mr. McGowan's arrival defendant at once assaulted him, and the only apparent motive therefor seems to be animosity engendered by the quarrel with Beatty, his employé. The evidence concerning the quarrel with Beatty was proper as throwing light upon the motives and subsequent acts of defendant in his quarrel and fight with McGowan.

The court, however, erred in some other rulings upon objections to evidence. The most important and palpable of these concerns the admission of certain testimony forced from the defendant upon cross-examination. The prosecution had proved that defendant had snapped a pistol at Beatty, and

had identified and placed the pistol in evidence. It had also been proved that defendant shot McGowan with a shotgun. Up to the time the questions hereinbelow set forth were asked of defendant on his cross-examination, the only weapons mentioned in any of the testimony were the shotgun and the pistol drawn on Beatty, which had been identified and put in evidence by the prosecution. Over the objections and exceptions of defendant the district attorney was allowed to ask of defendant the following questions: "Q. Saying this was the revolver you drew that morning, didn't you have another revolver on those premises? A. I did. I don't know where the revolver is. It was a loaded revolver. Q. Wasn't it in that room the morning you drew the revolver on Beatty? A. Yes, it was. Q. Wasn't it loaded with cartridges? A. Yes. Q. Where did you leave it? A. In a nightdress pocket. I think it was in one of my coat pockets. Q. Has not Gallagher informed you that he took that loaded revolver away from those premises? A. He did." By this action of the court defendant, in violation of his constitutional right, was forced to give evidence against himself. A defendant who testifies in his own behalf may be properly cross-examined fully about any testimony that he has given upon his direct examination, but not about new matter. *People v. Wong Ah Leong*, 99 Cal. 440, 34 Pac. 105; *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695; *People v. Bishop*, 81 Cal. 116, 22 Pac. 477; *People v. Baird*, 104 Cal. 462, 38 Pac. 310. The case of *People v. Wong Ah Leong*, supra, is particularly in point. There a defendant, who was charged with an assault with a knife, was compelled in cross-examination to testify about a loaded pistol that he had on his person when the assault was committed, although he had not testified about such pistol in his direct examination. Other witnesses, however, had testified to the fact that he did have such pistol. For this violation of the defendant's constitutional right the judgment of conviction was reversed. We are unable to distinguish the case at bar from the case above cited. In neither case had the defendant in his direct examination testified about the pistol about which he was compelled to testify in cross-examination. In the case at bar no evidence had been given about such pistol. This loaded pistol was brought into the case only through the questions objected to. The admission of this evidence was clearly erroneous, and the error was emphasized by the district attorney in his argument, when he urged that defendant had an arsenal in his house, mentioning the shotgun and the two pistols, and that he kept the weapons for the purpose of doing murder.

We think the court also erred in overruling objections to the following questions asked of the witness Eells by the prosecution on

cross-examination: "Q. Could you say whether or not he was a man of violent temper? Q. Was he not a man of violent temper?" The witness had testified to defendant's drinking habits, but had given no evidence that would warrant an attack upon his character such as is involved in the above questions. Defendant had not offered evidence of good character for peace and quietness, and in the absence of such evidence the prosecution may not blacken the character of a defendant by showing that he has a violent temper. *People v. Gordon*, 103 Cal. 573, 37 Pac. 534. The answers of the witness were such as probably precluded any injury to defendant's cause. Nevertheless the questions should not have been allowed, and upon a retrial should be avoided.

The court should also have sustained defendant's objections to certain questions put to the defendant on cross-examination, having for their purpose to prove that he was in the habit of having women in his rooms at all hours of the night drinking liquors. The manifest purpose of these questions was to show that defendant was an immoral and dissolute person, and thus to excite in the minds of the jury a prejudice against him for matters in no way connected with the homicide for which he was being tried; and this is the use the district attorney made of this evidence on this subject in his argument to the jury. He there argued that defendant kept large quantities of whisky and brandy in his room "which which to ply and debauch women who visited him at all hours of the night," and that "he kept a regular harem there." The objections to the questions touching his drinking with women should have been sustained. *People v. Lee Dick Lung*, 129 Cal. 493, 62 Pac. 71; *People v. Wallace*, 89 Cal. 161, 26 Pac. 650; *People v. Webster*, 89 Cal. 573, 26 Pac. 1030.

It is also claimed that the court erred in refusing certain instructions requested by defendant. We think, however, that the subject-matter of the instructions refused were sufficiently covered by instructions given.

For the errors above noted, however, the judgment and order are reversed, and the action remanded for a new trial.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 571

GAGOSSIAN v. ARAKELIAN et al.
(Civ. 538.)

(Court of Appeal, First District, California.
Dec. 23, 1908.)

1. QUIETING TITLE (§ 20*)—STATUTORY ACTION FOR DETERMINING ADVERSE CLAIM—GROUNDS OF ACTION—OBLIGATION BETWEEN PARTIES.

Code Civ. Proc. § 1050, authorizes an action to determine an adverse claim for money or

property upon an alleged obligation. The complaint alleged that the owner of a stock certificate transferred it to plaintiff, that thereafter a judgment was recovered against his transferor and the stock certificate was sold under execution to defendant, the sheriff executing a certificate of sale and notifying the corporation that defendant was the owner of the stock certificate, whereby defendant has prevented the issuance of a certificate to plaintiff, and the prayer was that title to the certificate be determined and ownership adjudged in plaintiff. *Held*, that the statute authorized an action in the nature of a bill quia timet to prevent future probable injury to the parties' rights, and to determine an adverse claim upon an alleged obligation between the parties, and, since the complaint did not allege an obligation between the parties, it did not state a cause of action under the statute.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 20.*]

2. QUIETING TITLE (§ 34*)—PLEADING—SUFFICIENCY—QUIA TIMET BILL.

The complaint did not state a good bill quia timet, not having alleged that plaintiff feared injury by the vexatious use of the certificate by defendant, or that he might use it against her if evidence to impeach it was lost, or that it constituted a cloud on her title.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 34.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Hanum Gagossian against Harry Arakelian and another. From a judgment for plaintiff, the defendant named appealed. Reversed.

M. F. McCormick, for appellant. A. M. Drew, for respondent.

KERRIGAN, J. A demurrer to the complaint was overruled. The case was dismissed as to all the defendants except Harry Arakelian. After trial the judgment went against him in favor of the plaintiff. This appeal is from the judgment on the judgment roll.

Plaintiff alleges, and the court found, that on June 26, 1905, S. A. Gagossian was the owner of a certificate of membership No. 67 issued by the Grocers' Winery & Distillery Association of Parlier, a corporation organized under the co-operative incorporation laws of California; that on said day he sold, assigned, and conveyed all his right, title, and interest in said certificate of membership to the plaintiff, who ever since has been and now is the owner thereof. The complaint also alleges, and the court found, that on November 20, 1905, John Arakelian recovered a judgment for a substantial sum against S. A. Gagossian; that thereafter, an execution having been issued, and levied on this certificate No. 67, it was sold, and the sheriff executed a certificate of sale of the interest of S. A. Gagossian to the purchaser Harry Arakelian, and notified the corporation that the latter was the owner and entitled to the possession of said certificate; that by reason of these facts Harry Arakelian has prevented,

and still prevents, the issuance of a new certificate of membership by the said corporation to said plaintiff. The prayer of the complaint is as follows: "Wherefore plaintiff prays for the judgment of this court determining the title to the said certificate, and adjudging that the said certificate No. 67 * * * is the property of this plaintiff, and that the said defendant Harry Arakelian has no estate, right, title or interest in or to the said certificate of membership."

Appellant contends that this is an attempt to maintain an action to quiet title to personal property; that such an action is not authorized under the practice in this state (Code Civ. Proc. § 738; *Fudickar v. East Riverside Irrigation District*, 109 Cal. 29, 41 Pac. 1024), and that therefore the demurrer to the complaint should have been sustained. Respondent, on the other hand, contends that this is an action under the provisions of section 1050 of the Code of Civil Procedure. We think with the appellant that the complaint does not state a cause of action. Section 1050 of the Code of Civil Procedure reads: "An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as surety." This section provides for an action in the nature of a bill quia timet, the object of which is to prevent a party from anticipated future probable injury to his rights or interests, as, for example, when it is sought to cancel an instrument which creates at least a prima facie liability against the plaintiff, or constitutes a cloud on his title to property, or where a surety is fearful of injury from neglect of his principal to pay the debt. The section quoted incorporates into the Code only part of this remedy. Under its provisions, as we read it, one may maintain an action against another to determine an adverse claim upon an alleged obligation existing between them. In this case the claim is adverse, but it is not upon an obligation between the parties, but is an obligation or duty of a third party to one of them. Hence we think the section is not broad enough to cover this case. Nor do the facts alleged in this case constitute a good bill quia timet. Among other things the respondent does not allege that she apprehends danger to her property, in that the instrument held by appellant may be vexatiously or injuriously used against her when the evidence to impeach it may be lost, or that it throws a cloud or suspicion over her title. 2 Story, Eq. Jur. § 694. All she complains about is that the corporation, because of the claim made against it by the appellant, refused to recognize her as the legal holder of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the certificate of membership No. 67. While the respondent may have a good cause of action against the corporation, the findings do not show that she is entitled to any relief against the appellant.

The judgment is reversed.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 624

EDDY v. AMERICAN AMUSEMENT CO.
(Civ. 598.)

(Court of Appeal, Second District, California.
Dec. 31, 1908.)

1. EVIDENCE (§ 459*)—PAROL EVIDENCE—CAPACITY OF CONTRACTING PARTY.

Plaintiff, an acrobatic performer, signed a written contract for services at \$250 per week, board, and transportation during the regular traveling season of 1907, agreeing to give two acts, and "none of the Eddy family to go in entry or parades, the Eddy family to have a real stateroom, large enough for all of the family in the Pullman sleeping car," and their engagement to be not less than 30 weeks. The contract was signed "William Eddy for Eddy family party of the second part." Held, that since the provisions with reference to the Eddy family might be eliminated, and leave a complete contract between plaintiff and defendant, parol evidence was admissible to show whether plaintiff's signature was as principal or agent for the Eddy family, though the instrument was sufficiently clear to bind plaintiff as agent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2112; Dec. Dig. § 459.*]

2. EVIDENCE (§ 459*) — PAROL EVIDENCE — WRITTEN CONTRACT.

It is no contradiction to a written contract, which is silent as to the fact, to prove by parol that a party is acting therein, not on his own behalf, but for another.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2112; Dec. Dig. § 459.*]

3. CONTRACTS (§ 179*)—CONSTRUCTION—PARTIES—PRINCIPAL AND AGENT.

Proof that a written contract was signed by one of the parties as agent for another, and not in his own behalf, did not release the agent, but bound the principal.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 179.*]

4. PLEADING (§ 225*)—AMENDMENT—ABUSE OF DISCRETION.

Where plaintiff sued in his own name for breach of an employment contract which he had signed "William Eddy for Eddy family, party of the second part," the denial of plaintiff's request for leave to amend, after sustaining a demurrer to the complaint because of the ambiguous form of the signature and the consideration of the references in the contract to the Eddy family, was an abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 575; Dec. Dig. § 225.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by William Eddy against the American Amusement Company. From a judgment sustaining a demurrer to plaintiff's complaint without leave to amend, he appeals. Reversed.

Elon G. Galusha, F. E. Davis, and J. W. Cochran, for appellant. George J. Denis and Denis & Loewenthal, for respondent.

TAGGART, J. Action for damages for breach of contract. Demurrer to complaint was sustained without leave to amend, and judgment entered in favor of defendant.

The complaint alleges: The making of an agreement between plaintiff and defendant on December 1, 1906, whereby the former, in consideration of the payment to him of a salary of \$250 per week, board, and transportation, agreed to furnish to and perform at each performance given by the latter during the regular traveling season of 1907: "Two acts (only), high wire act, acrobatic act, and none of the Eddy family to go in entry or parades. The Eddy family are to have a real stateroom large enough for all the family in the Pullman sleeping car, and their engagement for the season of 1907 is not to be less than (30) thirty weeks (guarantee)," etc. That before the time when plaintiff was to commence to perform such duties under the contract, to wit, on or about January 24, 1907, defendant repudiated the contract. That it was then too late for plaintiff to procure employment elsewhere for the season of 1907. That he had not been able to do so, and had expended \$400 in preparation to perform his part of the contract, and which he is ready, willing, and able to do, but that defendant refuses to permit him. Alleges that two weeks' salary is due under the contract, or \$500, and further damage in the sum of \$7,000. The copy of the contract attached to the complaint shows it to have been signed, "Wm. Eddy for Eddy family, party of the second part." The demurrer goes to the capacity of plaintiff to sue, defect of parties plaintiff because the "Eddy family" is not joined, misjoinder of causes of action, to wit, of an action for wages with an action for breach of contract, ambiguity, uncertainty, and unintelligibility arising from the failure to clearly allege either of said causes of action, and from the failure to clearly specify whether the contract is that of plaintiff or the contract of the "Eddy family." The defects upon which these several special grounds of demurrer are predicated are also urged to sustain the general ground that there is no cause of action stated on behalf of plaintiff because of the uncertainty of the terms of the contract pleaded, and because the signature of plaintiff thereto is as agent of the "Eddy family," and there is no obligation on the part of the latter to do or perform any act thereunder.

If the words "for the Eddy family" were eliminated from the signature, and the words, "none of the Eddy family to go in entry or parades," and the language relating to the stateroom in the Pullman and the word "their," before "engagement," left out of

consideration, the contract would be, as appellant claims, a straight contract between appellant and respondent. As to the words following the signature of "Wm. Eddy," there is nothing in the contract requiring the "Eddy family" to perform any act or do anything which can be construed to be a consideration for the payment to plaintiff of the salary, board, and transportation agreed to be paid to, and furnished for, him by respondent. The reservations as to the "Eddy family" are all matters which might be construed to relate to the accommodation of plaintiff's family when accompanying him on his travels and showing, not that they were to do any act in respondent's show, but that they were not to do certain things. The instrument, in its body, purports to be a contract between appellant and respondent, and contains no covenants which compel the construction that the "Eddy family" are parties to the contract. The question, then, of whether the signature is that of William Eddy as principal, or as agent for the "Eddy family" is one of fact which may be established by parol evidence. The rule is well settled that where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for and on behalf of a principal, or discloses an intent to bind such principal, or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear to bind the agent. It is no contradiction of a contract, which is silent as to the fact, to prove by parol that a party is acting therein, not on his own behalf, but for another. It does not release the agent, but binds the principal in addition to the agent. *S. P. Co. v. Von Schmidt*, 118 Cal. 368, 371, 50 Pac. 650; *McCormick v. Stockton, etc., R. R. Co.*, 130 Cal. 100, 62 Pac. 267.

The only ground of demurrer upon which the ruling of the trial court can be sustained, if it can be sustained at all, is that of uncertainty. This arises from the ambiguous form of the signature to, and the consideration of the references in, the contract upon the theory that it is signed "for the Eddy family." As this uncertainty may be entirely removed by parol evidence, it cannot be said that the complaint cannot be amended to show who was the real party of the second part in the contract, and therefore, in so far as the order denied the plaintiff leave to amend, we think the discretion of the trial court was abused. If the cause of action be made certain in favor of the plaintiff alone and so established by evidence, he would be entitled to recover; and, if the contract were in fact made on behalf of the "Eddy family," this question would be squarely presented by an amendment to that effect, and the cause could thereby be determined on its merits.

Judgment reversed, and cause remanded, with instructions to the trial court to vacate its order sustaining the demurrer without leave to amend, and in lieu thereof to enter an order sustaining the demurrer with leave to amend in 10 days.

We concur: ALLEN, P. J.; SHAW, J.

MEMORANDUM DECISIONS.

155 Cal. 102

AUZERAIS v. COFFEY, Judge of Superior Court. (S. F. 5,093.) (Supreme Court of California. Jan. 4, 1909.) In Bank. Application by Leonide G. Auzeais for a writ of mandate to J. V. Coffey, Judge of the Superior Court of the City and County of San Francisco. Transferred from District Court of Appeal on denial. Denied. J. J. Lermen, for plaintiff. J. V. De Laveaga and E. De Los Magee, for respondent.

PER CURIAM. This is an application for a writ of mandate requiring the defendant, a judge of the superior court, to grant to the plaintiff permission to institute an action against E. J. Le Breton, as receiver of the California Safe Deposit & Trust Company, an insolvent corporation. The proceeding was instituted in the District Court of Appeal for the First Appellate District, and, after judgment by that court denying the application for a writ, the matter was ordered transferred to this court for determination. The facts here presented differ in no essential respect from those which were before us in *De Forrest v. Coffey*, 98 Pac. 27, decided since the making of the order transferring this proceeding from the District Court of Appeal, and on the grounds set forth in the opinion there filed it must be held that the superior court did not abuse its discretion in denying leave to sue the receiver. It is ordered that the application for a writ of mandate be denied.

BEATTY, C. J., dissents.

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SOUZA v. LUCAS et al. (Civ. 590.)

(Court of Appeal, Second District, California.
Dec. 31, 1908. Rehearing Denied by
Supreme Court March 1, 1909.)

1. CHATTEL MORTGAGES (§ 22*) — MORTGAGES
ON GROWING CROPS—VALIDITY.

A chattel mortgage on growing crops, given as security for a note, and for such other sums as might be advanced, or merchandise sold to the mortgagor, during the continuance of the mortgage not to exceed a specified amount, is valid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 68; Dec. Dig. § 22.*]

2. CHATTEL MORTGAGES (§ 249*) — FORE-
CLOSURE.

Where the sheriff attempted to levy an attachment on mortgaged chattels, but failed to comply with Civ. Code, § 2969, providing that before mortgaged chattels are taken under attachment, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or deposit the amount thereof, such attempted levy did not impair the right of the mortgagee to pursue the remedy in equity given by section 2967, authorizing a mortgagee to foreclose the mortgagor's right of redemption, etc., provided a judgment in such foreclosure might be carried out, though the sheriff was liable for a conversion.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 249.*]

3. CHATTEL MORTGAGES (§ 249*) — FORECLO-
SURE — TORTIOUS REMOVAL OF MORTGAGED
CHATTELS.

The tortious removal, from the premises, of crops mortgaged does not impair the mortgagee's right to foreclose.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 249.*]

4. ATTACHMENT (§ 1*) — COMPLIANCE WITH STATUTE—NECESSITY.

Proceedings by attachment are statutory, and the provisions of the statute must be strictly pursued, or no rights will be acquired thereunder.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

5. ATTACHMENT (§ 164*) — STATUTORY PROCEEDINGS—NONCOMPLIANCE.

Civ. Code, § 2969, providing that, before mortgaged chattels may be taken under an attachment, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or deposit the amount thereof, etc., measures the power of the officer in effecting a legal attachment; and, when the conditions are not observed, the writ affords no justification, and neither the officer nor the creditor acquires any lien on the property.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 472; Dec. Dig. § 164.*]

6. CHATTEL MORTGAGES (§ 284*) — FORECLOSURE—PARTIES IN INTEREST.

One acquiring no lien by a levy of an attachment on mortgaged chattels because of a failure to comply with Civ. Code, § 2969, cannot complain of the action of the court, in foreclosure by the mortgagee, in allowing advances made under the mortgage to be charged against the mortgagor.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 284.*]

7. ALTERATION OF INSTRUMENTS (§ 20*)—CHATTEL MORTGAGES—ALTERATION IN NOTE SECURED—EFFECT.

The fact that a note secured by a chattel mortgage was, after execution of the mortgage, altered by adding thereto the name of the wife of the mortgagor did not affect the lien of the mortgage, nor the right of the mortgagee by foreclosure to proceed only against the mortgagor.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. § 160; Dec. Dig. § 20.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by A. T. Souza against Frank G. Lucas and others. From a judgment for plaintiff, defendants Sinsheimer Bros., and another appeal. Affirmed.

R. V. Bouldin and C. P. Kaetzel, for appellants. C. U. Armstrong and Paul M. Gregg, for respondent.

ALLEN, P. J. Appeal by defendants Sinsheimer Bros. and McFadden from a judgment in favor of plaintiff, and from an order denying a new trial.

The complaint was one for the foreclosure of a chattel mortgage theretofore given upon a growing crop of hay, barley, and beans by defendant Lucas to plaintiff as security for a note of \$600, and such other sums of money as might thereafter be loaned or advanced, or merchandise sold to, or for account of, said mortgagor during the continuance of the mortgage, not to exceed \$1,000, exclusive of the amount mentioned in the promissory note. The complaint alleges facts showing the due execution of the mortgage, the affidavit required by statute,

and its recordation; further, that a part of the growing crop, to wit, the beans, while on the premises where grown, was seized by defendant McFadden as sheriff, in a certain attachment proceeding instituted against Lucas by Sinsheimer Bros., and the beans which had been thrashed and upon the ground were seized by the sheriff without tender to the mortgagee of the amount of the mortgage, or by deposit with the county clerk or treasurer of the amount, as provided by section 2969, Civ. Code. It is further alleged that defendants Sinsheimer Bros. and McFadden still retain possession of said beans, and claim some interest in said mortgaged property under such attachment, which claim is subsequent and subordinate to plaintiff's claim under the mortgage. It is alleged that certain advances, aggregating \$372.73, have been made by plaintiff to Lucas under the terms of said mortgage, and that the note and the advances remain unpaid. The usual prayer for relief is found. Defendants demurred to the complaint generally, and because of a misjoinder of causes of action, which demurrer was overruled. The defendants who appeal filed a joint answer, denying specifically most of the allegations of the complaint, admitting, however, the seizure of the crop of beans under the writ, and that they claim an interest therein, but allege that the same is superior in right to the mortgage. The court found all of the allegations of the complaint to be true, except as to the amounts unpaid; that the mortgage was made in good faith, without any design to hinder, delay, or defraud creditors; that the claim of lien under the attachment was subordinate to the mortgage, and directed a sale of the property described in the mortgage, which included the beans, and the application of the proceeds so far as required to the payment of the judgment and costs.

It is appellants' contention that the complaint is insufficient, in that facts are not stated to entitle plaintiff to any relief, and further that there was a misjoinder of an action to foreclose with an action for conversion of the property mortgaged. With this we do not agree. The complaint sets out such a mortgage as under the laws of this state may be executed and enforced. The default which entitled plaintiff to a decree, and the subordinate character of the claim of the other defendants are made to appear. The mere fact that the sheriff, in violation of section 2969, Civ. Code, attempted to levy and remove a part of the property from the premises where it was raised, did not impair plaintiff's right to foreclose. It is true that such wrongful act upon the part of the sheriff would render him liable as in conversion, but plaintiff may nevertheless elect to pursue the remedy in equity guaranteed by section 2967, Civ. Code, when it is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made to appear that the judgment and decree of the court in such foreclosure can be carried into effect. There is nothing in the complaint indicating an attempt upon the part of plaintiff to enforce any right against the sheriff for the conversion, nor allegations which would warrant a judgment against him for the value of the property taken. The levy of the writ of attachment, under the circumstances of the case, placed the sheriff, and the creditor for whom he was acting, in no better position than that which would be occupied by any other trespasser who might surreptitiously remove from the premises a portion of a crop covered by a chattel mortgage. The tortious removal from the premises where raised does not impair the mortgagee's right. *Chittenden v. Pratt*, 39 Cal. 183, 26 Pac. 626. Proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed or no rights will be acquired thereunder. *Gow v. Marshall*, 90 Cal. 567, 27 Pac. 422. The provisions of the statute, which require the tender of payment into the hands of the county clerk or treasurer of the amount of the debt secured by chattel mortgage before levy can be made, measure the power of the officer in effecting a legal attachment. When these conditions are not observed, the writ affords no justification, and the officer becomes a wrongdoer. Neither the sheriff nor the judgment creditor by such attachment acquired any lien upon the property. Appellants, then, having no lien or legal right to the property in controversy in this proceeding, the action of the court in allowing certain advances to be charged was a matter which did not concern appellants as parties to the proceedings, and of which they cannot be heard to complain upon this appeal.

It is further urged by appellants that there was a material variance in the proof, in that the note offered in evidence was not the same note set out in the complaint or in the chattel mortgage, for the reason that the note offered in evidence bore the signature of Emelia Lucas, the wife of Frank G. Lucas, in addition to that of the husband. It will be observed, however, that the answer admits the execution of the mortgage as described in said complaint, which mortgage describes the note which the court finds was executed. While it may be true that the wife, subsequent to its execution, signed the note as surety, such signing would have no effect, there being no pretense of any consideration going to the wife on account of the same; and, in any event, the additional name of the wife on the note after the execution of the mortgage, the alteration not being material, would not affect or impair the lien of the mortgage, nor affect the right of the plaintiff in seeking relief by foreclosure of the mortgage to proceed only against

the principal and the property covered by the mortgage.

The court properly denied the motion for nonsuit and rendered a proper decree in the premises.

The judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 628

EICHELBURGER et al. v. MILLS LAND & WATER CO. et al. (Civ. 611.)

(Court of Appeal, Second District, California.
Dec. 31, 1908. Rehearing Denied
Jan. 30, 1909.)

1. VENDOR AND PURCHASER (§ 44*)—FRAUDULENT REPRESENTATIONS—PRESUMPTIONS.

Representations, made by a vendor prior to the purchase, are presumptively made with the design of inducing the purchaser to enter into the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 71; Dec. Dig. § 44.*]

2. VENDOR AND PURCHASER (§ 37*)—MISREPRESENTATIONS—RELIANCE.

Since the owner of real estate is presumed, in the absence of a showing to the contrary, to know the boundaries and area of the land, a purchaser may rely on his representations as to acreage or dimensions.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 55; Dec. Dig. § 37.*]

3. VENDOR AND PURCHASER (§ 37*)—MISREPRESENTATIONS—RELIANCE.

A purchaser is warranted in relying on the representations of the vendor as to acreage of the land, in the absence of inquiry or knowledge as to the true dimensions, though he was shown the land and its boundaries, and had the opportunity to measure it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 55; Dec. Dig. § 37.*]

4. VENDOR AND PURCHASER (§ 37*)—MISREPRESENTATIONS—RELIANCE.

Where a map exhibited to a purchaser did not correctly describe the land which the vendor proposed to sell, nor show any facts indicating that the vendor's representations as to the dimensions thereof were false, the map did not disclose facts which would lead a prudent man to believe that the land was not as represented, and the purchaser might rely on the representations.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 55; Dec. Dig. § 37.*]

5. CONTRACTS (§ 94*)—FRAUD—MEANS OF KNOWLEDGE.

The rule that means of knowledge is equivalent to knowledge, and that one having the opportunity, and knowing the facts constituting the fraud of which he complains, cannot be inactive and afterwards allege a want of knowledge arising by reason of his own laches applies to a determination of whether or not an action has been brought within the time limited after the discovery of the fraud, but has no application to the right of a party to a cancellation of his contract on the ground of fraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 424, 425; Dec. Dig. § 94.*]

6. CONTRACTS (§ 94*)—FRAUD—RELIANCE.

Equity will not withhold relief from parties ignorant of the true condition who, relying on false representations as to material facts made for the purpose of inducing assent, are thereby inveigled into contracts, on the ground

that there were circumstances calculated to arouse suspicion and cause an investigation whereby they might have discovered the fraud, and the liability of the adverse party arises from his own fraud, unaffected by the question of diligence on the part of the one seeking relief.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 424, 425; Dec. Dig. § 94.*]

7. CONTRACTS (§ 94*)—FRAUD—LOSS OR DAMAGE.

Fraud, to warrant the rescission of a contract, must be accompanied by some appreciable loss or damage.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420, 421; Dec. Dig. § 94.*]

8. CANCELLATION OF INSTRUMENTS (§ 53*) — FINDINGS.

Where, in a suit to rescind a contract to purchase land, the answer negatived the complaint, which alleged that the vendor represented the land to be 270 feet in width, while it did not exceed 170 feet, a finding that the land was less than 270 feet, without indicating even approximately the width thereof, except as shown by a finding that the tract was 1,400 feet long, bordering on the ocean, and that the same had a width at one end of about 168 feet, and a width at the other end of about 170 feet, measured at each end thereof to the point of extreme reach of the wash of the waves, and that the width of the land to the highest point of tide level was approximately 35 feet more at one end and 55 feet more at the other end, was insufficient on which to grant relief, for it could not be determined whether the deficiency in width occasioned appreciable damage to the purchaser, or occasioned a material failure of consideration.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 109-111; Dec. Dig. § 53.*]

9. EVIDENCE (§ 8*)—JUDICIAL NOTICE—TIDES.

The law notices the high spring tides, which are the fluxes of the sea at those tides which happen at the two equinoctials, the spring tides, which happen twice every month at the full and change of the moon, and the neap or ordinary tides, which happen at the change and full of the moon twice in 24 hours.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 7; Dec. Dig. § 8.*]

10. NAVIGABLE WATERS (§ 36*) — "TIDE LANDS."

"Tide lands" are such as are covered and uncovered by the flow and ebb of the ordinary or neap tides, and constitute the seashore over which the state exercises control and ownership by virtue of its sovereignty, and land extending to the line indicated by high-water mark at ordinary or neap tide is the subject of private ownership.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

For other definitions, see Words and Phrases, vol. 8, p. 6970.]

11. BOUNDARIES (§ 15*)—LAND BORDERING ON OCEAN.

The line to which the flow of the water reaches at ordinary or neap tide, unaffected by wind or wave, constitutes the boundary line of land bordering on the ocean.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 108-117; Dec. Dig. § 15.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by F. W. Eichelberger and another against the Mills Land & Water Company

and another. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Reversed.

Percy R. Wilson and Oscar C. Mueller, for appellants. W. H. Anderson, Anderson & Anderson, and E. W. Sargent, for respondents.

SHAW, J. This is an action to rescind a contract made with defendant Mills Land & Water Company, whereby plaintiffs agreed for a stipulated sum, payable as therein specified, to buy certain real estate described in said contract, and to recover a cash payment made to said Mills Land & Water Company on account of said purchase; also to procure the repayment of certain moneys and the surrender and cancellation of certain notes paid to and deposited with defendant Title Guarantee & Trust Company (a corporation), to be held by it in escrow pending the consummation of such purchase. The contract was made on July 6, 1905, and the land is described therein as follows: "All of that certain said property of the party of the first part, being blocks numbered seven (7), eight (8), nine (9), ten (10) and eleven (11), as shown upon the copy of a map hereto attached and marked 'Exhibit A,' the said property being more particularly bounded and described as follows, to wit: A piece or parcel of land situated in the county of Orange, state of California, and being a portion of section 14, T. 6 S., R. 11 W., S. B. B. and M. Said piece or parcel of land being more particularly described as follows, to wit: Beginning at a point 157.8 feet north 53° 06' west of where the east line of section 14 is intersected by a line 30 feet northeasterly from and parallel to that certain strip of land 40 feet in width conveyed by the Stearns Rancho Company and Robt. J. Northam to the Santa Ana & Newport Railway Company by deed recorded in Book 44 of Deeds, Records of Orange County, California, at page 66 thereof; thence from said point of beginning north 53° 06' west on a line parallel to and 30 feet northeasterly from the northeasterly line of said strip of land 40 feet in width, 1,400 feet to a point; thence south 36° 54' west 270 feet a little more or less to the Pacific Ocean; thence easterly along the Pacific Ocean 1,400 feet to a point; thence northeasterly 270 feet a little more or less to the point of beginning. The foregoing description to be made more certain by survey of the property to be hereafter had." The contract called for the payment of \$1,000 in cash (which was duly paid), and specified that the balance of the purchase price should be in cash, and promissory notes of plaintiffs, paid and delivered upon deposit of the contract and necessary instructions and escrow papers with said Title, Guarantee & Trust Company. By the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract the Mills Land & Water Company covenanted that it would, on or before six months from the date thereof, convey the property therein described to plaintiffs, free and clear of any incumbrances other than as therein mentioned, provided "that in the event for any reason the party of the first part [Mills Land & Water Company] should be unable within six months from the date hereof to furnish the party of the second part a clear title to said property, the party of the second part shall have the option of rescinding this contract and of recovering from the party of the first part all payments with legal interest made hereunder, but the party of the first part shall not be held to any other or further liability in the premises than the return of such payments." The grounds upon which plaintiffs base their right to a rescission are: First, a partial, though substantial, failure of consideration; second, that the execution of the contract on their part was procured by false and fraudulent representations, made to them by the defendant Mills Land & Water Company as to the quantity of land contained in the tract of real estate so purchased by them, and upon which representations they relied, believing them to be true, and without which they would not have made said purchase. Both contentions are based upon the alleged fact that the defendant Mills Land & Water Company, prior to the execution of the contract, represented to plaintiffs that the land in question consisted of a tract 1,400 feet in length and 270 feet in width, which dimensions, a little more or less, were likewise called for and specified in the contract; that as a matter of fact said tract of land so owned by the Mills Land & Water Company, and all which it was able to convey, did not exceed 170 feet in width by 1,400 feet in length. The court made its findings of fact, from which, as a conclusion of law, it found that plaintiffs were entitled to take nothing, and thereupon gave judgment for defendants. Plaintiffs appeal from the judgment, and an order denying their motion for a new trial.

The court made findings from which it appears that defendant Mills Land & Water Company, pending the negotiations which culminated in the making of the written contract to purchase, represented to plaintiffs that it was the owner in fee simple of the unincumbered title to the land in question, which consisted of a tract 1,400 feet in length bordering upon the Pacific Ocean, by a width of 270 feet, a little more or less; that at the time it made the representations said defendant had knowledge of the fact that said tract of land which it had agreed to convey was not of the dimensions as represented by it, and said defendant knew it could not convey title thereto; that relying upon said representations, and not otherwise, plaintiffs agreed to purchase said land; that they would not have purchased the same had they known said tract was less than as repre-

sented by said defendant; that pursuant to said agreement the parties entered into a written contract, wherein said land was particularly described in accordance with the representations as to the area thereof so made by said defendant, to which contract was attached a map upon which was delineated the blocks specified in the general description contained in the contract; that notwithstanding the fact that said defendant had knowledge that said tract of land was less than of the dimensions so represented by it, and so specified in said contract, it presented to plaintiffs a certificate of title containing a map falsely showing a tract of land of the dimensions called for in said contract, and by such presentation of such certificate falsely represented to plaintiffs that said tract of land was of the dimensions specified in said contract, and that it had title to and was able to convey the same. The plaintiffs did not learn that the tract of land owned by said defendant, and which they agreed to purchase, was of less dimensions than as described in the contract until after the execution thereof, and that plaintiffs did not know the dimensions of said tract of land nor anything regarding the dimensions thereof other than the facts stated to them by said defendant, except the knowledge which plaintiffs obtained by being shown the monuments, physical features and marks upon the ground. It further appears that the tract of land is situate between the Pacific Ocean and the right of way of the Los Angeles Interurban Railway, the line of which right of way was fixed, easily visible and ascertainable, and that upon said land were monuments and marks whereby the boundaries of said tract could be shown or disclosed, and other physical features easily discernible and in plain view, and that plaintiffs prior to the execution of the contract visited the land, and were shown the boundaries thereof, and had opportunity to observe, measure, and ascertain the true dimensions of the tract of land; that there was shown to plaintiffs a map like the one attached to said contract but said map did not correctly represent the quantity and extent of said land.

Appellants contend that the findings clearly disclose actual fraud on the part of defendant, within the meaning of section 1572, Civ. Code, which section defines actual fraud as consisting of "any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, by one having knowledge or belief of the fact." This contention may be accepted as correct. Indeed we do not understand that respondents controvert the proposition. Section 1689 of the Civil

Code provides that a party to a contract may rescind if his consent thereto was obtained by fraud. Section 1568, Civ. Code, provides that consent is deemed to have been obtained through fraud "only when it would not have been given had such cause [fraud] not existed." Counsel for respondents contend that plaintiff's consent to the contract was not induced by fraudulent representations found to have been made by defendant, but that said contract was made by plaintiffs without regard to defendants' representations. In other words, plaintiffs did not act upon defendants' statements as to the dimensions of the tract of land, but visited the land, upon which, as found by the court, were monuments and marks whereby the boundaries of said tract could be shown or disclosed, and that plaintiffs were shown the land, and had opportunity to observe, measure, and ascertain the true dimensions thereof. While plaintiffs could have ascertained the dimensions of the tract from these monuments and physical marks upon the land, and had opportunity so to do, it clearly appears from the findings that they did not avail themselves of such opportunity, for the court expressly finds, "that the plaintiffs did not, nor did either of them, know the dimensions of said land, nor anything regarding the dimensions thereof other than the facts stated as aforesaid to them by defendant Mills Land & Water Company, and other than the knowledge which the plaintiffs obtained by being shown the monuments, physical features and marks upon the ground." These monuments, physical features and marks upon the ground so found to have been shown to plaintiffs did not convey to them any information as to the fact that the parcel of land was of less dimensions than as represented by defendant, or described in the contract; for the court finds "that plaintiffs would not have purchased said property described in said contract had they known that said tract of land was less in area than as represented by said defendant Mills Land & Water Company." The effect of these findings is that plaintiffs, instead of measuring the land, and for themselves ascertaining the dimensions thereof, as they could have done, chose rather to rely upon the representations of defendant in relation to the same. Were they justified in so doing? As the representations were made prior to the transaction, and directly related to it, it must be presumed that they were made for the purpose and with the design of inducing plaintiffs to enter into the contract. Pomeroy's Eq. Jurisp. § 880. As a general rule the owner of real estate, in the absence of facts showing the contrary, is presumed to know the boundaries and area of his land, and a buyer is warranted in relying upon his representations in respect to such facts. It is immaterial whether the representations as to area be as to acreage or dimensions.

In the case of *Roberts v. French*, 153 Mass.

60, 26 N. E. 416, 10 L. R. A. 656, 25 Am. St. Rep. 611, it was represented to the purchaser that one of the lines of a parcel of land was 107 feet long, whereas it was only 95½ feet long. In discussing the effect of this representation the court says: "The statement of the length was a statement, as of the party's own knowledge, of the kind which our decisions pronounce fraudulent. * * * When a man conveys the 'notion of actual admeasurement,' * * * his statement has a stronger tendency to induce the buyer to refrain from further inquiry than a statement of the contents of a lot without giving grounds for the estimate." In *Stevens v. Giddings*, 45 Conn. 507, the line of a lot was represented as being 100 feet, whereas it was only 95½ feet. In its opinion the court says: "The controlling factor in this case is that there was a material deficiency in the quantity of land sold. * * * It would be altogether unusual for the purchaser to measure the depth of a lot after the seller by his circular had represented it to be of a certain depth, and his agent * * * had positively asserted at the time of the sale that it was of that depth. * * * We think the defendant had the right to rely on the representations of plaintiff and on the declarations of the auctioneer." In *Lynch v. Mercantile Trust Co. (C. C.)* 18 Fed. 486, it is said: "The owner of property, when he sells, is presumed to know whether the representation which he makes about it is true or false, and the positive statement thus made of a material fact, if false, is a fraud in law. A purchaser trusts in the owner's statements, and the law will assume that the owner knows his own property and truly represents it." In *Quarg v. Scher*, 136 Cal. 406, 69 Pac. 96, the contract described the land by metes and bounds, and as "containing about forty acres, more or less." It was afterwards ascertained by survey that the acreage in the tract was but 23½ acres. The court in rendering its opinion said: "It is next insisted that the defendant saw the land and inspected in before making the contract, and, having every opportunity to learn of the quantity of the land, he had no right to take the word of plaintiffs on the question of quantity; in other words, that the rule of caveat emptor applies to the case. This contention is not well founded. The defendant had a right to rely on plaintiffs' representation as to the quantity of land. The acreage of land is a thing that cannot be seen with the eye at a glance, but can only be ascertained with accuracy by scientific measurement, and when a vendor states to a vendee the amount of land in the tract which is the subject of the sale, such vendor will not thereafter be heard to say in a court of equity the vendee had no right to believe him. *Pringle v. Samuel*, 1 Litt. (Ky.) 43, 13 Am. Dec. 214." In the absence of any inquiry instituted by plaintiffs for the purpose of ascertaining the dimensions of the land, and in the absence

of knowledge as to the true dimensions, both of which facts appear from the findings, plaintiffs were warranted in relying upon the representations in that regard made to them by the seller Mills Land & Water Company. *Wainscott v. Occidental, etc., Ass'n*, 98 Cal. 253, 33 Pac. 88. As said by Mr. Pomeroy in his work on Equity Jurisprudence (section 895): "The mere existence of opportunities for examination or of sources of information is not sufficient"; and, further, quoting from the same section: "An opportunity or means of obtaining knowledge is not enough."

Respondents further insist that the facts disclosed by the map found by the court to have been shown plaintiffs, a copy of which was attached to the contract, were such as to indicate to them as reasonably prudent men that the tract of land was not as represented and described in the contract; that, notwithstanding the fraudulent representations, such map and the facts disclosed thereby was a warning which they neglected to heed, and hence they should not afterwards be heard to complain, for the reason that their own conduct contributed to the injury. Reference to this map discloses that delineated thereon are blocks 7, 8, 9, 10, and 11, designated in the general description contained in the contract to which it was attached; that these blocks were 250 feet in length, measured substantially parallel with the line of the beach, and of a width of 170 feet; that they were separated by unmarked spaces (presumably streets) 25 feet in width and of a length corresponding with the width of the blocks; that on the ocean side of said blocks was a space of 10 feet as indicated, marked "Board walk," between which and the water line was an unmarked space of 20 feet. On the other or land side of said blocks, extending the length thereof, was a strip of land, the width of which was 100 feet, measured from the boundary line of said blocks to a line marked, "Curve to connect proposed right of way," etc. This strip of land 1,400 feet in length and 100 feet in width was designated upon said map as "reserved for right of way for railroads." In view of the fact that the court found that this map did not correctly describe the land, that it is apparent that the subject of the contract was not five separate and distinct blocks 170 feet in width and of an aggregate length of 1,250 feet, and that no facts were shown by the map which would indicate that defendant owned less land than as represented, we are unable to find anything in connection therewith calculated to arouse suspicion on the part of plaintiffs as to the falsity of defendant's representations that it did own and was selling to plaintiffs a parcel of land of a width of substantially 270 feet, added to which is the fact that this general description by blocks is controlled by the more particular description following, whereby the tract is described by metes and bounds in full accordance with the representations theretofore made. In support of this con-

tention respondents cite *Dillman v. Nadlehoff*, 119 Ill. 567, 7 N. E. 88, but an examination of the opinion discloses that whatever may have been the representations as to the validity of the patents, which were the subject of the sale, the vendor inserted a clause in the contract to the effect that he did not warrant their validity, nor guarantee that they were not an infringement of existing patents. "It shows," says the court, "conclusively that the contingency of the patents ultimately proving to be invalid in law was in the minds of both contracting parties, and this was expressly provided for in the agreement." "In such case the seller cannot be held liable for a false representation where nothing appears to show, as is the case here, that the seller has been guilty of any artifice or other means to prevent the purchaser from examining and judging for himself." The case at bar is readily distinguished from that case in that the false representations as to dimensions were incorporated in the contract, and the representations were well calculated to prevent plaintiffs from making any surveys or investigation as to the true dimensions. It is true, as contended by respondents, that the courts of this state have said that "the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine and inactive and afterwards allege a want of knowledge that arose by reason of his own laches or negligence." *Shain v. Sresovich*, 104 Cal. 405, 38 Pac. 51; *Lady Washington C. Co. v. Wood*, 113 Cal. 487, 45 Pac. 809. But the question concerning which such statement was made was whether or not the action had been brought within three years after the discovery of the fraud. Hence this language can have no application to the case at bar. Courts of equity will not withhold relief from parties ignorant of the true condition who, relying upon false representations as to material facts made for the purpose of inducing assent, are thereby inveigled into contracts, upon the ground that there were circumstances calculated to arouse their suspicion and cause an investigation whereby they might have discovered the swindle. The liability of the defendant arises from its own fraud and false representations, and is unaffected by the question of diligence on the part of plaintiffs in availing themselves of the opportunity afforded for determining the size of the tract of land, or their failure to give heed to such warning as the exhibition of the map afforded of defendant's dishonesty. *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Wenzel v. Shulz*, 78 Cal. 221, 20 Pac. 404; *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. 736; *Merguire v. O'Connell*, 103 Cal. 50, 36 Pac. 1033; *Morris v. Courtney*, 120 Cal. 63, 52 Pac. 129; *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *Wilson v. Higbee* (C. C.) 62 Fed. 723; *Strand v. Griffith*, 97 Fed. 854, 38

C. C. A. 444; *Cawston v. Sturgis*, 29 Or. 331, 43 Pac. 656; *Steen v. Weisten* (Or.) 94 Pac. 834; *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *Cottrill v. Crum*, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549. While the findings do not support the judgment rendered by the court in favor of defendants, they are, by reason of the court's failure to find upon a material issue, likewise insufficient to support a judgment for plaintiffs.

The ground upon which the right to rescind is based is twofold, namely, on account of the fraudulent representations, and for a partial failure of consideration. Fraud, in order to warrant the rescission of a contract, must be accompanied by some appreciable loss or damage, for "courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral and involving no pecuniary or tangible injury" (*Wainscott v. Occidental, etc., Ass'n*, 98 Cal. 253, 33 Pac. 88); and, where the right to rescind is based upon a failure of consideration, such failure must be in a material respect (Civ. Code, subd. 4, § 1689). It is alleged in the complaint that the tract of land so represented to be 270 feet in width did not in fact exceed 170 feet in width, which allegation is negated by the averments of the answer. The court finds the tract of land to be less than 270 feet, but does not find as to the exact, or even approximate, width thereof. Hence it cannot be determined from the findings whether the deficiency in width so found to exist is such as to entitle plaintiffs to rescind the contract on account of appreciable loss or damage, nor whether the width is sufficiently less to constitute a material failure of consideration. It is true the court finds, by finding 8, the tract of land to be "1,400 feet long bordering upon the Pacific Ocean, and the same had a width at the westerly end of about 168 feet, and a width at the other end thereof of about 170 feet, measured at each end thereof to the point of extreme reach of the wash of the waves; that the width of said land to the highest point of tide level was approximately 35 feet more at the easterly end than the said width of 170 feet, and approximately 55 feet more at the westerly end than said width of 168 feet aforesaid." This is not a finding as to the width of the tract, for the reason that neither "the point of extreme reach of the wash of the waves," nor "the highest point of tide level," constitutes the boundary line of lands bordering on the ocean. "The law takes notice of three kinds of tides, viz.: (1) The high spring tides, which are the fluxes of the sea, at those tides which happen at the two equinoctials; (2) the spring tides, which happen twice every month, at the full and change of the moon; (3) the neap or ordinary tides, which happen at the change and full of the moon, twice in 24 hours." *Angell on Tide Waters*, p. 68; *Teschemacher v. Thompson*,

18 Cal. 11, 79 Am. Dec. 151. Tide lands are such as are covered and uncovered by the flow and ebb of the ordinary or neap tides (*Ward v. Mulford*, 32 Cal. 365; *People v. Morrill*, 26 Cal. 336, 354), and constitute the seashore (*Storrier v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155), over which the state exercises control and ownership by virtue of its sovereignty (*Hall on Rights to the Sea*). The land extending to the line indicated by high-water mark at ordinary or neap tide is the subject of private ownership.

The line to which the flow of the water reaches at ordinary or neap tide, unaffected by wind or wave, not the line of extreme high tide, nor extreme reach of the wash of the waves, constitutes the boundary line between the tract of land in question and the Pacific Ocean. Accepting finding 12, to the effect that defendant is unable to convey more land than the width of 170 feet at one end and 168 feet at the other end, as a finding of fact, and not a conclusion of law, it is nevertheless predicated upon a measurement shown by finding 8 to have been erroneously made, as heretofore stated.

It follows that the judgment and order appealed from must be reversed, and it is so ordered.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 591

PRE v. STANDARD PORTLAND CEMENT CO. (Civ. 326.)

(Court of Appeal, Third District, California. Dec. 30, 1908.)

1. MASTER AND SERVANT (§ 265*)—KNOWLEDGE OF CONDITIONS—PRESUMPTIONS.

In the absence of a showing to the contrary, the court must presume that an adult employé had ordinary intelligence, and hence was chargeable with knowledge of such facts existing where he was at work as would disclose themselves to one having such intelligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 892, 893; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 154*)—INJURY TO SERVANT—FAILURE TO WARN.

Where an employé at work on a clinker pile at a cement works was instructed not to undermine the pile, and was warned of the danger of the pile falling on him, but was not warned of the danger from heat, and the evidence showed that he knew the clinkers were hot, and that men working on the pile would in a few minutes expose hot clinkers, the failure of the employer to warn him against danger from heat was not actionable negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 308; Dec. Dig. § 154.*]

3. MASTER AND SERVANT (§ 236*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—PRECAUTIONS AGAINST KNOWN DANGERS.

Where an employé on a clinker pile at a cement works was instructed not to undermine the pile and was warned of the danger of the pile falling on him, he was bound to avoid undermining the pile himself, and was required

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to avoid danger occasioned by other employes undermining it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 742; Dec. Dig. § 236.*]

4. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The rule that a master is not liable for dangers existing in the place where the servant works, unless he knows the dangers or might have known thereof by using ordinary care, applies with greater force where the conditions surrounding the work are constantly changing owing to its progress, and, where the servant is under the same obligation as the master to look for dangers in the place of work and has equal facilities for ascertaining them and under those conditions continues the work, the master is not liable for any injury caused by the dangers thus existing, unless in some manner he coerces the servant to continue the work after he himself is aware of the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 583-592; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 206*)—LIABILITY OF MASTER—RISKS OF THE BUSINESS.

Under Civ. Code, §§ 1970, 1971, providing that an employer is not liable to an employe for injuries arising from the ordinary risks of the business, unless due to the employer's want of ordinary care, an employer fulfills his duty when he exercises ordinary care and the master is not responsible for injuries resulting from the natural incidents of the work known to the employe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. § 206.*]

6. MASTER AND SERVANT (§ 107*)—LIABILITY OF MASTER—PLACE BECOMING DANGEROUS DURING PROGRESS OF WORK.

Where a master does all that is incumbent on him in providing the safety of the place in which his servants work, and then commits the safety of it to them as emergencies may arise during the progress of the work, and the place becomes unsafe by reason of changes incidental to the progress of the work, or by reason of the conduct of fellow servants of any servant receiving injury, the master is not responsible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 200, 254, 255; Dec. Dig. § 107.*]

7. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

While the question of a master's negligence is for the jury, yet, where only one inference can reasonably be drawn from the evidence, the court is not bound by the conclusion reached by the jury, but may itself draw the inference.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1010; Dec. Dig. § 286.*]

8. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—ISSUES—INSTRUCTIONS.

Where, in an action for injuries to an employe, the issue made by the pleadings that the place where plaintiff was working was changing, and that such change was brought about by him or his fellow servants in the progress of the work, was met by the evidence, the court erred in submitting the cause on the theory that the changing conditions in the place were immaterial and in failing to present the issue in its instructions relating to a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1136; Dec. Dig. § 291.*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by Matteo Pre against the Standard Portland Cement Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Myrick & Deering, for appellant. Bell & York, for respondent.

CHIPMAN, P. J. Action for personal injury. It is alleged in the amended complaint that defendant is operating a cement plant known as the Portland Cement Works, Napa City; that prior to September 14, 1904, plaintiff entered the employment of defendant as a laborer at said works; that at the time of the injury complained of defendant was maintaining a room or house at its said plant, in which it stored ingredients used in manufacturing cement, commonly called "clinkers"; that such material was there stored in large quantities, forming a pile of considerable height; that, after being stored in said room, said clinkers became heated to such extent as to severely burn any person on whom they might fall; that said room was so constructed that said clinkers, as they might be desired for use, could be caused to fall from such pile through holes which could be opened along one side of the floor of said room, into a shaft or conveyor below; that said clinkers, after being so stored, became slacked, and thereby became and were likely to run or slide, and when such holes were opened, and such materials were thereby withdrawn from said room, the said materials which lay immediately above said holes would quickly run through said holes, and thereby would and did leave a high bank from said holes on said floor to the top of said pile of clinkers, and frequently, when a quantity of said clinkers had been so withdrawn, no more thereof would run down said slope or bank"; that defendant "did not provide any machinery or appliance for the purpose of starting the remainder thereof to run into said holes, but would and did direct its employes to go into said room in the trough or vacant space from which such clinkers had been drawn or run off, and shovel said clinkers from said bank into said holes. That such bank was likely at any time to cave in and start to run, and frequently did cave and start to run down from said bank to the vacant space from which such materials had been withdrawn, and would and frequently did fill up said vacant space where said employes were directed to go with said clinkers from such bank, and thereby cover such employes with said heated clinkers." It is then averred "that defendant well knew about said matters hereinabove mentioned, and said place was not a good, safe, or secure place to work in, and said defendant, well knowing the need thereof, did not provide therein a good, safe, or secure place to

work in, nor good, safe, or secure materials or appliances to work with therein"; that, knowing said facts, defendant "directed plaintiff to go into said room or house at said plant or works and to proceed to shovel said clinkers and cause the same to run into said holes; that defendant did not inform plaintiff that said work was in any respect dangerous, and wholly failed and neglected to warn plaintiff of or concerning such or any danger therefrom, and wholly failed and neglected to furnish or supply plaintiff with a good, safe, or secure place in which to do such work, or with a good, safe, or secure tool or appliance with which to do such work; * * * that defendant well knew that plaintiff was wholly ignorant of any danger therefrom, and without fault on his part, and while in said employ and engaged in said work so assigned to him by defendant and as directed by defendant, for want of due care and attention on its part, the pile of clinkers caved or slid from the bank thereof by and through the carelessness and negligence of said defendant, and plaintiff was thereby thrown down and buried by the caving of said burning and hot clinkers, and was thereby burned, crushed, and bruised, and received serious injury therefrom."

A general demurrer was overruled, and defendant answered, denying specifically the averments of the complaint. For a separate answer it is averred that at the time the plaintiff received the injury complained of he was at work causing a pile of clinkers to run through certain holes, there to be carried away by a belt passing underneath said holes; that plaintiff had been engaged in said work for some months, and had been instructed by defendant how to perform said labor; that plaintiff was employed "to cause said clinkers to pass through said holes, and in so doing it was necessary that said clinkers either be shoveled into said holes or that said clinkers be caused to cave down from the bank on the side of said hole"; that plaintiff knew that said bank of clinkers "must cave or run down in order that he perform the services required of him and which he had agreed to render"; that he knew that said clinkers were hot and would burn him if they came in contact with his person; that he knew each and every danger connected with his said employment, and thereby assumed all and every risk incident to his said employment; that plaintiff was at the time he received the injuries complained of guilty of contributory negligence which was the direct and proximate cause of the injuries received by him.

Resort to the uncontradicted testimony will make somewhat clearer the facts essential to a right understanding of the circumstances connected with the accident. The original materials of which clinkers are composed, and from which cement is made, are lime and clay—about 62½ per cent. lime.

The raw material is first ground in a crusher, then run into what is called a ball mill, where it is ground into particles of the size of a mustard seed; thence it goes into what is called a tube mill, and crushed into not quite the fineness of flour; next it goes into the kilns and is burned; thence it is run out on a platform and piled up, and is put through the simple process of being wet. There is next to the outside platform or pile of clinkers a clinker building. The material comes from the kilns on a carrying belt which runs over the clinker pile and, by means of a trip, drops its load at the piles. Here water is put upon the material, and it remains for a week or ten days to "slack and age," the process causing heat "enough to burn anybody." During the slacking process there is heat upon the surface of the pile while the interior is slacking, but does not stay upon the surface very long, and, when about ready to be moved, "the heat that is on the interior of the pile cannot be seen or felt upon the outside, * * * but down about six inches it is hot enough, down from six to twelve inches." Underneath this pile of clinkers and underneath the clinker building runs a belt upon which the clinkers were dropped through holes or slots in the floor of the platform and clinker building, the holes opening along the side of the piles. These holes occurred at intervals of about 13 feet, and were about 12 or 13 inches square of which there were 10 and were numbered 1, 2, 3, and so on. The clinkers were let down through these slots in succession, commencing with No. 1; the oldest material being over this slot where the carrying belt dumps first. The material is first let down by a man underneath the opening who takes out the slide. "After the man gets through underneath, when this hole is empty, we put a man in there and he pokes it down with a bar. When the incline of the funnel (which forms by the material running out) is so great that it won't come down, a man pokes it down with a bar or shovel." When the material would not run through by gravity, it became necessary to send men to the clinker pile and work it down to and through the slots. The tools required for this work were a shovel, pick, and a bar, 8 to 14 feet long, made of pipe with a point at one end like a chisel. When the clinkers are drawn from the different walls to the holes they are hot, but as exposed to the air they "cool off quick" before striking the belt. If they go "through fast enough, they are hot when they strike the belt," and "to keep the tunnel from being overheated and to keep the dust out" a fan was installed in the tunnel where the belt ran.

Witness Gledhill, who had charge of the shift on which plaintiff went to work, was called by plaintiff. He testified in chief: That plaintiff was a laborer at defendant's works, and had been for two or three months prior to the accident; that a man was need-

ed on the clinker pile, and he set plaintiff to work there, and he went to work with four men, one plaintiff's brother, all of whom were old workmen and understood the work and were present when Gledhill gave plaintiff his instructions, as to which latter Gledhill testified: "The instructions that I gave him were that I told him to look out it might cave down; that they should not undermine it, they should keep it on an angle of 45°. Well, I motioned to him. I told him as good as I could tell him. He could not understand me. * * * There were four men working on that clinker pile with Pre. I think they were all Italians. I know they couldn't talk English. I motioned to Pre not to undermine that pile. I took the shovel and showed him not to undermine the pile; that he should keep it on a slide so that it would not cave down. I think he commenced to work at hole No. 1. I went around there three or four times a shift. Sometimes a couple of times. I did not at any time motion to him as to the condition of the pile so far as heat was concerned. * * * They had taken out about 38 or 40 feet of the pile of clinkers, and were working at hole No. 3 when the plaintiff was hurt. Two of the men were supposed to work on the sides of the clinker pile and two of them on the face of the clinker pile in front. It didn't make any difference which two worked on the face. On this particular night on the 13th of September, 1904 (he went to work on the 11th), some of them were working on the sides and other part of them were working on the face. On this particular date the clinkers directly in front of the men were not old enough to answer all purposes for which we wanted it. For that reason they were pulling down the sides. * * * Four men moving that amount of clinkers in the period which I have stated would be moving that amount very slowly. They were not continually moving them. The effect of the air upon clinkers would be according to how fast they poke it down. If they poke it down fast enough, it would be hot. If they would not, the air would cool it. Would have to go into the pile from 6 to 12 inches to get hot cinders. It would have to stay in about two hours before it cools off a foot. The clinkers constantly roll down from the top if a man pokes it from the top. If he don't they won't." Cross-examination: "The pile of clinkers has been used as it was used on September 14, 1904, for about two years. We have handled these clinkers in the manner they were handled on September 14, 1904, for about two years. * * * I saw this plaintiff working on the pile of clinkers several times after I had placed him to work there. At all of those times he was performing work in the manner in which I had told him to. * * * The steam and heat comes from the water they put on the clinkers. It comes from the pile of clinkers. I didn't tell the plaintiff in this case the clinkers were

hot because he could find it out in a very short time after he worked there. A man commencing work on hole No. 1 and sending clinkers down that hole would have to work only a few minutes before he would expose hot clinkers. There were put down about 2,000 tons of clinkers from September 11th to September 14th, or the evening of September 13th, and at that time the entire pile of clinkers was heated from a point six or eight inches from the surface. The platform on which the clinkers are deposited is about 100 feet wide. * * * On the night of September 13th, when plaintiff was injured, all the clinkers back of the hole No. 3 in the middle of the pile had been removed. In the center of the platform, where the clinkers had been removed, there might be a mound of about two or three feet around each hole. Pre was working on the sides of the clinker pile or on the face of the wall in front of him. There were no clinkers in back of him. * * * Clinkers were being shoveled from the sides of the clinker pile to mix with the clinkers from the face of the clinker pile, because the clinkers in the face of the clinker pile were not old enough. * * * The sides of the clinker pile from hole No. 1 to hole No. 3 were about 15 to 20 feet, on September 13th, when plaintiff was injured. * * * We have never used any other kind of tool on that clinker pile in removing them. We are using the same kind of tools today. * * * The men working on the clinker pile sometimes have sacks on their feet to protect them from heat. That is quite common. When any of the holes are open and the clinkers commence to run down, it exposes some of the clinkers, say from 12 to 13 inches from the surface, and, when it runs down from the clinker pile, it exposes the whole face from the side from which it runs down, and then shows the whole surface of that side, from 12 inches down, is warm. Anybody putting his hand on it could feel it. It does not steam. By touching it you could tell it was hot. It only steams when it is new. * * * Heat that is generated from this clinker pile being chemical heat will burn cotton or rubber in time. It does not cause it to inflame; just chemically heats it up. This chemical heat does not emit any heat. It is not perceptible except to the touch, and there is no radiation from it." Redirect examination: "One could not handle that material with a shovel for a long time if he did not touch it with his hand without ever finding that it was hot. If you step into it when you are perspiring, or when your feet are damp, the chemical action with the dampness on your feet and the lime together immediately create a heat. You could not handle it with a shovel without getting into it where it was hot. If you got into it where it was hot, it would show the heat. I was in the clinker pile three or four hours before the accident and was there about 15 minutes after the accident."

The plaintiff was sworn as a witness, and testified in chief: "Before working on the clinker pile, I was working in the yard cleaning up. That work had nothing to do with the clinker pile. I had had no experience with the handling of clinkers before I went to work on the clinker pile. * * * I went to work about 6 o'clock in the evening. The boss went in there with me, and showed me how to shovel clinkers, and, when the clinkers got stopped up, to take a crowbar to make it go down into the tunnel below. He told me to do that kind of work. I worked there three nights. * * * After Mr. Gledhill showed me what to do, I followed my instructions. I had to shovel the clinkers with a shovel and whenever the hole got clogged up so that it didn't run any more I had to take a crowbar and go and break it down, and I did that. * * * The last night I was working there I was working on the fourth hole. * * * Q. Were you shoveling the clinker from right in front of you or from the sides? A. Shoveling from the sides." He further testified: "Something happened to me the last night. It came down a big pile of clinker on top of me. At that time I was on the side of the hole, and I was trying to send down the clinkers with a crowbar. The hole was stopped up. I was trying to drive it through. The clinkers that fell on top of me came from the front of me, and they fell on top of me. They burned me. The clothes I had on was a pair of overalls, jumper, working shoes, and a hat. [The witness exhibited part of his person to show the effect of his injuries. No claim is made of injury other than from burns.] Q. Did you know whether or not that clinker pile was hot? A. Certainly, know it was hot. Q. Ask him if he knew it was hot. A. Over in front I knew it was hot. Q. What do you mean by the front? A. In front of me. Q. Right in front of you? A. Well, above me. Q. Do you mean that you knew the wall right in front of you was hot? Did you know that wall was hot? A. That was near me was not hot. Q. That it was cold? A. Yes. Where the clinkers were being dumped they were hot. No one ever told me that this was hot where I was working. * * * The clinkers didn't hurt hardly anything on my clothes. Didn't burn hardly any. The stuff covered me. None of the men had been working on the big pile in front. We had all been working on each side of it. The front had not been disturbed. The clinkers fell from the front. In front of me and came right down on me. I had no time to get out of the way of it. I had not noticed any heat from the pile of clinkers while I was working there." Cross-examination: "I saw the clinker pile before I went to work on it. I saw it most every day. I never saw any hot clinkers on the pile until the night I was hurt. Q. You did not know there were hot clinkers on that pile until you were hurt, did you? A. Yes; I knew they were car-

rying hot clinkers there. Q. How did you know that there were hot clinkers there? A. Because sometimes I was passing near there I could feel that it was hot there. Q. You could feel that there were hot clinkers on that pile prior to September 13th, the heat from hot clinkers on that pile, had you? A. From where it would fall down; yes, I knew." He testified that he was working from the sides of the pile, and that neither he nor any of the other men "took any clinkers from the pile in front." "Q. Explain how you removed 38 feet of clinkers of that side, if they did not take anything in front, when they commenced at the wall? A. Because it goes down by itself. [Question repeated and answered the same.] Q. Ask him if he does not mean by that last answer that what fell on him came down by itself. I think that is what he means. A. Yes." He was then again asked to explain how so much had been removed without taking anything from the front of the pile. "A. We was shoveling there for three days. Q. From the front; from the pile of clinkers in front of you? A. From that 35 feet, you see, they were shoveling there for three days." After some further answers he was asked: "Q. After you commenced work there, did you not remove all the clinkers from the first hole up to the hole where you were hurt? A. No; we had not removed it all. Q. What had not been removed? A. Not all. [Question repeated and same answer.] Q. How much of it hadn't you removed? A. Maybe below 3 or 4 feet yet. * * * Q. Then you had removed all the clinkers from the first hole up to the fourth hole except about four feet of it? A. Yes. Q. Then you had removed 16 feet in height of that clinker pile from the first hole to the fourth hole? A. I don't know if it was 15 or 16 feet high." He was then asked if it was not true that every night while they were working there they were causing the clinkers to run down into these holes. "A. No; I didn't know that the clinker was coming down. No; the clinker was coming down by itself. We were shoveling on each side, and the clinker in front coming down by itself. They showed me how to do it—how to make the clinker come down." Again he answered: "They did not work it in any way to make the clinker fall. During all these three nights that I was working there the clinker came down gradually by itself. While I was working in front of this clinker coming down, I did not feel any heat from it. I heard that the clinker was hot. My brother was working with me on that clinker pile. I don't know how long he had been working there. The clinker that did not went down by itself we shoveled it down into the hole. We were constantly going ahead into that pile of clinkers, and the place where we were working was constantly changing by reason of the work we were doing. This accident happened about half-past

1 or 2 o'clock. After 12 in the night, we took lunch at 12 o'clock. We took lunch about five or six feet from the fourth hole. We sat within five or six feet of this hole while eating our lunch. Eating our lunch occupied about half an hour. * * * While I was eating my lunch, I didn't know that this mass of clinkers was liable to run down on me. I didn't know that night while I was working there that this mass of clinkers was liable to come down without me touching it. If I had known it, I wouldn't have stayed there. It was coming down by itself, and gradually as it came down we shoveled it out of sight, and so on. * * * Some lumps of this clinker came down from this pile before I was hurt. Q. Well, now, after this clinker had fallen down a certain ways, it left a slope there, did it not? A. Yes. Q. Now, how could the clinker run down into this hole, after you had reached a certain angle, unless you used some means to cause it to run down? A. Well, it was coming down by itself. It had a certain kind of fall that it was always coming down by itself." Redirect examination: He testified that the falling down he spoke of was "just a gradual fall." "Q. When it got back a little ways from the hole, and there would be a space between the hole and the bottom of the cinders, what would you do with that, which gradually came down on the face of the clinkers? A. They opened another hole ahead of it. Q. But between these holes is a space we will say of 13 feet? A. Oh, that we shoveled. Q. Whenever it would drop down then and would not go into the hole, you had to shovel it, did you? A. Yes. Q. Did you ever see, all the time that you worked there, three nights, this wall come down in anywhere near the quantity that it did when it fell on you? A. No, no, no, no."

We have endeavored to present in the foregoing all the evidence submitted by plaintiff bearing upon the question of defendant's liability for the injury. Witness Gledhill was recalled as defendant's witness, and testified: That he had heard plaintiff's testimony that from about the first hole in the clinker pile until about the fourth hole all that mass of clinkers was removed without either the plaintiff or the other men touching the mass of clinkers in front of them. "That," said the witness, "is impossible." He was asked to explain, and replied: "It has got to be continually poked to get down in them holes. We open this first hole. We have got to open it from the bottom, and then it will start to run down until it gets to a certain angle, but it will run at different angles. Sometimes it stands up straight. Well, then, we start here at the side and poke it down at the side until we can open that, first getting to this on a right angle, and poke around to the front to get that. * * * Other times it comes down at an angle of 45 degrees. Then it has got to be poked down, for it won't run. It would not be possible for clinkers to run

down through the first hole and the second hole without clinkers between those two holes being removed by hand or by some tool. * * * As the clinkers are taken from this pile, the mass of clinkers in front of the men working is constantly changing as the men work as they follow the mass of clinkers up." Upon cross-examination he testified that over the first hole, which was about two or three feet from the wall of the clinker building, the clinkers were about 10 feet deep and at the back part of the clinker pile it was about two feet deep. In letting down the clinkers through the hole "the funnel starts right from the top. * * * After the first pocket the clinkers do not come down of their own gravity onto the floor surrounding the hole unless we open the other holes. It would go down to the others, too, if we opened them, but we did not open the others until we get the first one empty. After the clinkers had run through the first hole, there would be a part of the floor around that hole bare, and then they had to commence and shovel into the hole. At the time plaintiff was injured, the material was not ripe enough for us, and we instructed the men to take some of the old material from the sides. We never instruct a man to go in front of the pile with a shovel. If there is any shoveling ever done, it is shoveled on the side. I mean to say that a man does not go directly in front of the clinker pile, but he stands to one side. They poke the clinkers down through the hole with a bar. It does not necessarily follow that the wall of clinkers in front of plaintiff was almost perpendicular to come down sufficiently to cover the plaintiff. If the clinker pile was at an angle and it fell down, the plaintiff would have been covered if he was at the bottom near the hole."

We have given the testimony at unusual length, as it seemed otherwise impracticable to convey a satisfactory conception of the character of the work which was set before plaintiff and to enable one considering the situation to rightly determine the relative rights and duties of the parties to the controversy. Even with this very full statement of the testimony, it is difficult to determine just how or by what immediate circumstances the accident was caused, for the foreman was not then present and none of the men who were working with plaintiff testified, and plaintiff gives no very clear account of how the accident happened. We think, however, that enough of the facts stand uncontradicted to furnish a reasonable solution of the question involved.

Defendant moved for a nonsuit at the close of the evidence, which was denied, and defendant duly excepted to the ruling. The cause thereupon went to the jury, under instructions by the court, and a verdict was rendered for plaintiff, assessing his damages at \$1,125. Judgment on the verdict was accordingly entered, from which and from the

order denying its motion for a new trial defendant appeals.

Appellant confines the argument principally to alleged error in denying its motion for a nonsuit. Further error is also assigned arising out of certain instructions given or refused. We can see nothing to be gained by a discussion of the motions separately, and shall, therefore, address this opinion to the order denying the motion for a new trial.

It is contended by appellant (1) that the evidence shows no negligence of defendant; (2) that the injuries received by plaintiff arose from the risk he assumed when he accepted and continued the employment; (3) that the injuries arose from the changing conditions made by the servant himself in the progress of the work. For these reasons, it is claimed that the verdict is against the evidence.

It is also urged that the court erred in some of the instructions given and in rejecting some which were asked; also that the verdict is contrary to instructions given by the court.

Respondent's contention is (1) that defendant was negligent in not providing a reasonably safe place to work, and in not maintaining it in a reasonably safe condition, and in not warning plaintiff of the danger of being burned; (2) that the doctrine of the assumption of risks has no application to dangers not contemplated by the servant, or where there is an extraordinary risk not known to the servant; (3) that it was for the jury to say whether the facts known to plaintiff ought to have brought home to him knowledge of the danger, and whether by his acceptance of the employment he assumed the risk; (4) that the contention that the place of work was not permanent, but became unsafe by reason of the progress of the work, and that the place of work was made by the servant has no application to the facts in the case.

There is no claim made that there was danger of injury from or that there was any injury done by the force of the clinkers falling upon plaintiff. It is conceded that the danger to him and the injury received by him lay solely in the fact that there was heat in the cinders sufficient to burn him when brought in contact with them; and defendant's liability, it is claimed, arose from the fact that plaintiff was not warned of this danger. So far as the question of a reasonably safe place to work is concerned, there having been no danger of injury except from heat, it is important only as it may be said to have contributed to that danger. Neither is it claimed that plaintiff was not furnished with appropriate tools with which to work. These were simple and their use understood. They were a shovel, a pick, and a long-handled bar with which to reach the cinder pile at a high point, when the workman was on the floor, or down to a low point when he

was on top of the pile. It is undisputed that plaintiff was shown where and how to perform the work assigned to him. He was told not to undermine the pile, but keep the materials at a slope. We must presume that he had ordinary intelligence, and, having ordinary intelligence, he must be charged with knowledge of such facts existing where he was at work as would disclose themselves to one having such intelligence. The exercise of a very ordinary intelligence would, without previous warning, have shown him that to undermine the pile the cinders might fall upon him. And the same degree of intelligence would have shown him that it would be unsafe to be where the cinders were liable to cave down upon him. Of this danger, however, he was warned and instructed to avoid it. He was not warned of danger from heat. But the undisputed testimony is that he knew before he went to work on the clinker pile that hot clinkers were dumped there from the furnace, and he knew that these clinkers were hot when he was working on the pile, for he so testified. He did not qualify this knowledge by saying that he knew the clinkers were hot, but did not know they would burn him. Plaintiff's other witness testified that a "man working on hole number 1 and sending clinkers down that hole would have to work only a very few minutes before he would expose hot clinkers," and for this reason he was not told that the cinders were hot. He had worked there for three nights and the body of the pile had been removed, except some at no great height at the sides, a distance of some 40 feet and to the fourth hole. It is inconceivable that he had not by this time learned that there were hot clinkers in the pile—hot enough to burn him. The undisputed evidence is that the outer surface cooled off to a depth of 6 to 12 inches and underneath this layer the cinders were hot. They cooled off when exposed to the air in passing slowly through the holes in the platform, but in caving down a hot surface was necessarily exposed and plainly discernable to the touch. Defendant had installed a fan below the holes to aid in the more rapid cooling off of the cinders. When the accident happened, plaintiff was working, as he says, near the fourth hole and had been shoveling from the sides. It does not clearly appear where the clinkers came from which caused the injury, but they must have caved down from the front. This front had been advanced from the first to the fourth hole without accident, but how near it was to plaintiff, or from what part of it, or because of what condition it then was in, we have no evidence to guide us. He worked on the sides and on the front. He testified: "While working in front of this clinker coming down, I did not feel any heat from it. I heard that the clinker was hot." He further testified: "We were constantly going ahead into that pile of clinkers and the

place where we were working was constantly changing by reason of the work we were doing there." Still plaintiff testified that he knew the clinkers were hot, and what he said in not feeling heat when working simply confirms Gledhill's statement that it was not radiating. We do not think that any rule of law would hold defendant responsible for not having warned plaintiff against the danger from heat, for the testimony of plaintiff's witness was that he could not have worked there without learning the fact, and plaintiff himself testified that he knew the fact.

If it be said that the caving down of the hot clinkers was the cause of the injury, the answer is that plaintiff was instructed not to undermine the pile and the same consequences of which he was warned he must have known would follow if the pile was undermined by one of his fellow employes. It was his duty to avoid doing this himself and the dictate of common prudence required that he should avoid the danger if done by another. We are unable to discover any rational ground upon which the jury was justified in its conclusion upon the facts as shown by plaintiff's evidence.

Respondent contends that defendant was guilty of negligence in not providing a reasonably safe place in which to work and maintaining it in safe condition. We cannot see that defendant could have furnished any different place in which to do the work than at the pile of material to be moved, nor that defendant could have maintained it in any different way. Furthermore, the place was necessarily, and, according to plaintiff's testimony, constantly, changing by the very work he was doing. Part of the time the place of work was on top of the pile and at other times on the floor of the platform or building, either at its sides or in front of the pile.

It seems to us that the principles discussed in *Thompson v. Cal. Construction Co.*, 148 Cal. 35, 82 Pac. 367, are applicable in this case. The injury there complained of arose from rock coming down a sloping bank where plaintiff was working. The court said: "There is nothing whatever to show that the defendant, or any of its servants in charge of the entire work or occupying the position of master with respect to plaintiff, had any better opportunities of ascertaining the conditions than the plaintiff. The rule applicable to such cases is that a master is not liable for dangers existing in the place where the servant is assigned to work, unless the master knows the dangers or defects, or might have known thereof if he used ordinary care or skill in ascertaining them. 19 Am. & Eng. Ency. of Law, p. 92. This rule applies with greater force in cases where the conditions surrounding the work are constantly changing, owing to the progress of the work. The rule is further modified by the proposition that where the servant is under the same ob-

ligation as the master to look for dangers in the place of work, and has equal facilities for ascertaining them, and under these conditions continues the work, the master is not liable for any injury caused by the dangers thus existing, unless in some manner he urges or coerces the servant to continue the work after he himself is aware, or should be aware, of the danger. 19 Am. & Eng. Ency. of Law, p. 130. In a case such as that under consideration, where the dangers complained of may to some extent arise from the changed conditions made by the servant himself in the progress of the work, he is under as much obligation as is the master to be on the lookout for such dangers. The plaintiff had the burden of proving that his injury was due to the negligence of the defendant. There was no evidence of such neglect other than the fact that the rock slipped down and caused the injury. Under the circumstances above stated, the mere happening of the accident is not *prima facie* evidence of neglect on the part of the master."

While it is true that the direct cause of the injury was the heat in the cinders, it is likewise true that plaintiff was brought in contact with this heat solely by reason of the slipping or caving down of the material. Of this plaintiff was cautioned against, and, besides, it was an occurrence obviously likely to happen, against which it was plaintiff's duty to guard and to avoid any danger therefrom should it happen. To hold the master liable under such circumstances he could only avoid the liability by standing over the servant and constantly warning him of danger. In speaking of the Code rule (Civ. Code, §§ 1970, 1971), the court further said: "The duty of the employer in this respect is not absolute. He is not required at all hazards to furnish a reasonably safe place to work. His duty is fulfilled when he exercises ordinary care for that purpose."

In line with these views the learned trial judge instructed the jury as follows:

"(4) I instruct you that by the term 'risks of the business' is meant such risks as the employe is as likely to know as the master, and which are the natural and ordinary incidents of the work the employe agrees to do, and which are liable to happen in the performance of such work.

"(5) I instruct you that under no circumstances is a servant legally entitled to demand an absolutely safe place in which to work. All that the law requires of the master is to furnish a place as reasonably safe as the proper carrying on of the work will reasonably permit. A master is not bound to anticipate and guard against every possible danger, but only such as can be foreseen by the exercise of reasonable care. An employer is not an insurer of the safety of the place in which his servant works."

"(9) Plaintiff in working upon said clinker pile assumed not alone all the risks that he

knew, but also all the risks he could have ascertained by the ordinary exercise and use of his natural senses.

"(10) If you find from the evidence in this case that the plaintiff, while working in the clinker pile, knew or could have ascertained by the ordinary use and exercise of his natural senses that the clinkers were hot, I instruct you that defendant was under no duty to inform plaintiff that said clinkers were hot, and defendant is not guilty of negligence in failing to so inform him.

"(11) If you find from the evidence in this case that the plaintiff, while working in the clinker pile, knew or could have ascertained by the ordinary use and exercise of his natural senses that the clinkers were hot and would burn him if he came in contact with them, then I charge you that plaintiff, in accepting employment to work on said clinker pile, assumed the risk of being burned by said clinkers, and your verdict should be for the defendant."

To our minds it seems clear that the jury wholly disregarded these instructions, and that had they followed them the verdict must, under the evidence, have been for the defendant. The following cases may be read with profit in this connection: *Fries v. American, etc., Co.*, 141 Cal. 610, 75 Pac. 164; *Killelea v. Cal. Horseshoe Co.*, 140 Cal. 602, 74 Pac. 157; *Corletti v. S. P. Co.*, 136 Cal. 642, 69 Pac. 422; *Hanley v. Cal. Bridge Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; *Limberg v. Glenwood L. Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33. "Where the master does all that is incumbent upon him in providing for the safety of the place in which his servants are to work, and then commits the safety of it to them to be attended to by them as emergencies may arise during the progress of the work, then if the place becomes unsafe by reason of changes incidental to the progress of the work, or by reason of the conduct of the fellow servants of any servant receiving injury, the master will not be responsible." 4 *Thompson on Negligence*, § 3876. This doctrine is quite fully discussed in *Callan v. Bull*, 113 Cal. 593, 603, 45 Pac. 1017. See this case distinguished and the rule further discussed in *Hanley v. Cal. Construction Co.*, supra, cited by both parties. See, also, 2 *Labatt, Master & Servant* (Ed. 1904) §§ 587, 588.

The evidence fails to bring this case within the rule stated in respondent's third point, namely, that it was for the jury alone to say whether the facts known to plaintiff ought to have apprised him of the danger, and that whether, by his acceptance of the employment, he assumed the risk, for it is undisputed that he had knowledge of the very danger from which he suffered injury and which, by the exercise of ordinary prudence, he could have avoided. It is true that the

question of defendant's negligence was for the jury to determine. But, where only one inference can reasonably be drawn from the evidence, the court is not bound by the conclusion reached by the jury, but may itself draw that inference. It was said in *Hennessey v. Bingham*, 125 Cal. 627, 634, 58 Pac. 200, 202, cited by respondent: "Negligence is the ultimate fact to be inferred from many probative facts. The inference is within the province of the jury, even when the facts are undisputed. When different conclusions as to negligence can reasonably be drawn from the admitted facts, it is not for the court to instruct the jury as to which is to be adopted." This is as strong a statement of the rule as may be found. But we do not understand that a jury has an unrestrained and unlimited right to infer negligence from a given state of facts. Otherwise the jury might draw absurd and unreasonable inferences which would result in gross injustice and the court be powerless to furnish relief.

Appellant complains that the instructions given wholly ignore the issue made by the pleadings, that the place where plaintiff was working was constantly changing, and the further fact that such change was brought about by plaintiff or by his fellow servants, in the progress of the work. It is claimed that an instruction which omits all reference to a question of fact which the jury under the evidence must pass upon is prejudicially erroneous—citing *Killelea v. Cal. Horseshoe Co.*, 140 Cal. 602, 74 Pac. 157. The issue was made in the pleadings and was met by evidence, and should have been presented to the jury by the court in connection with its instructions relating to a "safe place to work." Defendant's instructions embodying this feature of the case were refused. The case seems to have been submitted to the jury upon the theory that changing conditions in the place to work, brought about by the plaintiff in the course of the work itself, were immaterial. We think this was error.

In our opinion the trial judge should have granted the motion for a new trial.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

9 Cal. App. 612

CROZER v. WHITE et al. (Civ. 518.)

(Court of Appeal, Third District, California.
Dec. 31, 1908. Rehearing Denied by
Supreme Court March 1, 1909.)

1. EVIDENCE (§ 460*)—PAROL—AMBIGUITY IN DEED.

Where land conveyed is described as "my dwelling house and lands appurtenant thereto," parol evidence is admissible to show how much land was to be included.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2119; Dec. Dig. § 460.*]

*For other cases see same topic and section: NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. DEEDS (§ 118*)—LAND CONVEYED—DESCRIPTIONS—EVIDENCE.

Evidence held to show that it was intended by a deed describing the premises as "my dwelling house and lands appurtenant thereto" in a specified section to convey the entire tract of land, which was a farm of 110 acres.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 118.*]

3. DEEDS (§ 58*)—DELIVERY.

Where the grantor places a deed in the hands of a third person, with unconditional instructions to deliver the same to the grantee, the delivery is perfect, though actual delivery to the grantee did not take place until after the death of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 130; Dec. Dig. § 58.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by Georgie E. Crozer against W. P. White and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Dudley Kinsell, for appellant. Weldon & Held and E. M. Frost, for respondent White. Thomas, Pemberton & Thomas, for respondent Rohrbough.

HART, J. The plaintiff brought this suit to quiet her title to certain real property, of which she alleged her ownership in fee, situated in Mendocino county, embracing 110 acres of land "and being a part of the N. W. ¼ of section 18, township 22 N., R. 12 W., M. D. B. & M." The defendant W. P. White, answering the complaint, denies that plaintiff "is now, or that she was at the time of the commencement of this action, the owner in fee of all or any part of that real property" described by metes and bounds in the complaint, and sets up ownership thereof in himself, alleging "he is now, and has been at all times since the 10th day of August, 1901, the owner in fee" of said land. The defendant Rohrbough alleges in his answer, that he has a leasehold interest in said land as tenant under the terms of a certain written lease, "made on the 15th day of April, 1900, in which the then owner of the premises described in plaintiff's complaint, George E. White, was the lessor, and this defendant became and was made a lessee of said premises for the term of 10 years from and after the said 15th day of April, 1900, and that under said lease this defendant entered into the possession of the premises and has remained in possession thereof ever since as such tenant and not otherwise." The court's findings from the evidence were in favor of the defendants, to whom, accordingly, judgment was awarded, quieting their respective titles to the land in controversy. This appeal is from the order denying the plaintiff a new trial.

The appellant contends that the evidence does not justify the findings of the court in favor of the defendant White's ownership

of the land in dispute and against the plaintiff's ownership thereof, and in support of this contention presents and urges four different and distinct propositions, among which are the following: (1) That the description in the deed from George E. White to the defendant W. P. White is wholly insufficient to identify the land therein and thereby sought to be conveyed with the land described in the complaint, and that the deed is therefore void for want of definite description; (2) that there is no evidence to show a delivery of said deed from George E. White to the defendant W. P. White, either actual or constructive. The remaining propositions need not be particularly noticed.

The land in dispute was the separate property of said George E. White in his lifetime, and, so far as any public record shows to the contrary, remained so up to the time of his death, which occurred on June 9, 1902. Upon the administration of the estate of said White, the court, sitting in probate, set aside this land for a limited time to his widow, Louise B. White, and later the said court determined that said Louise B. White and the plaintiff herein were the only heirs of said George E. White and decreed a distribution of said premises to said heirs, subject to the limited homestead to Louise B. White. From the testimony of the witness Benjamin Blockburger, a notary public, residing at Blocksburg, Humboldt county, it appears that, on August 10, 1901, the witness and George E. White met by accident on the public highway, at or near the "shearing corral" of the deceased, known as "Nefus Peak"; that White said to Blockburger that he (White) desired to deed the premises concerned here to his brother W. P. White; that thereupon Blockburger, having with him several blank sheets of foolscap paper and a pen and a bottle of ink, prepared a deed, under the instructions of said George E. White, conveying the premises, for a named consideration of \$100, to said W. P. White; that, after George E. signed and acknowledged the deed, Blockburger stated that he would have to take the instrument to his office in order to attach his notarial seal thereto, and then asked George E. "if he wanted me to forward the deed for record"; that White in reply said, "No, give it to Pit," referring to W. P. White. Blockburger, it seems, never informed W. P. White nor any other person that George E. White executed said deed, or that he (Blockburger) had the same in his possession until long after the death of George E. In fact, Blockburger testified that he had entirely forgotten about the deed and the grantor's instructions with reference thereto, and did not recall the transaction or the instructions of the grantor until some time subsequent to the death of George E. White and after the conclusion of certain litigation, to which W. P. White was a par-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ty, over the estate of George E. in the probate court. The foregoing, while not presenting in substance all the facts brought out at the trial, involves a statement thereof sufficient for the purposes of the consideration of the only points which in our opinion it is necessary to examine. The deed in question grants, sells, and forever quitclaims to said W. P. White "all the right, title, and interest and claim of" said grantor "to that lot, piece and parcel of land situate and being in the county of Mendocino, state of California, bounded and described as follows: Being a portion of section 18, Township 22 North, Range 12 West, Mount Diablo Meridian, it being my dwelling house and lands appertant thereto—together with all and singular the tenements, hereditaments, and appurtenances thereunto of the said premises," etc. The land described in the complaint comprises, it will be observed, 110 acres, and is situated in the same section, township, and range as is the land described in the said deed. The latter, however, while specifically designating the "dwelling house" and adding "land appertant (appurtenant) thereto," does not declare the number of acres which it was the intention of the grantor to convey. From the face of the deed itself it is manifestly impossible to determine with absolute certainty whether the land to be conveyed with the dwelling consists of one acre or more or less or of the entire 110 acres, in about the center of which, so the witness Rohrbough states, said dwelling is situated. It is thus to be seen that the description contained in the deed is indefinite, in that the exact number of acres which it was the intention of the grantor to convey is not designated therein. Upon the theory, therefore, that the uncertainty so arising involves an ambiguity which it was proper to explain by parol testimony, the court, over the objection of appellant, allowed evidence to be introduced for the purpose of showing that the intention of the grantor was to convey the whole of the 110 acres described in the complaint.

Counsel for the appellant contends that the court committed prejudicial error by permitting parol or testimony extrinsic to the deed to be received for the purpose of explaining the ambiguity therein, for the reason, as he asserts, that said ambiguity is patent, and not latent, and that parol testimony is never admissible for the purpose of explaining a patent ambiguity. We think the court's ruling admitting the evidence to determine the number of acres intended to be conveyed by George E. White is unassailable. It has been held that, "while parol evidence is not admissible to add to, contradict, or vary a writing, yet it is admissible to explain an ambiguity, whether latent or patent." *Shore v. Miller*, 80 Ga. 93, 4 S. E. 561, 12 Am. St. Rep. 239; *Cottingham v. Hill*, 119 Ala. 353, 24 South. 552, 72 Am. St. Rep. 923; *Borchard v. Eastwood*, 133 Cal. xix, 65 Pac. 1047; 2

Devlin on Deeds (2d Ed.) § 1012; *McCullough v. Olds*, 108 Cal. 529, 41 Pac. 420; *Rea v. Haffenden*, 116 Cal. 603, 48 Pac. 716. The evidence was admitted here, obviously for the purpose of making definite the only element wanting in the deed to render it definite, to wit, the number of acres or the quantity of the tract of land owned by the grantor in the section and township mentioned as among the descriptive words of the deed he thereby intended to convey; that is, whether all of said tract or only a portion thereof. The object in receiving the testimony, in other words, was not to correct an insufficient description, but to ascertain how much of a tract of land correctly described in the deed it was the intention of the grantor to thereby convey. The sole question, then, to be determined by such evidence was: What is the quantity of land to which the dwelling house mentioned in the deed is appurtenant? Or, in other words, in view of the testimony that the 110 acres described in the complaint comprised all the land in the township designated in the deed as well as in the complaint owned by the grantor at the time he executed the deed, did George E. White intend to convey to his brother all said land or only a portion thereof? It is clear that, while the deed is not expressed in strictly proper or precise legal terminology, the land intended to be conveyed was all that to which the dwelling house was understood by the grantor to be appurtenant—that is, so much of all the land upon which the dwelling stood as said dwelling house is essentially appurtenant to, considering the nature of the purposes for which the same could with advantage be used.

The witness Rohrbough testified that the 110 acres, on which the dwelling house mentioned in the deed is located, comprised all the land owned by George E. White in the north half of section 18, township 22, etc., and that said dwelling stands "almost in the center—that is, equally distant from the line, the northwest line, and almost the same distance from the north half." He stated that said land was known as the "White homestead." He further testified: "There are fences around this dwelling house. On the south there is a private roadway leading out to the county road, and there is a fence around the dwelling house, a yard fence. The garden and orchard is in front across the private road, and is not within the inclosure around the dwelling house. There is a portion of the yard where the fence met in the rear of the dwelling house, a low building about 70 feet long which really includes the yard, and the fences come up to that so as to make a complete inclosure. There is probably a little over an acre so inclosed, about 200 feet, not to exceed 250 feet square, and there are fences all around so that it is entirely inclosed. * * * All the buildings and barns are outside this inclosure—another building, a granary, and

two or three barns and sheds—quite a number of buildings.” Rohrbough also testified that he had a lease of the 110 acres of land referred to from George E. White; that he had, as such lessee, the use of the barns, granary, and other outhouses; that George E. White resided in the dwelling house mentioned up to the time of his death; that the granary, barns, etc., were used in connection with said dwelling.

W. P. White testified that his brother “in parables” often told him that he (W. P.) would get the “home place.” He did not explain how or in what manner the “parables” were expressed by George E. White, but from them he clearly understood that he was to get his brother’s homestead upon the latter’s death. He further said that George E. White was indebted to him to the extent of \$8,000 or \$10,000—the exact amount he could not recall. Blockburger testified that he met George E. White on the public highway on the day the deed was prepared, as heretofore related; that White said to the witness that he desired to give the home place (referring to the land in question) to his brother, W. P. White, remarking at the same time that “W. P. had a better right to it than anybody else.”

The testimony thus presented constitutes in substance all the proof received upon the point under consideration.

Evidence admitted for the purpose of clearing up an ambiguity in a written instrument should, of course, have the effect of fully accomplishing such purpose. Its object is to render absolutely clear that which before was not clear, and therefore not capable of intelligent or definite apprehension. Such testimony should, in other words, be so clear and convincing as to put beyond dispute or all reasonable doubt the exact meaning and intention a party designs to convey and express by the use of the language in the instrument as to which the ambiguity arises. We think that the testimony here meets the criterion suggested. The testimony shows that the land described in the complaint and sought to be described in the deed is located in a farming community, and was the homestead and residence of George E. White. It had always been devoted in its use to agricultural, horticultural, and stock-raising pursuits, and was useful for no other purpose. The dwelling mentioned in the deed stood approximately in the center of this, the only tract of land owned by the deceased in the section and township designated in the complaint and in the deed. There was no subdivision of the tract into separate and distinct lots and parcels. It is true that a fence had been erected inclosing about one acre of the land immediately surrounding the dwelling, but the barns and other outhouses and the orchard, which the witness Rohrbough stated had always been used in connection with the house, were outside said inclosure. Besides, some

of the witnesses testified that George E. White had declared to them that upon his death his brother, the grantee, would receive this particular tract of land, because he was entitled to it as against all other persons who might be interested. Moreover, the deed, as we have seen, grants to the grantee all the right, title, and claim of the grantee to “that lot, piece and parcel of land, * * * being a portion of section 18, township 22 north, range 12 west, M. D. M.” In the light of the testimony to the effect that the grantor owned but one “lot, piece and parcel” of land in said section and township and that a comparatively small tract, what other reasonable interpretation from the language of the deed itself could be placed upon his intention as to the quantity to be conveyed than that he meant to transfer to his brother the whole tract? He refers to the land in his deed as “that lot, piece and parcel,” and it would seem that, if he had intended to convey anything less than the 110 acres constituting all the land he owned in said township, he would have so indicated by appropriate language or by language reasonably and fairly indicating such intention. The use of the word “that,” as indicated, would at least ordinarily be accepted as referring to a specific lot or tract of land consisting of a definite number of acres. We think that such is the reasonable interpretation of the language of the deed, considered in connection with the testimony, and that it thus appears sufficiently clear and certain that the grantor intended to convey to W. P. White nothing less than the full 110 acres of land, to which the dwelling mentioned in said deed appears, from all the circumstances, to be appurtenant. The house without all the land, as we understand the evidence as to the situation of the latter and the purposes to which it is adapted, would be practically valueless for any purpose, except merely as a place of shelter. It appears to be situated remote from any urban community, or from any other object which would render it convenient or profitable as a mere residence or place of abode. The only use to which it can be devoted, as before declared, is for the purposes to which the entire tract of land is adapted, and those are the only purposes for which it had ever been used. Our Civil Code (section 3522) declares that one who grants a thing is presumed to grant also whatever is essential to its use. And in the case of *Sparks v. Hess*, 15 Cal. 195, 196 (approved in the case of *McShane v. Carter*, 80 Cal. 315, 22 Pac. 179), it is said: “The true doctrine we conceive to be this: That everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee, or, as observed by Mr. Justice Story, in *Whitney v. Olney*, 3 Mason 280, Fed. Cas. No. 17,595,

the good sense of the doctrine on this subject is, that under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee. In that case, Mr. Story held that by the device of a mill and its appurtenances—not the buildings merely, but all the land under the mill and necessary for the use of it passed to the devisees." The cases cited by appellant, to wit, *Lick v. O'Donnell*, 3 Cal. 59, 58 Am. Dec. 383, *Schenk v. Evoy*, 24 Cal. 105, *Grogan v. Vache*, 45 Cal. 611, *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356, and *Adams v. Hopkins*, 144 Cal. 41, 77 Pac. 712, have been carefully examined, and we think have no application to the case at bar.

The second point urged by appellant, that there was not in law a delivery of the deed, is without substantial merit. Blockburger, to whom the deed was delivered by the grantor with explicit instructions that he deliver it to the grantee, testified: "I considered that my instructions were to deliver the instrument at the first opportunity, or when it was called for. I was not instructed to hold it." He further testified that he thought he had delivered the deed to W. P. White when he gave the latter "the bundle of papers, which was soon after this paper was executed." This witness in reply to a direct question as to whether the grantor had instructed him to deliver the deed to W. P. White declared that he (the grantor) did so instruct him.

Thus the uncontradicted testimony clearly shows that the grantor, on placing the deed in the hands of Blockburger, with a request that he deliver it to the grantee, intended to and did part with all dominion and control over the instrument. There is absolutely nothing to be found in Blockburger's testimony tending to show that the deceased, when handing the deed to the former with instructions that it be delivered to W. P. White, did so with any qualifications or conditions, or with any intent to recall the instrument before delivery. Blockburger's failure to deliver the deed to the grantee was due entirely to a mistake or inattention or carelessness on his part. It was no fault of the grantor that the deed was not delivered immediately or within a short time after its execution. Blockburger thought he had, in fact, delivered it to the grantee soon after he was given possession of it for that purpose. He had the custody of papers belonging to each of the parties to the deed, and kept the papers of each in separate and distinct packages, but through inadvertence placed the deed among the papers of the grantor, or otherwise, he says, the deed would have been delivered to the grantee soon after it was executed.

We think that it is well settled in this

state that where a grantor has placed the deed in the hands of a third party, with instructions to deliver it to the grantee, even where the same is to be delivered after the death of the grantor, if there be nothing to indicate an intention on the part of the grantor to recall the same, such deed has then passed beyond the control of the grantor for all time. Manifestly the question must be determined by the grantor's intention in the matter, and is one of fact to be solved by the light of all the circumstances surrounding the transaction. *Bury v. Young*, 98 Cal. 451, 33 Pac. 338, 35 Am. St. Rep. 186; *Wittenbrock v. Cass*, Adm'r, etc., et al., 110 Cal. 1, 42 Pac. 300. The circumstances here clearly indicate a perfect delivery.

The other questions urged—that of estoppel and that the deed is void because the wife of the grantor did not join in its execution—are not, as stated, of sufficient importance to demand special consideration. The testimony shows without contradiction that Rohrbough, as is alleged in his answer, holds a written lease of the land described in the complaint for a period of 10 years, and that the time provided by said lease has not expired. Our attention has been called to nothing in the record authorizing a disturbance of the order as to said defendant.

For the reasons stated herein, the order appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(155 Cal. 185)

MIDDLECOFF et al. v. CRONISE et al.
(L. A. 2,291.)

(Supreme Court of California. Feb. 10, 1909.
On Rehearing, March 11, 1909.)

1. PARTITION (§§ 30, 43*)—JURISDICTION.

The right to partition in one action two or more parcels is not affected by the fact that the parcels are situated in different counties, and the action is maintainable in any county in which a part of the land is situated.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 82, 109; Dec. Dig. §§ 30, 43.*]

2. PARTITION (§ 30*)—ACTION—CO-TENANCY OF PARTIES.

To justify a single action for partition of two or more parcels of land, each parcel must be owned by the same persons or grantees or successors of such persons, but the interest of each co-tenant to each parcel need not be the same.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 82; Dec. Dig. § 30.*]

3. TENANCY IN COMMON (§ 35*)—CONVEYANCE BY CO-TENANT—EFFECT.

A tenant in common cannot by a conveyance of his interest in a part of the property held in common prejudice the rights of his co-tenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 27; Dec. Dig. § 35.*]

4. PARTITION (§ 30*)—PROPERTY TO BE INCLUDED.

Property originally held in common by co-tenants continues for the purpose of partition to be a unit, though some of the co-tenants have conveyed their interests, and in one action for partition the respective rights of all the parties interested may be determined.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 30.*]

5. PARTITION (§ 30*)—PARTIES.

Where property, consisting of several parcels originally held in common by co-tenants, some of whom have conveyed their interests, is sought to be partitioned in one action, a necessary party defendant may be a co-tenant only as to one of the parcels involved, and the fact

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that he has no interest in the other parcels is no ground of objection of the joinder in one action of the various parcels.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 30.*]

6. PARTITION (§ 30*)—PARTIES—"REAL PROPERTY."

Where property consisting of separate parcels situated in different counties was not originally held in common by all the co-tenants of the various parcels, or their predecessors in title, there was no such unity of title as authorized the joinder of all the parcels in one suit for partition under Code Civ. Proc. § 752, authorizing co-tenants in possession of "real property" to sue for a partition thereof; the words "real property" referring to such as to which such unity of title exists as authorizes a single action.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5939-5951.]

7. PARTITION (§ 74*)—ISSUES—RELIEF.

Where the requisite unity of title as to the co-tenants exists, the claims of any person adverse to the co-tenants may be determined in an action for partition, and thus settle all controversies to the title in one action and equitably apportion the property.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 74.*]

8. PARTITION (§ 30*)—COMPLAINT—CAUSES OF ACTION.

A complaint for partition of three parcels of land situated in different counties and not held in common by the co-tenants or their predecessors in title, which alleges that partition is necessary to enable plaintiffs interested in each parcel to obtain some remedy from the condition which has arisen by virtue of a fire destroying the buildings on one of the parcels by using the proceeds of the other parcels for the improvement of the former parcel, and that plaintiffs are without remedy, except in a court of equity, states only a cause of action for partition, the other matters alleged going simply to the relief in the adjustment of the interests of the parties among themselves in the event that a partition is had, and the joinder in one action of the separate parcels cannot be sustained.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 82; Dec. Dig. § 30.*]

9. PARTITION (§ 30*)—MISJOINDER.

Where a suit for partition of three parcels of land situated in different counties is brought in a county in which one of the parcels is situated, a defendant having an undivided interest in each parcel may demur on the ground of misjoinder of causes of action because the parcels have never been held in common by the co-tenants or their predecessors in title.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 30.*]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Eliza F. Hubbard Middlecoff and another against Maria Hubbard Cronise and others. From a judgment of dismissal, on sustaining demurrers to the complaint, plaintiffs appeal. Affirmed.

W. W. Middlecoff, for appellants. Carter P. Pomeroy, for respondents.

ANGELLOTTI, J. This is an action commenced in the superior court of Los Angeles county by Mrs. Eliza F. H. Middlecoff and

one of her two minor children, against her other minor child and Mrs. Maria H. Cronise, for the partition of three separate parcels of land, situated respectively in the city and county of San Francisco, Los Angeles county, and San Joaquin county. The husband of Mrs. Middlecoff is made a party plaintiff, and the husband of Mrs. Cronise is made a party defendant, but neither has any interest in the property. Mrs. Cronise is interested in the San Francisco property only, under a deed executed April 28, 1890, by one Maria S. Hubbard, then the owner in severalty of the whole thereof, conveying an undivided one-half thereof to her for and during her natural life, and thereafter to the issue of her body forever, and failing such issue at the time of her death to Mrs. Middlecoff. Mrs. Middlecoff, in the year 1904, quitclaimed her interest in this undivided half to Mrs. Cronise. The other undivided half of the San Francisco property was conveyed on the same day by Mrs. Hubbard to Mrs. Middlecoff for and during her natural life, and thereafter to the issue of her body, and failing such issue to Mrs. Cronise, who, in the year 1904, quitclaimed her interest therein to Mrs. Middlecoff. Shortly before the commencement of this action, Mrs. Middlecoff conveyed to her two minor children an undivided $\frac{1}{100}$ of said property. The whole of the San Joaquin property was conveyed by Mrs. Hubbard to Mrs. Middlecoff for her life and thereafter to the issue of her body, and in case issue should fail, then from the death of Mrs. Middlecoff to Mrs. Cronise, and Mrs. Cronise, in the year 1904, quitclaimed all her interest therein to Mrs. Middlecoff. Shortly before the commencement of this action, Mrs. Middlecoff conveyed to her two minor children an undivided $\frac{1}{100}$ thereof. The Los Angeles property was originally owned by one Lillie Volmer, who, on August 22, 1907, conveyed it to Mrs. Middlecoff for her life, and thereafter to the issue of her body, and failing such issue, from the time of her death to her husband, W. W. Middlecoff, who has quitclaimed his interest to Mrs. Middlecoff. A conveyance of an undivided one-third of this property has been executed by Mrs. Middlecoff to her two minor children. The above stated facts are shown by the allegations of the complaint. The complaint thus shows by specific averments that Mrs. Cronise neither has nor ever had any interest whatever in the property situated in the county in which this action was brought, and that she acquired her undivided interest in the San Francisco property from the then owner of the whole property in severalty, except in so far as she subsequently acquired some interest under the quitclaim deed of Mrs. Middlecoff, who was not, at the time of the execution thereof, the owner of any interest in the Los Angeles property. It further shows that Mrs. Cronise is in no way interested in the San Joaquin

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property. Mrs. Cronise and her husband demurred to the complaint upon the grounds, among others: (1) That the court has no jurisdiction of the subject of the action in so far as it purports to affect them or either of them; (2) that the complaint does not state facts sufficient to constitute a cause of action against them or either of them; and (3) that several causes of action have been improperly united in said complaint in this: That a cause of action against them for the partition of a tract of land situated in the city and county of San Francisco and in which alone they or either of them or their predecessors or grantors are alleged to have had or have any interest is improperly united with a cause of action solely between Mr. and Mrs. Middlecoff and their minor children for the partition of the tracts situate in the counties of Los Angeles and San Joaquin. A demurrer was also interposed on behalf of the minor defendant upon the same grounds. These demurrers were sustained by the trial court, and, plaintiffs declining to amend, judgment dismissing the action was entered. This is an appeal by plaintiffs from such judgment.

It is thoroughly established that partition may be had in one action of two or more tracts or parcels of land, and the fact that such tracts are situated in different counties cannot affect this right; the action being maintainable in such a case in any county in which a part of the property is situated. See *Murphy v. Superior Court*, 138 Cal. 69, 70 Pac. 1070. Where a complaint is filed looking to the partition of two or more tracts of land which may be partitioned in one action, it states, of course, only one cause of action, as is claimed by plaintiffs for the complaint before us asking for the partition of three several tracts of land. The difficulty with this complaint, however, is that the co-tenancy between all the alleged co-tenants exists only as to one of said tracts; only a portion of them being interested in either of the other two tracts. It appears to be the well-settled rule that, with the exception to be hereinafter stated, while two or more parcels of land may be the subject-matter of a single proceeding for partition, even though the interest of each co-tenant is not the same in each parcel, in order to justify such union in one suit each parcel of land must be owned by the same persons. The matter was stated by the Supreme Court of Massachusetts as follows: "The question now raised is this: Can a petitioner who holds two parcels of land in different proportions, one as co-tenant with A., and the other as co-tenant with A., B., and C., have judgment for partition of both, on one petition? And we have no doubt that he cannot. Nor could he, even if he owned the same proportional part in each parcel. If he holds with the same co-tenant or co-tenants, different parcels, in different proportions—as half of one and two-thirds of another—he may have partition of both on one petition. In such a case there would

be no misjoinder. But by the amendment which this petitioner has made of his petition there is a misjoinder which must defeat him. The holder of a note against A. and also a note against A., B., and C. might as well bring one action on both notes, and recover judgment thereon." *Hunnewell v. Taylor*, 69 Mass. 111. See, also, *Freeman on Co-Tenancy & Partition*, § 437; *Reckefus v. Lyon*, 69 Md. 589, 16 Atl. 233, 530; *Appeal of Small (Pa.)* 15 Atl. 767; *Harman v. Kelley*, 14 Ohio, 502, 45 Am. Dec. 552; *Brownell v. Bradley*, 16 Vt. 105, 42 Am. Dec. 498; *Pankney v. Howard*, 47 Miss. 83; *Kitchen v. Sheets*, 1 Ind. 138; *Smith v. Pratt*, 13 Ohio, 549.

The exception to this rule is one based on the universally accepted doctrine that one co-tenant cannot by a conveyance of his interest in a portion of the property held in common, etc., prejudice the rights of his co-tenants. The grantee or successor of such a co-tenant simply steps into the shoes of his grantor, subject to all the rights of the other co-tenants and their successors as to partition. For all the purposes of partition, the whole property originally held in common by the co-tenants, whether consisting of one or any number of parcels, continues to be a unit, the subject-matter of a single action, just as if no change in the ownership of any interest therein had occurred, and in such action the respective rights of all the parties interested, original co-tenants and successors, may be determined. In such a case a necessary party defendant may be a co-tenant only as to one of the parcels involved, and the fact that he is not interested in the other parcels is no ground of objection to the joinder in one action of the various parcels of land. In such a case there is but one cause of action stated, the partition of a single lot of real property originally held in common, and, for all the purposes of the proceeding, still so held. See *Freeman on Co-Tenancy & Partition*, §§ 196, 199, 203, 465. Numerous cases sustaining the joinder of different parcels under these circumstances are to be found in the books, but we have been cited to no case, and we have seen no case, where such a joinder has been sustained, unless the common source of title was a co-tenancy as to all the property involved. This is true of the California cases, including *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; a case much relied on by plaintiffs. The case of *Harlan v. Langham*, 69 Pa. 237, was of this character, being, as stated by the court, "the case of an original tract held in common, but which one of the tenants in common has carved out into parcels, and conveyed them in severalty." The claim was made that these grantees must each be proceeded against severally for the tract or parcel of land of which he is a tenant, and that one action would not lie; but the court held that, if the defendants are tenants of the same original tract with the plaintiffs, there is no rule or principle which requires that they should be tenants in common among

themselves. The conclusion was expressly based on the doctrine that a co-tenant could do no act to the prejudice of his co-tenants, and *Gates v. Salmon*, supra, was approvingly cited on this point. The court said: "Of course this principle must be held applicable only where there has been an original tract held in common, and not to the case of several tracts so held, under different grants." The exception is thus based on the theory that for the purposes of partition all the property originally held in common constitutes a unit, a single aggregation of property, regardless of subsequent changes in ownership of interests in portions thereof.

No such theory can obtain, however, where all the property sought to be partitioned is not and was not originally held in common by all the co-tenants of the various parcels or their predecessors in title. Between the property so held and that not so held there is no such unity of title and tenancy as authorizes the joinder of both in the same proceeding. *Pankey v. Howard*, supra. The inclusion of property not so held with that so held is the statement of a second cause of action relating to a different subject-matter. It was said by the Supreme Court of Maryland, after citing authorities: "All these authorities hold that it is a misjoinder to include in one proceeding for partition real estate owned jointly by A. and B., and also real estate owned jointly by A., B., and C. The reason why this should not be done, they say, is obvious. C. has no interest whatever in the lands held jointly by A. and B., and he therefore cannot properly be made a party to their controversies, and made to bear the burden of any part of their costs. In such a case, also, there must be two separate decrees against different parties, and relating to different subject-matters, which is manifestly improper. We think therefore that there should have been two separate suits in this case, one for the partition of the lands held in common by Andrew and George T. Lyon, and the other for the partition of the lands held by said Andrew, George T. Lyon, and J. Thompson Frieze." *Reckefus v. Lyon*, supra. As suggested by the Massachusetts Supreme Court, there is no more legal support for such a joinder in one action than there would be for a joinder of a cause of action on a note held by the owner against A., with a cause of action on another note held by the same owner against A., B., and C. Our statute relating to partition contemplates no such joinder. The "real property" referred to in section 752, Code Civ. Proc., as to which an action for partition may be brought, is the real property as to which such unity of title exists as authorizes a single action under the rules we have discussed. That the rights of adverse occupants of the land sought to be partitioned may be put in issue, tried, and determined, as is held by this court (see *Adams v. Hopkins*, 144 Cal. 19, 29, 77 Pac. 712, and cases there cited), and by the New York Court of Appeals (see *Sat-*

terlee v. Kobbe, 173 N. Y. 91, 65 N. E. 952), does not affect the question. Where the requisite unity of title as to the co-tenants exists, the claims of any and all persons adverse to the co-tenants in regard to the property may be determined in the action, in order to settle all controversies to the title in one action and equitably apportion the property of the defendants. Such a determination of adverse claims is merely incidental to the main purpose of the action, the partition of the property held in co-tenancy. It is suggested by learned counsel for plaintiffs that this action may be regarded as an action for partition against the defendant minor only for the partition of the Middlecoff interests, and that Mrs. Cronise is a necessary party only in the sense that her presence is essential to do complete justice among the Middlecoffs. There is, of course, nothing in this. So far as Mrs. Cronise is concerned, the action is one solely for the partition of land as to part of which she is a co-tenant.

The complaint contains certain allegations which counsel claims make the action something more than an action for partition; it being one, as he puts it, "to enable the plaintiffs to get some remedy from the condition which has arisen by virtue of the San Francisco fire, which leaves the life tenants of vacant property without remedy except in a court of equity." The theory appears to be that it is essential to the protection of the Middlecoff interests that those interests in all three parcels of land should be settled in one action, wherein the proceeds of a sale of the Los Angeles property and the San Joaquin property may be devoted to the improvement of such portion of the San Francisco property as is finally set off to the Middlecoffs. We see nothing in the additional allegations that make the action other than one primarily for a partition; the other matters alleged going simply to the relief that is to be given in the adjustment of the interests of the Middlecoffs among themselves, in the event of a partition being had. Nor, if the object of the joinder be as stated, and such object can be attained in a single action involving all the three parcels of the Middlecoffs, and in a single action only, are the plaintiffs without remedy. They may have the San Francisco property partitioned in a single proceeding in which a part of the property may be assigned in severalty to the Cronise interests, and the other part to the Middlecoff interests, and, this having been done, they may bring their single action, including the San Joaquin and Los Angeles properties, and the Middlecoff portion of the San Francisco property.

We are satisfied that the Cronise demurrer on the ground of misjoinder of causes of action was well taken. There is nothing in the claim that the demurrer was not sufficiently specific in this regard. No brief has been filed in support of the ruling sustaining the demurrer of the defendant minor. We are of

the opinion, however, that, on the case as stated in the complaint, the objection of misjoinder was available to him.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

On Rehearing.

W. W. Middlecoff, for appellants. Carter P. Pomeroy and Percy R. Wilson, for respondents.

PER CURIAM. The petition for a rehearing is denied. Petitioners ask that, if the rehearing be denied, the affirmance of the judgment be made without prejudice to the right of plaintiffs to commence a new and separate action for the partition of the Los Angeles and San Joaquin properties and the San Francisco property. The judgment of affirmance in no way affects plaintiffs' rights in that regard, and no such qualification thereof is essential.

155 Cal. 177

LYDEN v. SPOHN-PATRICK CO. et al.
(S. F. 4,960.)

(Supreme Court of California. Feb. 10, 1909.)

1. PARTNERSHIP (§ 9*)—CONTRACT—CONSTRUCTION—INTEREST IN PROFITS.

Where plaintiff's entire interest in a business consisted in his right to receive one-half of the profits for his services, he was not a partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 23; Dec. Dig. § 9.*]

2. PLEADING (§ 406*)—COMPLAINT—OBJECTIONS—WAIVER—FAILURE TO DEMUR.

Where a complaint contains two or more counts, one of which is good, the objection that the other counts do not state facts sufficient to constitute a cause of action is not waived by a failure to demur.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1366; Dec. Dig. § 406.*]

3. MASTER AND SERVANT (§ 80*)—ACTIONS FOR SERVICES—COMPLAINT.

A contract required plaintiff to devote his whole time to a business for one-half of the profits, \$200 per month to be advanced to him as salary, the contract to be in force for six months, but, if the business was profitable, it might be continued for successive periods of six months, terminable by either party for breach by the other. *Held*, that a complaint alleging that there was due plaintiff \$200 a month from January 11, 1904, amounting to \$4,200, was fatally defective for failure to allege that the contract was continued or that plaintiff was actually occupied in the business for such period, or that, if the amount was claimed for expenses or as profits, he had incurred expenses or that there were profits.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 113; Dec. Dig. § 80.*]

4. JUDGMENT (§ 256*)—APPLICATION TO PLEADINGS OR FINDINGS.

Where, in an action for services, plaintiff's second count was based on the contract, and sought to recover \$200 per month as distinguished from damages for breach of the contract, and the only finding relating to the non-performance of the contract referred to in such count stated that defendant had never paid plaintiff the sum of \$200 per month for a breach of six months between certain dates, and an-

other finding declared that defendant refused to carry on the business at all after the first six months, the facts alleged in such count having been denied by the answer, there was neither finding nor pleading sufficient to sustain a judgment for plaintiff on such count.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 446; Dec. Dig. § 256.*]

5. MASTER AND SERVANT (§ 73*)—CONTRACT OF EMPLOYMENT—SUBSTANTIAL PERFORMANCE.

A servant cannot recover the entire compensation specified in his employment contract, unless he has himself substantially performed his obligation to devote his entire time and energies to the business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 92; Dec. Dig. § 73.*]

6. MASTER AND SERVANT (§ 80*)—ACTION ON CONTRACT—MATERIAL ISSUES—FAILURE TO FIND.

Where, in an action on an employment contract, the answer denied that plaintiff had complied therewith by employing his full time in the business, a material issue was thereby raised, and the court's failure to find thereon constituted ground for reversal.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 80.*]

7. FRAUDULENT CONVEYANCES (§ 205*)—VACATION—ACTION—RIGHTS TO SUE.

No one but a creditor or one having some interest or estate in property alleged to have been fraudulently conveyed can sue to set aside the transfer.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 624; Dec. Dig. § 205.*]

8. FRAUDULENT CONVEYANCES (§ 241*)—VACATION—RIGHT TO SUE—JUDGMENT.

A creditor in general cannot sue to set aside a fraudulent conveyance until after he has established his debt by the recovery of a judgment thereon.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 697; Dec. Dig. § 241.*]

9. FRAUDULENT CONVEYANCES (§ 222*)—VACATION—RIGHT TO SUE—ISSUANCE—LEVY OF ATTACHMENT.

The beginning of an action and the issuance and levy of an attachment does not give plaintiff a status which will enable him to maintain an action to set aside a fraudulent conveyance except where the debtor is a nonresident.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 222.*]

10. FRAUDULENT CONVEYANCES (§ 296*)—STATUS OF PLAINTIFF—EXISTENCE OF DEBT.

In an action to set aside an alleged fraudulent conveyance, the fact that an action is begun to recover an alleged debt does not establish its existence either as a matter of pleading or evidence.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 891; Dec. Dig. § 296.*]

11. FRAUDULENT CONVEYANCES (§ 263*)—VACATION—COMPLAINT.

In a suit to set aside an alleged fraudulent conveyance, the complaint must allege that the transfer has actually been made; an allegation that the transferee claims to be the owner of the property being insufficient.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 771; Dec. Dig. § 263.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Frederick F. Lyden against the

Spohn-Patrick Company and others. From a judgment for plaintiff, and from an order denying defendants' motion for a new trial, they appeal. Reversed.

E. D. Knight and Otto tum Suden, for appellants. E. H. Wakeman, for respondent.

SHAW, J. The defendants appeal from the judgment and from an order denying a new trial. Two separate actions were consolidated in the court below and tried together. The first action was against the Spohn-Patrick Company alone, upon a complaint for the recovery of money on a contract. The second action was begun one week after the first action. It was against the Spohn-Patrick Company, the John H. Spohn Company, and certain persons alleged to be directors of both companies. Its object was to declare fraudulent and set aside a suspected transfer by the Spohn-Patrick Company of all its property to the other company above named.

The complaint for money stated three separate causes of action, in three counts. The first count was for the sum of \$3,650.33, as one-half of the profits alleged to have been made in the business of Spohn-Patrick Company for the six months ending January 11, 1904, conducted by the plaintiff, which share of the profits the plaintiff claimed to be due him under the contract set forth in the complaint, and for an accounting to determine the true amount of such profits. The second count was to recover \$4,200 from the Spohn-Patrick Company, alleged to be due the plaintiff under said contract. The third count was for the sum of \$1,450, alleged to have been laid out and expended by the plaintiff for the use and benefit of the defendant under the terms of the contract. The court found that there was due the plaintiff on the first count \$1,029.43, on the second count \$1,200, and on the third count \$1,525.47, making a total of \$3,725.47, for which sum judgment was rendered against the Spohn-Patrick Company. The three counts are each based upon the same contract. The material parts of the contract are as follows: The company agreed to advance to the plaintiff \$200 per month as salary, with the necessary incidental expenses, including carrying charges on the sales of canned salmon, which constituted the stock in trade, and also the money necessary to purchase the goods. Of the net profits of the business carried on in this manner the company was to receive 50 per cent. and the plaintiff 50 per cent., the profits to be divided at the end of each month. The agreement was to continue for six months from its date, which was July 11, 1903, and was to continue thereafter, in consecutive periods of six months each, for three years from its date if at the end of the first six months and each successive six months, respectively, there should be no net loss to the company. The expenses thus advanced, including the salary, and any other expenses necessary to the business, were to be charged against the receipts, and the company was to have 6 per

cent. interest on money advanced in purchase of goods. The company was also to have the right to reject sales and to be the judge of the credit of the parties to whom sales were made. The plaintiff was to devote his entire time and energies in the interest of the business. Failure on the part of either to carry out any portion of the agreement made it null and void at the option of the other party. The contract did not make the plaintiff a partner in the business. He was to have no title to any of the property, and was not liable for any of the debts. His entire interest in the business consisted in his right to receive one-half of the profits as his compensation. The second count fails to state a cause of action. This count, after alleging the execution of the contract, and referring to a copy thereof as an exhibit, proceeds to aver this only: "That, under and by virtue of the terms of said agreement, there is due and payable to the plaintiff the sum of \$200 per month from the 11th day of January, 1904, amounting in all to the sum of \$4,200, no part of which has ever been paid, and the whole thereof still remains due and owing and unpaid from defendant to the plaintiff."

Where a complaint contains two or more counts, one of which is good, the objection that the other counts do not state facts sufficient to constitute a cause of action is not waived by a failure to demur. *Haskell v. Moore*, 29 Cal. 433; Code Civ. Proc. § 434. The contract does not contain any absolute promise or covenant by the Spohn-Patrick Company to pay the plaintiff any sum of money. Its obligation to pay would not arise thereunder, except upon certain conditions and the performance by the plaintiff of certain services. The salary of \$200 per month to be advanced to the plaintiff during the time he was occupied in the business would not be due him unless he had actually engaged in the business, and \$4,200 would not be due as alleged, unless he had continued to be so engaged for the period of 21 months without payment. If this count is intended to cover the salary for such a period, it should have alleged that the plaintiff had performed, or offered to perform, during that period, or for some period, the services required by the contract. As the contract itself prescribes that it shall continue in force for six months only, unless the business for the first six months proved profitable, there should have been alleged facts showing its continuance during the time for which compensation is claimed. If the \$4,200 is claimed as a reimbursement for incidental expenses and carrying charges paid by the plaintiff, assuming for the present that he was authorized by the contract to advance such expenses from his own funds, the fact of his advancing and paying such expenses should have been alleged. If it is claimed to be due as his share of the profits, there should be an allegation that there were prof-

its and a statement of the amount. None of these facts are alleged either specifically or generally, and for these reasons this count is deficient.

Furthermore, even if there were such allegations, or if the allegations above quoted were sufficient, the findings do not cover them. The only finding relating to the supposed breach of the contract referred to in this count is the eighth, which merely states that said company "has never paid to the plaintiff the sum of \$200 per month, or any part thereof, for the period of six months from the 11th day of January, 1904, to the 11th day of July, 1904." Another finding declares that the Spohn-Patrick Company refused to carry on the business at all after the first period of six months, ending January 11, 1904, and that the business was then ended. The answer denies the averment of the second count above quoted. It thus appears that no facts are shown which would entitle plaintiff to the \$200 per month claimed by the second count. He might possibly claim damages for a wrongful refusal of the defendant to carry on the business after the first six months, if there was such wrongful refusal, and some expressions in the findings seem to indicate that the court supposed it was giving judgment for this sum on that theory. But there was not even an attempt to allege any such cause of action, and any judgment based on that theory would be erroneous and invalid. This part of the judgment is not supported either by the pleadings or the findings.

The part of the judgment based on the first count is also unsupported by sufficient findings. This count asserts a claim, founded on the contract hereinbefore stated, for one-half of the alleged net profits accruing from the business to be carried on under the contract, for the first six months' term, ending January 11, 1904. The contract provides that the plaintiff was to devote his entire time and energies to said business. It is perfectly clear that he could not recover, under the contract, the entire compensation there specified unless he had himself substantially performed this covenant. To show such performance, the third paragraph of this first count alleged that the plaintiff entered into the employment of said defendants in accordance with the contract, and remained continuously in said employment, carrying out his part of the contract, until January 11, 1904. The answer denied these averments, and alleged that during that period he falsely represented to said defendant that he was employing his full time in the business, but that, in fact, he occupied himself therein during that time only about three hours each day and spent the remaining hours in idleness and in his own affairs in no wise connected with said business, and that said business required all his time and energy for its proper management. An issue was thus made upon a material fact in-

involved in the first count, and it was necessary for the court to make a finding thereon. It made none whatever, but disposed of this issue by stating in the findings that the third paragraph of the first count was admitted by the answer. This, as we have shown, is a mistake. Not only does this omission establish a failure of the findings to support the judgment, but it also constitutes a failure to find upon a material issue. This is a ground for a new trial, and is one of the grounds assigned therefor in the defendants' motion for a new trial. This error will therefore require, not only a reversal of the judgment, but also of the order denying the motion for a new trial. *Great Western G. Co. v. Chambers*, 153 Cal. 307, 95 Pac. 151; *Swift v. Occidental, etc., Co.*, 141 Cal. 165, 74 Pac. 700; *Kaiser v. Dalto*, 140 Cal. 167, 173 Pac. 828.

The court also gave judgment for the plaintiff in the second action to set aside a suspected fraudulent transfer from the Spohn-Patrick Company to the John H. Spohn Company. This judgment is founded upon a complaint clearly insufficient. No one but a creditor, or one having some interest or estate in the property, can maintain a suit to set aside a fraudulent transfer. It is the general rule that even a creditor cannot do so until after he has established his debt by the recovery of a judgment thereon. *McMinn v. Whelan*, 27 Cal. 315; *Ohm v. Superior Court*, 85 Cal. 548, 26 Pac. 244, 20 Am. St. Rep. 245; *Field v. Andrada*, 106 Cal. 110, 39 Pac. 323; *Murphy v. Clayton*, 114 Cal. 536, 43 Pac. 613, 46 Pac. 460; *Aigeltinger v. Einstein*, 143 Cal. 609, 77 Pac. 669, 101 Am. St. Rep. 131; *First Nat. Bank v. Eastman*, 144 Cal. 493, 77 Pac. 1043, 103 Am. St. Rep. 95. The beginning of an action and the issuance and levy of a writ of attachment therein does not give the plaintiff a status which will enable him to maintain such an action. *McMinn v. Whelan*, *supra*; *Aigeltinger v. Einstein*, *supra*. There is an exception to these rules in cases where the debtor is a nonresident, and where consequently no personal judgment can be obtained against him. *First Nat. Bank v. Eastman*, *supra*. This exception is of no consequence here for the defendant is not a nonresident. This complaint does not show that the plaintiff is, or ever was, a creditor of the Spohn-Patrick Company. The only allegations in that behalf are that on November 1, 1905, plaintiff had begun an action in the superior court against that company to recover \$9,300.33, upon an agreement in writing between it and the plaintiff, and that on November 4, 1905, plaintiff caused a writ of attachment in said action to be issued and levied on the property of said defendant. In other parts of the complaint, it is stated that the alleged transfer, if made at all, was made with intent to hinder and defraud plaintiff "as a creditor" of said Spohn-Patrick Company. There is no averment that any money

was due or owing on the demand referred to in the attachment suit, nor of any facts to show that any indebtedness existed from said defendant to the plaintiff. The fact that an action is begun to recover an alleged debt does not establish the existence of the debt, either as a matter of pleading or as a matter of evidence.

It is also necessary in such an action to allege that the transfer complained of has been made. The complaint does not allege that any transfer has been made, but stops with the statement that the J. H. Spohn Company claims to be the owner of the property described, and the prayer is that if any such transfer has been actually made that it be declared fraudulent and set aside. For these reasons the part of the judgment based upon this complaint is erroneous.

Appellants assert that many other erroneous rulings were made, and the voluminous transcript is filled with objections to the actions and rulings of the court below. Many of these proceedings were irregular, to say the least, but the judgment, so far as the first action was concerned, is an entire judgment for a stated sum of money, and, as it is in part erroneous on the face of the judgment roll, it is within the discretion of this court to reverse it altogether. The claim asserted in the last count of the complaint is so connected with those embraced in the first and second counts that in justice to the defendant the whole case should be tried anew. For these reasons, we have not considered the sufficiency of the evidence to uphold the findings relating to the third count of the complaint in the first action, and we think it useless to discuss the many errors occurring upon the trial which are claimed by the appellant to have been made. Upon another trial, it is to be supposed that most of the injurious proceedings here complained of will be avoided.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

155 Cal. 193

HIBERNIA SAVINGS & LOAN SOCIETY v.
BOYD. (S. F. 4,944.)

(Supreme Court of California. Feb. 11, 1909.
Rehearing Denied March 10, 1909.)

1. MORTGAGES (§ 525*)—FORECLOSURE—SALES—AMOUNT—EVIDENCE.

Under Code Civ. Proc. § 729, providing that the report of a commissioner appointed to sell property under a mortgage shall have the same effect as a sheriff's return under execution, and under Pol. Code, § 4178, making such return prima facie evidence of the facts stated therein, on suit on a deficiency judgment after foreclosure sale, the fact of a report of the commissioner being admitted by the pleading, it was prima facie evidence of the amount for which the property sold and that the report was correct.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1529; Dec. Dig. § 525.*]

2. JUDGMENT (§ 913*)—ACTION ON—PLEADING.

An allegation that a judgment of a court of superior or general jurisdiction "was duly given and made" implies a lawful judgment pronounced by a court having jurisdiction of the person and subject-matter.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1740; Dec. Dig. § 913.*]

3. PLEADING (§ 377*)—ADMISSIONS—FAILURE TO TRAVERSE.

An allegation of a complaint, in a suit on a judgment for a deficiency after foreclosure sale, that the judgment was duly given, was admitted by defendant's failure to controvert it, and hence plaintiff was not required to show that there was a complaint in the former action, or a request for personal judgment, or personal service of summons, or that the mortgaged land was situated within the jurisdiction of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1228; Dec. Dig. § 377.*]

4. JUDGMENT (§ 951*)—ACTION ON—PLEADING.

Where, in an action on a judgment, jurisdiction of the person and of the subject-matter in the former action is admitted, the judgment is admissible in evidence, though not accompanied by the other papers constituting the judgment roll.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1810; Dec. Dig. § 951.*]

5. PLEADING (§ 127*)—ADMISSIONS.

In an action on a deficiency judgment given on mortgage foreclosure, the sale of all the mortgaged land was established by an admitted allegation of the complaint that the referee duly sold "the said land," referring to the mortgaged land.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 264; Dec. Dig. § 127.*]

6. MORTGAGES (§ 561*)—FORECLOSURE—"COMMISSIONER"—"REFEREE."

In an action on a deficiency judgment on mortgage foreclosure, the word "referee," as used in an allegation that the sale was made by a referee, is synonymous with "commissioner," within Code Civ. Proc. § 726, requiring a foreclosure sale to be made by a commissioner when not made by the sheriff.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 561.*]

For other definitions, see Words and Phrases, vol. 2, p. 1306; vol. 7, p. 6027.]

7. MORTGAGES (§ 497*)—FORECLOSURE—DECREE—COLLATERAL ATTACK.

Where a court has jurisdiction of the person and of the subject-matter in a mortgage foreclosure action, error in ordering a sale by an improper person could not be collaterally attacked in an action on a deficiency judgment; the remedy being appeal from the foreclosure judgment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1470; Dec. Dig. § 497.*]

8. PLEADING (§ 127*)—ADMISSIONS.

In an action on a deficiency judgment on mortgage foreclosure, an admitted allegation that the referee appointed to make the sale returned his report in the cause must be taken to mean that the report in all respects conformed to law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 264; Dec. Dig. § 127.*]

9. PLEADING (§ 205*)—GENERAL DEMURRER.

If the taking of an oath and the filing of a bond by a referee appointed to sell land on mortgage foreclosure as required by Code Civ. Proc. §§ 726, 729, and the placing of an order of sale in his hands, were indispensable to a valid sale, and it was necessary to show them in

an action on a deficiency judgment, allegations that pursuant to the foreclosure judgment the referee duly sold the land and returned his report, etc., sufficiently showed performance of such requirements, as against a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 492; Dec. Dig. § 205.*]

10. EVIDENCE (§ 178*)—LOST RECORDS—SECONDARY EVIDENCE.

Act June 16, 1906 (St. 1906, p. 73, c. 55), providing for the restoration of court records lost by fire, etc., did not make inadmissible oral evidence in an action on a deficiency judgment on mortgage foreclosure, to prove the record in the foreclosure case including such judgment, where all the records were destroyed in the San Francisco fire.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 583; Dec. Dig. § 178;* Records, Cent. Dig. § 33.]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Hibernia Savings & Loan Society against James T. Boyd. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

E. W. McGraw, for appellant. Edwin L. Forster, for respondent.

ANGELLOTTI, J. This is an action on an alleged judgment for deficiency after foreclosure sale of mortgaged premises. A verdict in favor of plaintiff for the amount of such alleged judgment, with interest, was rendered by the jury trying the case, in accord with an instruction of the trial court directing them to so do. This is an appeal by defendant from the judgment entered on such verdict, and from an order denying his motion for a new trial.

Upon the facts, as established by the admissions of the answer and the uncontroverted evidence given at the trial, the trial court was fully warranted in instructing the jury to find for the plaintiff. The admissions contained in defendant's answer were sufficient to warrant the trial court in taking it as a conceded fact that the original foreclosure judgment was duly given and made by the superior court of the city and county of San Francisco in an action in which it had jurisdiction of the subject-matter and in which it had acquired jurisdiction of the person of the defendant, Boyd. The real issues made by the answer in regard to this were as to the nature and terms of said judgment, and the exact date upon which it was given and entered (October 13 or 15, 1900); the date being material in view of the defense of the statute of limitations. The evidence was such as to compel the conclusion that the judgment was given, made, and entered on October 15, 1900, and was for the foreclosure of a certain mortgage upon the lands described in the complaint in said action, and for the sale of said lands to satisfy the

said judgment for the sum of \$61,184.10, and for the appointment of a referee to make sale of said lands, and out of the proceeds thereof, if sufficient, to satisfy said judgment for \$61,184.10, and, if the sum so obtained for said lands was insufficient to satisfy said sum, that the clerk of said court enter a judgment in said action, against Boyd, for such deficiency, and that it adjudged Boyd personally liable on said mortgage.

It was alleged in the complaint "that thereafter, and in pursuance of said judgment and decree, the said referee duly sold the said land, obtaining therefor the sum of \$56,184.10, and that he thereafter returned to this court his report in said cause, which, among other things, showed the sale of said land, and the amount received therefor." By his answer to this defendant, on information and belief, denied simply that the referee sold said land for any sum less than the entire amount of the judgment, not denying the sale, and not denying that the referee made a return to the court showing the sale for \$56,184.10 only. The evidence introduced was such as to compel the conclusion, in accord with the allegation of the complaint, that the clerk of the court did on November 15, 1900, after the filing of such report, docket the deficiency of \$5,000 against defendant in his judgment docket, as it was his duty to do both under the law (Code Civ. Proc. § 726) and the terms of the foreclosure judgment, if the report of the officer showed such deficiency. The so-called referee was practically the "commissioner" provided for by section 726, Code Civ. Proc., to act in place of the sheriff in such matters where it is so desired by the court, and such a commissioner's report, like the return of the sheriff, is prima facie evidence of the facts stated therein. Pol Code, § 4178; Code Civ. Proc. § 729. The fact of such a report being admitted by the pleadings, there was prima facie evidence that the property was in fact sold for only \$56,184.10, and defendant made no attempt to rebut this. Therefore it was established not only that the referee's report showed the sale for \$5,000 less than the amount of the judgment, but also that the report was correct, thus disproving defendant's allegation in this regard.

The claim that these admitted and proven facts were not sufficient to compel judgment in favor of plaintiff is based on many objections, some of which are exceedingly technical. The objection that the jurisdiction of the superior court to make the original foreclosure judgment in all respects as it was made was not shown is answered by what we have said as to the admissions made by the answer. The allegation of the complaint was that the judgment therein alleged "was duly given and made" by the superior court of the city and county of San Francisco. This was not denied except as to the date of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

judgment and the terms thereof. Such an allegation, in the case of a court of superior or general jurisdiction, implies a lawful judgment; that is, a judgment within the right and authority of the court to pronounce, a judgment by a court having jurisdiction of both the person of the defendant and the subject-matter of the action. See *Weller v. Dickinson*, 93 Cal. 110, 28 Pac. 854; *Ashton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624; *S. F. Land, etc., Co. v. Hartung*, 138 Cal. 223, 230, 71 Pac. 337. In so far as the complaint alleged such a judgment, it was not controverted by the answer, and therefore stands admitted. Hence it was not necessary in the case at bar to show that there was a complaint in such action, or a request therein for personal judgment, or personal service of summons, or that the mortgaged land was situated wholly or partly in the city and county of San Francisco. All things essential to the jurisdiction of the court to give the exact judgment it did give against defendant were included in the admissions. The only things in dispute as to the foreclosure action were the date and terms of the judgment. What we have said on this objection answers also the contention of the defendant that the judgment in that action was not admissible in evidence unless accompanied by the other papers that constitute the judgment roll. All of the papers and records of the action, including the record of both original and deficiency judgments, were destroyed in the conflagration of April 18-20, 1906, and plaintiff made secondary proof of the judgments only, introducing no evidence as to the other papers and records. The claim of defendant to the effect that the judgment alone is not admissible without the other portions of the judgment roll is necessarily based solely on the theory that jurisdiction to give the judgment must appear before it can be held binding. Where jurisdiction of both person and subject-matter is conceded, the judgment alone is clearly admissible, and it is unnecessary to supplement it by proof of the other portions of the judgment roll.

It is said that there was no proof that all of the mortgaged property had been sold by the referee, and that no deficiency judgment could be given until all had been sold. We have already quoted the admitted allegation of the complaint that the referee duly sold "the said land," and so reported to the court.

It is objected that the person appointed to make the sale on foreclosure is styled a "referee," while the Code of Civil Procedure provides only for the appointment of a "commissioner" for that purpose, where the sheriff is not to make the sale. Section 726. As we have intimated, the word "referee" as here used must be regarded as synonymous with the word "commissioner" used in section 726. Code Civ. Proc. Were this not so, the defect would not be available to defendant on this

collateral attack on the foreclosure judgment. So far as the question of jurisdiction is concerned, the superior court, having jurisdiction of the subject-matter and the person of the defendant, had jurisdiction to order the sale to be made by any person, and if it ordered it to be made by some one other than those designated in section 726, Code Civ. Proc., it simply erred in the exercise of its jurisdiction, and the remedy of defendant was to be found in an appeal from the foreclosure judgment.

The allegation in the complaint, admitted by the answer, that the referee "returned to this court his report in said cause" showing certain enumerated things, must here be taken as meaning that he made the report in all respects as required by law. This disposes of the objection that it does not appear that he filed a "verified report and account of the sale," or that such report was accompanied by the proper affidavits, as required by section 729, Code Civ. Proc.

We think the allegations in the complaint were sufficient, in the absence of specific objection by demurrer, to show the docketing of the deficiency judgment in the manner provided by law. The uncontroverted evidence introduced by plaintiff certainly made a prima facie case in this behalf. The same may be said of the objection that the complaint did not allege or the evidence show the appointment of any commissioner or referee. As against merely a general demurrer, the complaint must be construed as showing the appointment by the judgment of a referee, who subsequently sold the mortgaged property, and the proof makes a prima facie case in that regard.

Sections 726 and 729, Code Civ. Proc., provide that a commissioner appointed to sell mortgaged property, before entering upon his duties, must be sworn to perform them faithfully, and give a bond with sufficient sureties in such sum as may be ordered by the court, to the effect that he will faithfully perform the duties of commissioner according to law. It has also been held by this court that it is essential to a valid sheriff's sale on foreclosure that an order of sale should have been issued on the judgment and placed in the hands of the officer. *Heyman v. Babcock*, 30 Cal. 367. None of these things was alleged in terms in the complaint or specifically proved at the trial. It is not necessary to determine here what would be the effect of a failure to comply with these requirements. If they were indispensable to a valid sale, and it was necessary to allege and show them in an action upon the deficiency judgment, we think that the allegations of the complaint as to the sale by the referee were sufficient to include them as against a general demurrer, and that they were effectually admitted by the answer. We have already stated the contents of the pleadings on this point. The

pleadings imply a valid sale by the referee; the only issue in regard thereto being the amount realized thereon.

What we have said disposes of all the points made by appellant, except the contention that the trial court erred in admitting oral testimony to prove the record in the foreclosure case, including the deficiency judgment. As we have said, all records appertaining thereto had been destroyed in the general conflagration of April 18-20, 1906, and proof of such destruction was made to the trial court. This contention appears to be based on the act of June 16, 1906, providing for the restoration of court records which have been lost, injured, or destroyed by conflagration or other public calamity (St. 1906, p. 73, c. 55), which it is claimed provides an exclusive remedy, and forbids all other proof of lost judicial records. It is not claimed that, in the absence of such act, oral proof of the records would not have been admissible. A judicial record is a public writing (section 1894, Code Civ. Proc.), and section 1855, Code Civ. Proc., provides in terms that when an original writing has been lost or destroyed, and proof of such loss or destruction made, it may be shown either by copy or oral evidence of its contents. In *Ames v. Hoy*, 12 Cal. 11, an action on a judgment, it was in terms held that parol evidence was admissible to show the existence and contents of a judgment, the record of which had been destroyed by fire. The court very tersely disposed of the objection of the defendant in this regard, saying: "It is also argued that the destruction of the book containing the judgment is the destruction of the judgment itself, so that, the primary evidence of the judgment being removed, no other proof of it is admissible. We think that this position is alike indefensible in reason and on authority." See, also, *In re Warfield*, 22 Cal. 51, 64, 83 Am. Dec. 49. Mr. Freeman quotes approvingly the rule announced by Mr. Greenleaf in his work on Evidence, as follows: "If the record is lost, and is ancient, its existence and contents may sometimes be presumed; but whether it be ancient or recent, after proof of the loss, its contents may be proved, like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence"—and declares this rule to be sustained, beyond a doubt, by the weight of authority. 2 Freeman on Judgments, § 407, and note. After a careful examination of its contents, we are satisfied that the act of June 16, 1906, should not be construed as purporting to make any change in this well-settled rule of evidence.

The judgment and order are affirmed.

We concur: SHAW, J.; SLOSS, J.

155 Cal. 206

NORDSTROM et al. v. CORONA CITY WATER CO. (L. A. 2,114.)

(Supreme Court of California. Feb. 17, 1909.
Rehearing Denied March 18, 1909.)

1. EXECUTION (§ 403*)—SUPPLEMENTAL PROCEEDINGS—ACTION BY CREDITORS—ORDER AUTHORIZING ACTION—NECESSITY—SUFFICIENCY.

Code Civ. Proc. § 720, provides that when, in proceedings supplementary to execution, a person alleged to be indebted to a judgment debtor denies the debt, the court may permit the judgment creditor to bring suit against such person to recover the debt. Plaintiffs recovered a judgment against another, to whom defendant was indebted upon a judgment, and plaintiffs instituted supplementary proceedings and procured an order permitting them to sue defendant "for the recovery of their judgment." Held, that the order, when read in the light of the prior proceedings, substantially complied with the statute, and, even if not sufficient to authorize the action, plaintiffs, having prosecuted the supplementary proceeding to the point of procuring a denial of indebtedness from defendant, could bring the action without an order.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 403.*]

2. MECHANICS' LIENS (§ 291*)—ENFORCEMENT—JUDGMENT—PERSONAL JUDGMENT AGAINST CONTRACTOR—FORM OF JUDGMENT.

A number of mechanic's lien claimants being authorized by statute to join in the same action, on procuring a personal judgment against the contractor, a single judgment was properly entered.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 599; Dec. Dig. § 291.*]

3. EXECUTION (§ 403*)—SUPPLEMENTARY PROCEEDINGS—ACTION BY CREDITOR—PLEADINGS—VARIANCE.

Since a single judgment was proper where a number of plaintiffs united in an action against the contractor to establish mechanics' liens, no variance appears in an action against a debtor of the contractor, authorized in proceedings supplementary to execution, between allegations that a judgment was procured against the contractor by plaintiffs for a certain sum, and proof that the judgment was in fact several, and each was entitled to only a part of the sum.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 403.*]

4. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—PLEADING—VARIANCE—MISLEADING EFFECT.

If an allegation, in a complaint against one indebted to plaintiffs' judgment debtor, that plaintiffs recovered a judgment for a certain sum, shows a variance in that the proof was of a several judgment, each of plaintiffs being entitled to only a part of the sum, the variance did not mislead defendant to its prejudice, and hence was not reversible on appeal, under Code Civ. Proc. § 469, making no variance material unless it actually misled the adverse party to his prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4086; Dec. Dig. § 1039.*]

5. EXECUTION (§ 403*)—SUPPLEMENTAL PROCEEDINGS—ACTIONS BY CREDITORS—NATURE OF ACTION.

A proceeding under Code Civ. Proc. §§ 717-720, to compel one owing money to a judgment debtor to apply the debt to satisfy the judgment, is a statutory proceeding supple-

mentary to execution, designed to take the place of a creditor's bill, and does not depend upon a preceding garnishment of the debt, and the levy of execution upon the one so owing does not give a cause of action against him.

[Ed. Note.—For other cases, see Execution, Cent. D.g. § 1131; Dec. Dig. § 403.*]

6. GARNISHMENT (§ 106*)—LIEN—CREATION AND EXISTENCE.

Code Civ. Proc. § 688, providing that until a levy property is not affected by the execution, implies that it is affected after the levy, so that when, after a garnishment upon execution, the judgment creditor proceeds by supplementary proceedings to collect the debt due the judgment debtor, the judgment relates back to the levy of execution and cuts off intervening rights.

[Ed. Note.—For other cases, see Garnishment, Dec. Dig. § 106.*]

7. EXECUTORS AND ADMINISTRATORS (§ 224*)—ACTIONS—CONDITIONS PRECEDENT—PRESENTATION OF CLAIMS—NECESSITY—CLAIM SECURED BY LIEN.

In view of Code Civ. Proc. § 688, providing that until a levy property is not affected by execution, implying that it is affected after levy, a levy of execution before a judgment debtor's death upon debts due him establishes a lien within section 1500, forbidding the holder of a claim, except a demand secured by lien, from maintaining an action thereon against an administrator, unless the claim is first presented, so that, even if the section would bar an action against a debtor of decedent to compel the application of the debt to the payment of a judgment against him, the presentation of the claim was unnecessary; this conclusion being supported by section 1505, providing that if execution is actually levied upon decedent's property before his death the same may be sold, implying that the death of the judgment debtor would not destroy the effect of executions levied before his death.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 224.*]

8. GARNISHMENT (§ 130*)—SET-OFF.

As a general rule a garnishee may set off against the claims of a judgment creditor any demand available against the debtor himself, but the set-off must have existed at the time of the garnishment, so that a judgment, recovered against the debtor by one garnished in aid of an execution, subsequent to the garnishment, cannot be set off, unless it is shown to have been founded upon a liability existing at the time of the garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 255-259; Dec. Dig. § 130.*]

9. GARNISHMENT (§ 128*)—ACTIONS—LIMITATIONS.

If the obligation of a garnishee is not barred as against the judgment debtor, the statute of limitations has no application to bar an action by the judgment creditor against the garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 253; Dec. Dig. § 128; * Limitation of Actions, Cent. Dig. § 51.]

Department 1. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by A. Nordstrom and others against the Corona City Water Company. From a judgment for plaintiffs and an order denying a motion for new trial, defendant appeals. Affirmed.

E. W. Freeman and A. D. Laughlin, for appellant. Peck & Palmer, Wilfred M. Peck, and William F. Palmer (M. E. C. Munday

and F. L. Binford, of counsel), for respondents.

SLOSS, J. This is an action to recover the sum of \$3,384.10 and interest from defendant as garnishee. The plaintiffs, 19 in number, had, under the authority of section 1195 of the Code of Civil Procedure, joined in an action against one A. L. McConnell, as contractor, and defendant Corona City Water Company, as owner, to foreclose mechanics' liens for amounts claimed to be due the said plaintiffs for work done. On July 6, 1903, judgment was entered in said action, declaring that plaintiffs were not entitled to liens, but awarding them, severally, judgments against McConnell for different amounts aggregating \$3,125.33, with interest and costs. On July 7, 1903, execution was issued on this judgment and placed in the hands of the sheriff. On July 8, 1903, the sheriff duly levied said execution upon the indebtedness of the Corona City Water Company to McConnell, and made return. On July 17, 1903, McConnell recovered a judgment against said water company for \$3,441.50, which, upon appeal to this court, was affirmed for \$3,315.50 and costs. On said July 17, 1903, after the recovery of said judgment by McConnell, a second execution was issued upon plaintiffs' judgment against McConnell, and was on the same day levied by the sheriff upon all debts owing from Corona City Water Company to McConnell, and returned. It is found by the court that the time of the levy of each of said executions the water company was indebted to McConnell in the sum of \$5,200. Said water company failed and refused to pay to the sheriff upon the levy of said executions, and its indebtedness to McConnell has never been paid. The plaintiffs instituted proceedings supplementary to execution in the action in which they had recovered judgment against McConnell, and such proceedings resulted in an order made on the 13th day of October, 1906, authorizing plaintiffs to bring this action against the Corona City Water Company to recover so much of the debt due from the water company to McConnell as would satisfy plaintiffs' judgment against McConnell. The present action resulted in a judgment in favor of plaintiffs, and defendant appeals from the judgment and from an order denying its motion for a new trial.

1. The order authorizing plaintiffs to maintain this action is assailed as failing to comply with the requirements of section 720 of the Code of Civil Procedure. Under that section (as it read at the time of the order in question), when, in proceedings supplementary to execution, a person or corporation alleged to be indebted to the judgment debtor denies the debt, the court or judge may "authorize by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the

recovery of such * * * debt." The order here made was that plaintiffs "be permitted to bring an action against the Corona City Water Company for the recovery of their judgment." While the order did not follow the precise language of the Code, it was, when read in the light of the proceedings leading up to its making, in substantial compliance with the law; but even if it was not, in itself, sufficient as an order authorizing suit under section 720, the plaintiffs had the right, after having prosecuted their supplementary proceedings to the point of securing from defendants a denial of indebtedness to the judgment debtor, to bring this action without any order permitting them so to do. *Phillips v. Price*, 153 Cal. 146, 94 Pac. 617.

2. It is argued that there is a variance between the allegations and the proof regarding the judgment of plaintiffs against McConnell. The averment of the complaint is that the plaintiffs obtained a judgment against McConnell for the sum of \$3,125.33 and costs. This form of statement implies, as is claimed, that the judgment was one in which the plaintiffs were equally interested to the extent of the whole amount recovered; whereas, in fact the judgment was several in favor of each plaintiff, and each was limited in interest to the amount awarded to him. The plaintiffs were, however, while setting forth distinct causes of action against McConnell, authorized by statute to unite in one action, and in that action a single judgment was properly made and entered. *Willamette, etc., Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629; *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, 31 Pac. 164. The allegation that plaintiffs recovered "a judgment" was therefore sustained by the proof offered; but, even if a variance may be said to appear, it was one that could not possibly have misled the defendant to its prejudice, and it must be disregarded here. Code Civ. Proc. § 469.

3. On May 15, 1905, after the levy of the executions above referred to, McConnell died, and his widow was appointed administratrix of his estate. Notice to creditors was duly given, but plaintiffs' judgment against decedent was not presented to the administratrix for allowance, and the time for presenting claims had expired before the filing of the complaint herein. The appellant's position is that the plaintiffs, by reason of their failure to present to the administratrix a claim upon their judgment against her intestate, have lost their right to maintain any action upon such judgment. Any claim against the estate of a decedent, arising upon contract, must be presented within the time limited by the notice to creditors, and, if not so presented, "is barred forever." Code Civ. Proc. § 1493. A judgment against the decedent for the recovery of money must be presented "like any other claim." Code Civ. Proc. § 1505. The assets of a decedent come to the hands of his personal representative charged with the burden of discharging, in addition

to the expenses of administration, all the debts of the decedent, in the order of priority declared by law. Code Civ. Proc. § 1643. No execution (except in certain cases) is to issue against the property of the decedent (Code Civ. Proc. § 1505); but all debts, after allowance by the executor or administrator, and approval by the court, are to be paid, subject to the direction of the court, in due course of administration. Code Civ. Proc. §§ 1504, 1647. No holder of a claim can, except in the case of a demand secured by mortgage or lien, maintain an action thereon unless the claim is first presented. Code Civ. Proc. § 1500. There may be a question whether this prohibition covers only actions against an administrator or executor as such, or includes actions (like the present) instituted against third persons for the purpose of subjecting to the payment of a debt of the decedent assets belonging to his estate. Assuming that this is one of the actions referred to in section 1500, we think it comes within the exception declared in that section. The argument of appellant is that the levies of execution (garnishment) created neither a liability from the water company to the plaintiffs, nor a lien in favor of plaintiffs upon the debt due from said company to McConnell. The present action is one brought under the authority of sections 717 to 720 of the Code of Civil Procedure, to compel a debtor of the judgment debtor to apply the debt due the latter to the satisfaction of the judgment. It is a statutory "proceeding supplementary to execution" and is designed to take the place of the equitable remedy by creditor's bill, formerly the only method of reaching assets which could not be seized on execution. *Herrlich v. Kauffmann*, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50; *Matteson Mfg. Co. v. Conley*, 144 Cal. 483, 77 Pac. 1042. While the Code (Code Civ. Proc. § 688) authorizes the levy of execution upon debts and credits, "in like manner as upon writs of attachment" (i. e., by garnishment), the right to maintain an action, like the one at bar, to recover debts due the judgment debtor, is in no way dependent upon any precedent garnishment of such debts. *Carter v. L. A. Nat. Bank*, 116 Cal. 370, 48 Pac. 332. There is, furthermore, this peculiarity in the Code sections regulating garnishments. By the express terms of the statute relating to attachments, persons indebted to the defendant are, upon receiving notice that such debts are attached, made directly liable to the plaintiff for the amount thereof. Code Civ. Proc. § 544. No such direct liability is, however, provided in the case of a levy of execution upon such debts, and this court has, on several occasions, pointed out that the levy of execution upon a debtor of the judgment debtor does not give the plaintiff a cause of action against the garnishee. *Roberts v. Landecker*, 9 Cal. 262; *Herrlich v. Kauffmann*, *supra*; *Carter v. L. A. Nat. Bank*, *supra*.

Accordingly, says the appellant, the plain-

tiffs acquired no rights against it until the institution of this action, and at that time they had lost their right to proceed against the judgment debtor, and could not proceed against assets of his estate; but this argument assumes, not merely that the garnishment, when made, creates no direct liability to the plaintiffs, but that, under our Code, such garnishment on execution has no effect whatever upon the title to the fund garnished, unless the debt is, by the garnishee, paid to the sheriff. Under this view the creditor would be subject, after levy, to be defeated in his efforts to collect the debt by collusion between the judgment debtor and the garnishee, or by the act of either. The judgment debtor might render the levy useless by assigning his claim against the garnishee, while the latter could accomplish the same result by paying the claim to the judgment debtor or acquiring an offsetting demand against him after garnishment. We cannot accept an interpretation leading to such results. It is true that the Code does not specifically define the effect of levying execution upon debts due the judgment debtor. It does, however, authorize such levy, and it is not to be supposed that the Legislature intended to confer upon the judgment creditor the right to levy an execution, which could have no effect beyond that of warning the adverse parties and thus facilitating a possible effort to defeat the collection of the judgment. In *Lean v. Givens*, 146 Cal. 739, 81 Pac. 128, 106 Am. St. Rep. 79, it was held that the levy of an execution on land (where the judgment itself was not a lien) creates a lien upon the land from the date of the levy. The sections of the Code relied upon to sustain this conclusion (Code Civ. Proc. §§ 681, 683, 688, 537) nowhere declare in express terms that a lien is created. The same sections are applicable to the levy of execution on debts, and the reasoning there used justifies the conclusion that a garnishment on execution fixes the rights of the judgment creditor so as to make his right to recover the debt from the garnishee superior to any claim or demand accruing subsequently. Section 688 provides that, "until a levy, property is not affected by the execution"; a form of statement carrying with it the clear implication that, from and after the levy, it is so affected. When therefore, after a garnishment upon execution, the judgment creditor proceeds by supplementary proceedings or creditor's bill to collect the debt, any judgment recovered by him relates back to the levy of the garnishment, and intervening rights are cut off. It is somewhat difficult to define the exact nature of the right which the creditor secures by such levy. It may be regarded as an involuntary assignment of the debt, or as the creation of a lien thereon. The term "lien," defined by the Civil Code (section 2872) as a charge imposed upon specific property, may not perhaps be accurately

applied to a charge upon a chose in action; but, having in view the purpose of section 1500 of the Code of Civil Procedure, which is designed to dispense with the necessity of presenting a claim against the estate of a decedent where recourse is sought only against property which is bound as security for the claimant's demand, we find no difficulty in holding that, within the meaning of this section, the levy of execution upon debts due a judgment debtor does create a lien upon such debts. An argument in support of this conclusion may be drawn from section 1505 of the Code of Civil Procedure, which provides that, if execution is actually levied upon property of the decedent before his death, the same may be sold. While debts levied on cannot be sold, the section does indicate that the Legislature did not intend to give to the death of the judgment debtor the effect of destroying executions already levied. The failure of plaintiffs to present their claim to the administratrix of McConnell's estate did not therefore affect their right to reduce to possession the debt due from the water company to the judgment debtor; such debt having been levied on by execution prior to McConnell's death.

4. The answer alleged and the court found that in February, 1906, the Corona City Water Company, defendant herein, recovered a judgment against the administratrix of the estate of McConnell for \$7,121, payable in course of administration, and that no part of this judgment has been paid. This judgment against the estate of the original judgment debtor is relied on as an offset to the demand here in suit. As a general rule, the garnishee may offset against the claim of the judgment creditor whatever demand he might be able to set off against the claim of the judgment debtor against him. "Of course the garnishee can plead any defense he may have against his creditor. * * *" *Carter v. L. A. Nat. Bank*, supra. But the set-off which may be claimed by the garnishee must be one which existed at the time of the garnishment. *Freeman on Executions*, § 417. We have already, in discussing the effect of McConnell's death, stated our reasons for holding that the effect of the levy of an execution upon debts due the judgment debtor is to fix the rights of the parties, so that neither the judgment debtor nor the garnishee can, by subsequent action, destroy the effect of the garnishment. If this view be correct, it must follow that the judgment recovered by the water company against McConnell's estate could not be set off against plaintiffs' demand; such judgment having been recovered long after the levy of the writs of execution, and there being neither allegation nor proof that it is founded on a liability owing to the defendant at the time of the garnishment.

5. There is no merit in the appellant's contention that the action is barred by the stat-

ute of limitations. The judgments obtained by McConnell against the water company were rendered less than four years before the commencement of this action, and a suit on these judgments by McConnell or his administratrix would, of course, not have been barred then. Code Civ. Proc. § 336. If the obligation of the garnishee to the judgment debtor is not barred, the statute of limitations has no application. "As to the statute of limitations, if the garnishee is entitled to the plea as against the defendant in the attachment suit, he can plead it. The liability created by the garnishment is never barred." *Carter v. L. A. Nat. Bank*, *supra*. The case just cited was one of a garnishment on attachment. The same rule must apply to garnishment on execution. In this action the defendant occupies the same position that it would hold if it were being sued by McConnell, the judgment debtor (2 Wade on Att. § 453), and, if such suit would not be barred by limitation, the present action is not.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J

155 Cal. 201

FOX v. WORKMAN, City Treasurer, et al.
(L. A. 2,206.)

(Supreme Court of California. Feb. 13, 1909.
Rehearing Denied March 15, 1909.)

1. JUDGMENT (§ 590*)—CONCLUSIVENESS—MATTERS CONCLUDED.

Plaintiff had formerly demanded of a city treasurer that he sell a railroad right of way, fee, and easement, to satisfy a street improvement bond, and the railroad company in a suit against plaintiff and the treasurer had obtained an injunction forbidding the sale of the easement of right of way and had the bond declared void as against it. Subsequently plaintiff again demanded of the treasurer sale of the same property to satisfy the bond, and upon refusal sued him to compel him to sell it. *Held*, that the judgment in the former suit was binding on both plaintiff and the treasurer in the second suit, and a sale could not be compelled.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1084, 1085, 1102–1106; Dec. Dig. § 590.*]

2. MUNICIPAL CORPORATIONS (§ 950*)—STREET IMPROVEMENT BONDS—SALE—DEMAND OF BONDHOLDER.

The making of a demand in writing that the city treasurer sell property as subject to the lien of a street improvement bond being expressly made a condition precedent to the right of the holder of the bond to have the property sold, by St. 1893, p. 36, c. 21, § 5, the demand must be to sell the exact property subject to the bond to make it compulsory upon the treasurer to act, and, where only the fee of land subject to a railroad right of way was subject to the bond, a demand to sell the entire right of way, fee, and easement was insufficient to authorize mandamus to compel the treasurer to act.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 950.*]

Department 1. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Edwin R. Fox against W. H. Workman, City Treasurer, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

L. M. Fall, for appellant. E. W. Camp and L. R. Hewitt, for respondents.

SLOSS, J. This is an action brought to recover from the defendant Workman, as treasurer of the city of Los Angeles, and the sureties upon his official bond, damages in the sum of \$5,000 for the refusal of Workman to comply with plaintiff's demand that he sell a certain tract of land in order to satisfy a street improvement bond (St. 1893, p. 33, c. 21), held by plaintiff and claimed by him to be a lien upon the land. Judgment was entered in favor of the defendants, and plaintiff appeals on the judgment roll alone.

From the findings it appears that the bond, and the assessment upon which it was based, described the property as follows: "Commencing at the N. W. intersecting point of Avenue 33 and the right of way of the Southern California Railway Company; thence meandering in a northerly direction 9,635' to Avenue 50; thence along the S. line of Avenue 50, 62'; thence meandering in a southerly direction 9,566' to Avenue 33; thence W. 60' along the N. line of Avenue 33 to beginning. Being the Southern California Railway right of way between Avenues 33 and 50." Default having been made in the payment of both principal and interest, the plaintiff prepared and delivered to the city treasurer a written demand for the sale of the premises covered by the lien of said bond and the form of an advertisement for such sale. In accordance with this demand the city treasurer caused the advertisement to be published. Plaintiff demanded that, at the time fixed for sale, the property described in the advertisement be offered for sale and sold. The defendant Workman, however, failed and refused to offer or to sell said property or any part thereof, and has ever since continued to refuse to offer said property for sale. The court finds that a certain amount is due on the bond, and that plaintiff has incurred certain expenses for attorney's fees and court costs. In response to an issue raised by a separate defense of estoppel by judgment, there is a finding as follows: An advertisement identical with the one above mentioned, so far as relates to said bond, and excepting the date of sale, was published December 18, 1901, and thereupon or about the 11th day of January, 1902, the Southern California Railway Company, a corporation, as plaintiff, brought an action

in the superior court against W. H. Workman, as treasurer of the city of Los Angeles, state of California, and E. R. Fox, defendants, to restrain defendants from selling said property, and in the complaint in said action filed said railway company prayed judgment, among other things, that said bond be decreed to be void. In said action said Workman and Fox entered their appearances, and on or about May 9, 1902, a final judgment was entered in which, after reciting that the defendants had defaulted after their demurrer had been overruled with leave to answer, and that all of the allegations of the complaint were true, it was ordered, adjudged, and decreed that said defendant Workman, as city treasurer of the city of Los Angeles, his deputies, agents, etc., be and "each of them are hereby forever restrained and enjoined from selling or attempting to sell, any part or portion of plaintiff's right of way, in said complaint and hereinafter described, for the purpose of satisfying the bond in said complaint mentioned and referred to, or any part thereof; and it is further ordered, adjudged, and decreed that said bond above mentioned, and in said complaint referred to, is absolutely void and of no force and effect as a lien upon the right of way of the plaintiff above mentioned, and hereinafter described, or any portion thereof." An appeal was taken from said judgment to this court, and upon said appeal the judgment was affirmed.

From these findings the court drew the conclusions of law that the plaintiff should take nothing by the action, and that the defendants are entitled to judgment against the plaintiff for their costs. The decision of the case turns upon the effect of the judgment in *Southern California Railway Company v. Workman and Fox*. As is stated in the findings, defendants in that action appealed to this court. The decision affirming the judgment is reported in 146 Cal. 80, 79 Pac. 586, 82 Pac. 79. The contention of the appellant is that all that was determined in that case was that the right of way, i. e., the easement, of a railroad corporation could not be assessed and sold to defray the cost of street improvement work; whereas the only thing demanded of defendant Workman in this case was, it is claimed, that he sell, not this right of way, but the fee, subject to the easement. If it were true that the demand here made was that such fee, separate and apart from the easement, be sold, there would be much force in appellant's position. In the opinion of the court in the former case it is said that: "It is not necessary to decide in this case as to whether or not the fee or reversion in the land can be assessed. * * * It is sufficient to say that this proceeding is for the purpose of enjoining a sale of plaintiff's right of way; that is to say, its easement. The judgment is that the bond is void as a

lien upon plaintiff's right of way, and that defendant be enjoined from selling 'any part or portion of plaintiff's right of way, in said complaint, and hereinafter described.' If the defendants do not intend to sell the plaintiff's easement, but only the subordinate estate, the judgment is not in any way injurious to them." The court did not therefore in the former decision determine that the fee, subject to the easement, could not be, or that it had not been, assessed. The judgment there affirmed merely declared that the bond created no lien upon the right of way. It could not bar plaintiff's right to have the fee, subject to such easement, sold.

If plaintiff had, after the decision of the earlier case, made a demand for such sale, he would have been asserting rights that had not yet been litigated; but this he did not do. Only one demand, that of December 18, 1901, is averred by plaintiff. This demand was the foundation of both advertisements, the one of December, 1901, which led to the injunction suit, and the one of August, 1906, under which the treasurer refused to sell. The advertisements, except as to date, were in the same words. Now, while the judgment in *Southern California Railway Company v. Workman* did not adjudicate that the fee, subject to the easement, could not be sold to satisfy the bond, it certainly did determine that the sale which Workman, pursuant to Fox's demand, had announced his intention of making, was a sale of more than this fee, and included the easement of the railway company. The opinion of the court states that "it was evidently the intention to assess and sell the right of way as described by metes and bounds in the assessment." If such easement had not been included in the proposed sale, there would, under the views expressed by the court regarding a sale of the fee, have been nothing to enjoin. We find, then, that what the plaintiff in this case demanded of the treasurer was exactly what he had demanded of him in 1901—that he make a sale covering both the fee and the easement. The latter the treasurer had no right to sell, and had been enjoined from selling by a judgment binding upon this plaintiff. A compliance with the demand would have been a violation of the injunction.

The making of a demand in writing that the treasurer sell the property claimed to be subject to the lien was, under section 5 of the statute providing for the issuance of street assessment bonds, a condition precedent to the plaintiff's right to have such property sold. St. 1893, p. 36, c. 21. Where a demand must be made in order to impose a duty on a public officer, it is settled that a mandamus will not issue unless there has been a specific and definite demand for the performance of the very act to which petitioner is entitled. 19 Am. & Eng. Ency. of Law (2d Ed.) 761; *Price v. Riverside L. & I.*

Co., 56 Cal. 431; *Douglas v. Town of Chatham*, 41 Conn. 211; *State v. Davis*, 17 Minn. 429 (Gil. 406). The reason for this rule applies as well to an action against a public officer for damages for the violation of an official duty. "The party suing must show a plain duty violated" (Mechem, Pub. Off. § 667), and, where the duty arises only upon the making of a demand, such demand must be for the precise thing which it was the officer's duty to do. Here the plaintiff, having at most a right to compel the sale of the fee, subject to the easement, made a demand for a sale of property described in terms covering both fee and easement. The officer was justified in refusing to comply with this excessive demand, and no liability for damages accrued upon such refusal.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

155 Cal. 205

TATTENHAM et al. v. SUPERIOR COURT et al. (S. F. 5,195.)

(Supreme Court of California. Feb. 16, 1909.)
APPEAL AND ERROR (§ 148*)—RIGHT TO APPEAL—PERSONS NOT PARTIES.

Persons enjoined in an action to which they were not parties can appeal by making themselves parties.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 148.*]

In Bank. Petition by one Tattenham and others for certiorari against the Superior Court of the City and County of San Francisco and another. Writ denied.

Henry B. Lister, for petitioners. Bush Finnell, for respondent.

PER CURIAM. This is a petition for the writ of certiorari. It is alleged that the petitioners have been enjoined in an action to which they were not parties, and therefore not subject to the jurisdiction of the court granting the injunction. If they can appeal it is conceded they have no right to the writ, and there is no doubt that they can appeal by making themselves parties in the manner pointed out in *Elliott v. Superior Court*, 144 Cal. 509, 77 Pac. 1109, 103 Am. St. Rep. 102.

Writ denied.

155 Cal. 215

STOWELL v. RIALTO IRR. DIST.
(L. A. 2,162, 2,163.)

(Supreme Court of California. Feb. 17, 1909.
Rehearing Denied March 19, 1909.)

1. WATERS AND WATER COURSES (§ 230*)—IRRIGATION DISTRICT—BONDS—SALE.

Wright Act (St. 1887, p. 36, c. 34) § 16, authorizes irrigation district boards to sell bonds from time to time, to raise money to construct canals and works, to acquire property and rights, and otherwise to fully carry out the purposes of the act, and declares that such sales

shall be to the highest responsible bidder, except that no bonds shall be sold for less than 90 per cent. of their face value; and section 12 provides that the board may acquire by purchase or condemnation lands and waters and other property necessary to construct, use, supply, repair, and improve its canal or works, including canals and works constructed, and being constructed by private owners. *Held*, that where an irrigation district contracted with a land and water company for the transfer to the district at different times of specific water rights with completed pipe lines and rights of way necessary to the use and enjoyment of the rights transferred, to be paid in bonds which were to be issued in each instance only on the delivery of a deed conveying the property, all construction to be completed by the water company, the bonds were validly issued.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319; Dec. Dig. § 230.*]

2. WATERS AND WATER COURSES (§ 240*)—IRRIGATION—WORKS—"CONSTRUCTED AND BEING CONSTRUCTED."

Wright Act (St. 1887, p. 34, c. 34) § 12, authorizes an irrigation district to acquire by purchase canals and works, "including canals and works constructed and being constructed" by private owners, etc. *Held*, that the words "constructed and being constructed" indicated an intention to authorize irrigation districts to negotiate for water systems in advance of their total completion.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 240.*]

3. WATERS AND WATER COURSES (§ 230*)—IRRIGATION DISTRICTS—BONDS—FORM—DATE OF PAYMENT.

Wright Act (St. 1887, p. 35, c. 34) § 15, declares that bonds of irrigation districts shall be payable in installments, to wit, beginning at the eleventh year and increasing in percentage annually, until the twentieth year the bonds shall be paid, and declares that they shall bear date at the time of their issue. Certain bonds in question recited that they were signed and issued on November 17, 1890, and attached to each were two series of coupons, one for interest payable semi-annually and the other for installments of principal maturing from the eleventh to the twentieth year after the issuance of the bonds. In the body of the bonds the district promised to pay \$500 at the dates and on installments as follows, to wit: At the expiration of 11 years from date 5 per cent.; at the expiration of 12 years from date 6 per cent. of said sum, etc.; and that such installments shall be paid "as provided in and only upon the surrender of the respective interest coupons" attached thereto, which provided for payment of an installment on January 1, 1902, and of subsequent installments on January 1st in successive years, both the body of the bond and the interest coupons making the interest payable on the first days of January and July beginning with July, 1891. The court found that the bonds were signed December 21, 1890, and that none of them were disposed of or delivered prior to the succeeding day. *Held*, that while the nominal date of the bonds was November 17, 1890, they did not begin to bear interest until January 1, 1891, and were to be regarded, therefore, as issued on that date, and therefore substantially complied with the statute.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319; Dec. Dig. § 230.*]

4. WATERS AND WATER COURSES (§ 230*)—IRRIGATION DISTRICTS—BONDS—STATUTES.

The power of an irrigation district to issue bonds must be exercised in the manner prescribed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed by statute; it being within the power of the state to prescribe the form in which such bonds shall be executed in order to bind the public for their payment.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 319; Dec. Dig. § 230.*]

5. WATERS AND WATER COURSES (§ 230*)—IRRIGATION DISTRICTS—BONDS.

Under Wright Act (St. 1887, p. 35, c. 34) § 15, fixing the term for which bonds of an irrigation district shall run, bonds fixing a shorter or longer term of payment would be invalid.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 319; Dec. Dig. § 230.*]

6. WATERS AND WATER COURSES (§ 230*)—IRRIGATION DISTRICTS—BONDS—NEGOTIABILITY.

Since Civ. Code, § 3137, authorizes a party paying a negotiable instrument to demand its surrender as a concurrent condition, the fact that irrigation bonds provided that installments of principal should be payable only on surrender of the coupons covering such installment did not render the bonds nonnegotiable in form as containing a promise of the maker on a condition not certain of fulfillment, which Civ. Code, § 3088, declares shall destroy the negotiable character of an instrument.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 319; Dec. Dig. § 230.*]

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Actions by N. W. Stowell against the Rialto Irrigation District. From judgments in favor of defendants in each case, and from orders denying plaintiff's motion for a new trial, he appeals. Reversed.

Oscar C. Mueller (Sidney J. Parsons, of counsel), for appellant. Henry Goodcell and F. A. Leonard, for respondents.

SLOSS, J. In each of the above-entitled actions the plaintiff seeks to recover from the Rialto Irrigation District the amount of certain interest coupons attached to bonds issued by the district. The cases were consolidated for trial, and judgment was entered in favor of the defendant in each case. Appeals are prosecuted by the plaintiff from these judgments and from orders denying his motions for a new trial. Except as to the numbers of the coupons involved, both cases present the same facts, and our discussion of the questions of law arising on these facts is applicable to both appeals.

The respondent is an irrigation district organized under the provisions of the Wright act. St. 1887, p. 29, c. 34. The coupons sued upon are held by plaintiff, who claims to have purchased them before maturity, in good faith and for value, from the Semi-Tropic Land & Water Company, a corporation. The bonds to which these coupons had been attached were originally disposed of by the Rialto Irrigation District to the Semi-Tropic Land & Water Company in a manner which,

as is claimed by the respondent, and was found by the court, contravened the terms of the act authorizing the issue of such bonds. The court also found that plaintiff acquired his coupons with notice of the fact that the bonds had been disposed of in an illegal manner. The appellant contends, first, that the bonds were so issued as to make them valid in the hands of the original holder; and, second, that, even if payment of the bonds could not have been enforced by the Semi-Tropic Land & Water Company, the finding that plaintiff took with notice of any defect in the manner of their issuance is without support in the evidence. The second branch of appellant's position will not engage our attention, since we are of opinion that his first contention must be sustained.

By a vote of the electors of the district at an election held on the 15th day of November, 1890, the board of directors was authorized to issue bonds to the amount of \$500,000. On December 10, 1890, a written contract was entered into between the district and the Semi-Tropic Land & Water Company for the disposal to the latter of the bonds so authorized. By this contract the Semi-Tropic Company agrees to sell and convey to the irrigation district, by a good and sufficient deed, a continuous and perpetually flowing stream of water equal to 1,000 inches, flowing from a tract of land described in the agreement. It further agrees that the pipe lines through which the water is to be conveyed and delivered to the district shall be of certain sizes and materials, and shall be laid and constructed in a specified manner. Pipe lines, having a conveying capacity of at least 75 inches each, are to be laid along certain avenues and boundary lines of the district, and the pipe lines and system are to be completed within two years after the date of the agreement. The main pipe line to the northern boundary of the district is to be completed, and a continuous stream of 300 inches of water delivered through it, on or before the 15th day of December, 1900. Upon completion of said main pipe line, and the delivery of said 300 inches, the Semi-Tropic Land & Water Company agrees to execute and deliver to the Rialto Irrigation District a good and sufficient deed of grant, bargain, and sale, conveying to the district "said perpetually flowing stream of water equal to three hundred inches, * * * together with said main pipe line and the right of way and privileges belonging therewith or appertaining thereto, and also a perpetual right in and upon the tract of land constituting the course of supply of said water. * * *" Upon the subsequent delivery of each additional 100 inches of water, up to a total of 900 inches, the Semi-Tropic Company agrees to execute to the district a good and sufficient deed conveying each said stream of 100

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

inches, together with any and all pipe lines and pipe then laid and constructed, and rights of way pertaining thereto, and a perpetual right in and upon the land constituting the source of supply. Upon the completion of all the pipe lines and system provided for in the agreement, and the delivery of the entire stream of 1,000 inches, the Semi-Tropic Company agrees to execute and deliver to the district a deed conveying an estate in fee simple in and to all the sources of supply of said water, all water up to 1,000 inches not previously conveyed, and all pipe, pipe lines, rights of way, and privileges appertaining thereto. In consideration of these covenants, the irrigation district agrees to buy and take said stream of 1,000 inches, together with the lands from which said water is derived, and the pipe and pipe lines, rights of way and privileges used to convey and deliver said water, and to deliver to the Semi-Tropic Company therefor bonds of the Rialto Irrigation District, to the amount of \$500,000, to be delivered as follows: \$150,000 of said bonds, at par value, upon the construction and completion of the main pipe line to the north boundary line of the district, the delivery there of 300 inches of water, and the delivery of the deed thereof; \$50,000 of said bonds, in addition, upon the delivery of each subsequent stream of water equal to 100 inches and the delivery of the deed thereof, up to 900 inches; and the last \$50,000 to be retained until 60 days after completion of the entire system and delivery of the last deed provided for. The court finds that said contract "was thereafter, by mutual agreement, modified in some particulars, but not so as to change its general scope and purpose." The Semi-Tropic Land & Water Company partly performed said contract, and at different times conveyed to the district portions of said 1,000 inches of water, and portions of said pipe lines as completed, and received from the district, in exchange, bonds as called for by the contract. The coupons held by plaintiff were all attached to bonds which had been so received by the Semi-Tropic Company.

The argument of respondent is that the contract provided an unauthorized and illegal method of issuing bonds of an irrigation district. Under section 16 of the Wright act, the board is authorized to sell bonds from time to time, to raise money for the construction of canals and works, the acquisition of property and rights, "and otherwise to fully carry out the purposes of this act." Such sale must be to the highest responsible bidder, after publication of notice of sale as prescribed in the act, and no bonds are to be sold for less than 90 per cent. of their face value. Section 12 provides that "said board shall also have the right to acquire, either by purchase or condemnation, all lands and waters, and other property nec-

essary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs, for the storage of needful waters, and all necessary appurtenances. In case of purchase the bonds of the district * * * may be used at their par value in payment." As this court said in *Hughson v. Crane*, 115 Cal. 404, 412, 47 Pac. 120, 121: "These are the only provisions in the act for any disposition by the directors of the bonds of the district, and it follows that the only mode in which they can exercise their power of disposing of the bonds, so that they may become valid obligations against the district, is either to exchange them for property at their par value, or to sell them for money in the open market, under the restrictions and limitations given in section 16, at not less than 90 per cent. of their face value. The express provision giving to the board power to exchange them for certain property at their par value excludes the right of the board to exchange them for any other purpose, or to dispose of them in any other manner than by the sale authorized by section 16." Applying these views to the facts before the court, it was held in *Hughson v. Crane* that the directors had no power to turn bonds over to an agent who was to sell them at not less than 90 per cent. of their face value, nor to deliver bonds to a contractor, in payment for construction work done by him for the district. Similarly in *Stimson v. Alessandro Irrigation District*, 135 Cal. 389, 67 Pac. 496, 1034, it was decided that the statute did not authorize the directors of an irrigation district to make a contract with a water company whereby the district issued all of its bonds in consideration of the mere executory promise of the water company that it would in the future lease water to the district at a stipulated rent. In *Leeman v. Perris Irrigation District*, 140 Cal. 540, 74 Pac. 24, the doctrine of the former cases was reaffirmed. One of the bonds there involved was issued under circumstances similar to those considered in the *Stimson Case*, and on the authority of that case was held to be void in the hands of the original holder. Others had been exchanged by the district for warrants originally issued to pay for construction work. It was held that section 12 of the act did not authorize the directors to part with bonds in this manner. "The only express authority given to use bonds in payment for any purpose," says the court, "is in the case of the purchase of property necessary for the works. * * * There is no express authority anywhere in the act for exchanging bonds for construction work, or for exchanging bonds for warrants issued for construction work. * * *

In the case at bar it was concluded by the

court below that the contract between the Semi-Tropic Land & Water Company and the Rialto District was one whereby bonds were to be issued as payment, in part at least, for construction work, and that, under the decisions just referred to, such issue was unauthorized. We think, however, that the contract is not to be construed as calling for the delivery of bonds in payment for construction work. It provides for the transfer and conveyance to the district, at different times, of specific water rights, together with completed pipe lines and rights of way necessary to the use and enjoyment of the water rights transferred. The bonds are, in each instance, to be issued by the district as the purchase price of the water rights and completed pipe lines and systems conveyed to it, and only upon delivery of a deed conveying such property. No construction work was to be done under this contract for the district. The purchase and laying of pipe was the affair of the Semi-Tropic Company alone, and the district did not bind itself to pay for the construction of any pipe line by means of bonds or otherwise. What it did agree to do was to purchase certain water rights, together with the pipe lines needed for the reception and distribution of the water, and to pay for such property, when ready for delivery and conveyance, with bonds. Under such contract the district was using bonds in the manner authorized by section 12 of the act; that is to say, for the acquisition by purchase, of "lands and waters, and other property necessary for the construction, use, supply, maintenance, repair and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs, for the storage of needful waters, and all necessary appurtenances." So long as it did not issue any bonds until it received, as consideration therefor, the property which it had a right to buy for bonds, we see no objection to a contract by which it bound itself in the future to take and pay for water rights not yet developed and works not completed at the date of the contract. By the use of the words "works constructed and being constructed," the Legislature clearly indicated its intention to authorize districts to negotiate for water systems in advance of their total completion. In no event was there any obligation under this agreement to accept anything but developed water rights and completed pipe lines, nor a duty to deliver bonds except upon transfer of such rights and lines. Each conveyance represented the right to a specific amount of water, together with such works as were necessary to make it available. Each issue of bonds was a payment for the water and pipe lines conveyed at the time of the issue. For these reasons, we think that none of the cases relied on by respondent is applicable to the facts here presented, and that these bonds, so far as

the manner of their issuance is concerned, were valid even in the hands of the original holder.

The respondent makes the further contention that, apart from the manner in which they were exchanged, the bonds are void upon their face. Section 15 of the act provides that bonds of irrigation districts shall be payable in installments as follows: At the expiration of 11 years not less than 5 per cent. of said bonds; at the expiration of 12 years not less than 6 per cent.; and so on, the percentage increasing by one in each year until the twentieth, when a percentage sufficient to pay off the bonds shall be paid. It is also provided that the bonds shall "bear date at the time of their issue." The bonds here in question contain the statement that they have been signed and issued on the 17th day of November, 1890. Attached to each bond are two series of coupons, one for the interest payable semiannually, and the other for the installments of principal to fall due from the eleventh to the twentieth year after the issue of the bonds. In the body of the bond, the Rialto Irrigation District promises to pay to bearer the sum of \$500, "at the dates and upon installments as follows: At the expiration of 11 years from date, 5 per cent. of said sum; at the expiration of 12 years from date, 6 per cent. of said sum. * * *" This language, if it stood alone, would make the installments of principal payable at the end of the respective periods named from and after November 17th, 1890. The bond provides, however, that the installments are to be paid "as provided in and only upon the surrender of the respective installment coupons hereto attached." The coupons call for payment of an installment on the 1st day of January, 1902, and of subsequent installments on the 1st day of January in successive years. Both the body of the bond and the interest coupons make interest payable on the 1st days of January and July of each year, beginning with July, 1891. It is found by the court that the bonds were signed on or about December 21, 1890, and that none of them were disposed of or delivered prior to December 22, 1890.

The points made by respondent are that the bonds did not "bear date at the time of their issue," as required by the act, and that they were made payable at periods longer than those authorized by the statute. If November 17, 1890, is to be taken as the date of issue of the bonds, the installments of principal, which by the terms of the coupons become due on January 1st of 1902 and following years, are in each case made payable at a time later by some 44 days than the number of years fixed in the act for the respective payments. The power of public corporations to issue bonds is to be exercised in the manner prescribed by statute. "There can be no doubt that it is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the

public for their payment. If not so executed, they create no legal liability." *Anthony v. County of Jasper*, 101 U. S. 693, 25 L. Ed. 1005. Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter (*People's Bank v. School District*, 3 N. D. 496, 57 N. W. 787, 28 L. R. A. 642) or a longer term (*Norton v. Town of Dyersburg*, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. Ed. 85; *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495) than that authorized are invalid. But, in determining the true effect of any written instrument, the entire writing must be considered. Here we find that while the nominal date of November 17, 1890, is stated in the bond, the first payment of semiannual interest fell due on July 1, 1891. The bonds, therefore, did not begin to bear interest until January 1, 1891, and the installments of principal were made payable in the required number of years after that date. Under these circumstances, the bonds are to be regarded as, in effect, issued on January 1, 1891, which may be treated as their real date, in contradistinction to the nominal date of November 17th. That the execution and issuance of the bonds in this form and manner was a substantial compliance with the statute, both as to date and term of running, is a view well sustained by authority. *Township of Rock Creek v. Strong*, 96 U. S. 271, 24 L. Ed. 815; *Dows v. Town of Elmwood (C. C.)* 34 Fed. 114; *City of South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. 449, 31 C. C. A. 585; *Yesler v. City of Seattle*, 1 Wash. St. 308, 25 Pac. 1014. See, also, on effect of antedating bonds, *Flagg v. City of Palmyra*, 33 Mo. 440; *State v. Moore*, 46 Neb. 590, 65 N. W. 193, 50 Am. St. Rep. 626.

We think there is no merit in the point that the bonds failed to comply with the statutory requirement that they should be "negotiable in form." The installments of principal were made payable only upon surrender of the coupons, and it is urged that this imports into the promise of the maker a "condition not certain of fulfillment," and so, under section 3088 of the Civil Code, destroys the negotiable character of the instrument. But ordinarily a party paying a negotiable instrument is entitled to demand its surrender as a condition concurrent to its payment by him (Civ. Code, § 3137), and the insertion in the instrument of a stipulation for this condition, which would in any event be implied, does not affect its negotiability (*Humboldt Township v. Long*, 92 U. S. 642, 23 L. Ed. 752; *Frank v. Wessels*, 64 N. Y. 155).

For these reasons, the following order will be made in each of the cases under consideration. The judgment and the order appealed from are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

155 Cal. 224

PEOPLE v. CIPOLLA. (Cr. 1487.)

(Supreme Court of California. Feb. 18, 1909.)

1. CRIMINAL LAW (§ 564*)—VENUE—PLACE OF CRIME—COUNTY BOUNDARY.

Evidence held sufficient to show that a homicide was committed within 500 yards of the boundary line of S. county, so as to authorize trial in that county under Pen. Code, § 782, providing that, when the crime is committed within 500 yards of the boundary of two or more counties, jurisdiction may be had in either.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1284; Dec. Dig. § 564.*]

2. HOMICIDE (§ 340*)—APPEAL—PREJUDICE.

Where accused was guilty of murder or was entitled to an acquittal under the evidence, he was not prejudiced by instructions defining the circumstances which would reduce a felonious homicide from murder to manslaughter on the theory that because such instructions were not applicable to any issues or evidence they tended to confuse or mislead the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 716; Dec. Dig. § 340.*]

3. CRIMINAL LAW (§ 829*) — REQUEST TO CHARGE—CORRECTION.

Where the court instructed the jury on the presumption of innocence, it was not required to correct and charge a request commencing with the sentence, "That the guilt of defendant is presumed to be innocent until the contrary is proved."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

4. CRIMINAL LAW (§ 346*)—VENUE—LOCUS OF CRIME—EVIDENCE.

Where the venue of the prosecution for homicide was claimed to have been properly laid in S. county because the offense was committed within 500 yards of the county line, evidence of witnesses who testified to the location of decedent's body when found, and the distance which they measured from that point and the boundary line of S. county, was admissible to fix the locus of the crime and the distance from that point to the county boundary line.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 786; Dec. Dig. § 346.*]

5. HOMICIDE (§ 203*)—DYING DECLARATIONS—PRELIMINARY PROOF.

Dying declarations are admissible in a prosecution for homicide where made by the victim under a solemn conviction of approaching death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

6. HOMICIDE (§ 214*)—DYING DECLARATIONS—RES GESTÆ.

Dying declarations may cover all of the res gestæ.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. § 214.*]

7. HOMICIDE (§ 214*)—DYING DECLARATIONS—RES GESTÆ.

Under the rule that the res gestæ embraces, not only the actual facts of the assault and the circumstances surrounding it, but matters antecedent to it, as well as the acts immediately following the assault, it was proper, in a prosecution for homicide to admit decedent's dying declaration as to the assault, and that accused carried him to a river near by, and threw him into it, together with decedent's statement that, on being thrown in, he crawled out of the water, grabbed a brush, and climbed on the bank, and laid down because he could go no further.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. § 214.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

Antonio Cipolla was convicted of murder, and he appeals. Affirmed.

Chas. B. Harris, P. C. Dore, and J. S. Daly, for appellant. U. S. Webb, Atty. Gen., and C. Charles Jones, Deputy Atty. Gen., for the People.

HENSHAW, J. Defendant, convicted of murder in the first degree, appeals from the judgment and from the order denying his motion for a new trial. While the sufficiency of the evidence to sustain the verdict and judgment is not questioned, it may be well, for the better understanding of the propositions which appellant advances, briefly to state that evidence.

The deceased, Joseph Piraino, and the defendant, were Italian laborers. Piraino had rented a room in a lodging house in Sacramento, which he shared with Cipolla. Both were out of work and seeking employment, but Piraino had about \$130 in gold, which he carried about his body in a money belt. Cipolla seemingly had no money. At least, he borrowed small sums from Piraino from time to time with which to purchase his meals. Upon the morning of the homicide, he had thus obtained \$1 from Piraino, with a part of which he procured himself to be shaved. He wore a mustache. In the afternoon of that day, at Cipolla's suggestion, the two crossed the river, and proceeded up the Yolo levee with the purpose of visiting a ranch conducted by Italians, in an endeavor to secure employment. On their way they were joined by two other Italians, strangers to the deceased. The four men were seen upon the levee by two witnesses, who recognized the defendant. When they had proceeded a short distance up the river, the defendant demanded of the deceased that he give up his money. The deceased refused and protested, when he was seized by either arm by the two strange Italians. Cipolla then drew a knife, and slashed him savagely with it about the head, the back, and the abdomen. The wounds across the abdomen were of a frightful character, extending from the spine upon the left around and across to the spine on the right, severing the intestines and nearly cutting the body in two. The money was taken, and the murderers carried him, still living, to the river nearby, and threw him into the water. Piraino, notwithstanding his frightful wounds, was able to drag himself to the bank, where he was observed by men upon a passing steamboat. He was picked up, taken to a hospital at Sacramento, still alive and conscious, and able to give an account of the crime as above narrated. A visit was made to his room, where Cipolla was found and arrested. He had shaved off his mustache, and in one of his shoes were found two twenty-dollar gold pieces. He was taken to the hospital and

confronted with Piraino, who declared him to be his false friend and murderer. Trial was had in the county of Sacramento by virtue of section 782 of the Penal Code, which declares that, when a crime is committed within 500 yards of the boundary of two or more counties, the jurisdiction is in either of such counties.

Appellant's first contention is that the evidence is insufficient to establish the fact that the crime was so committed within 500 yards of the boundary of Sacramento county. The evidence of Piraino, however, is that he was thrown into the river close to the spot where the assault occurred. The body was found but 196 feet from the boundary line, and blood marks were found in the immediate neighborhood. There the ground gave evidence of having been disturbed as by a struggle, blood marks were plentiful, and a sheath knife, with its sheath, was found, the knife wet with blood. The evidence was sufficient upon this point.

Complaint is made that the court gave instructions touching the circumstances which would reduce a felonious homicide from the grade of murder to that of manslaughter. It is said that the giving of these instructions was erroneous because they were not applicable to any issue that arose during the course of the trial, and because they tended to confuse and mislead the jurors. The court in this instance followed the common practice of trial judges, of giving a skeleton outline to the jurors of the law touching the kinds and degrees of homicide. If it be said that in this instance the law applicable to manslaughter was without the evidence and could but have served to mislead the jury, it must be answered that the defendant could not have suffered any injury thereby, as such confusion would have made only for his benefit. True, under the evidence, he was either guilty of murder or he was guilty of no crime at all. The jury believed and found him to be guilty of murder. If they had been "confused" by the instructions into rendering a verdict of manslaughter, clearly such a verdict would have been to his material benefit.

The court refused to give a proposed instruction touching the presumption of innocence which began with the following sentence: "The jury are instructed that the guilt of the defendant is presumed to be innocent until the contrary is proved." Manifestly this sentence contains a clerical misprision upon the part of the proponent, but, as the court instructed fully and fairly upon the matter of the presumption of innocence, it was not called upon to correct proposed instructions which were clearly erroneous, and there was no error in refusing to give this particular one.

Objection was made to the evidence of certain witnesses who testified to the location of the body when found, and the distance which they measured from that point to the

boundary line of Sacramento county. The evidence from what has been said above was admissible as tending to fix the locus of the crime, the distance from that point to the boundary line, and consequently the venue.

The dying declarations of Piraino were properly received in evidence. The preliminary showing to justify the introduction of such evidence that it was made under the solemn conviction of approaching death was ample. It is well settled that such declarations may cover all of the *res gestæ*. It is equally well settled that the *res gestæ* embraces, not only the actual facts of the assault and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with the assault, as well as acts immediately following the assault and so closely connected with it as to form in reality a part of the occurrence. Under this, it was proper to admit in evidence decedent's statement of the assault, of the carrying by the murderers of his body to the river nearby, and the throwing of it in. The declarations of the deceased as to what he did upon being thrown into the water come fairly within this rule; his statement being that he crawled out of the water at about the place where he was thrown in. "There is brush. I grab the brush and climb on the bank, and then I can get no further. I lay down." This concludes the review of the points presented by appellant.

None of the matters complained of contained error, and the judgment and order appealed from are therefore affirmed.

We concur: BEATTY, C. J.; SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; MELVIN, J.

7 Cal. Unrep. 362

NOBLE v. CLELAND, Treasurer.
(S. F. 4,899.)

(Supreme Court of California. Feb. 19, 1909.)

MUNICIPAL CORPORATIONS (§ 126*)—OFFICERS
—OFFICES—CREATION—EXECUTIVE OFFICER.

The city of Ukiah had power to create the office of "executive officer" by city ordinance, and to fix his salary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 298; Dec. Dig. § 126.*]

Department 1. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by J. H. Noble against T. M. Cleland, treasurer. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Preston, for appellant. Arthur J. Thatcher, for respondent.

PER CURIAM. This is an action by a taxpayer to enjoin payment of a city warrant issued in payment of the monthly salary of one B. H. Miller as "executive officer"

of said city of Ukiah. The office in question was created by an ordinance of the board of trustees of the city. Plaintiff claims that the board had no power to pass the ordinance creating the office, and hence that it is void. The court below held the ordinance valid, and gave judgment for the defendant. In the case of *De Merritt v. Weldon* (decided November 20, 1908) 98 Pac. 537, this court, in bank, considered this question, and declared the ordinance valid.

Upon the authority of that case, the judgment is affirmed.

to show the actual intention of the parties and to show the modifications necessary to make the contract conform to such intention.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 156; Dec. Dig. § 44.*]

2. REFORMATION OF INSTRUMENTS (§ 6*)—INSTRUMENTS WHICH MAY BE REFORMED—"CONTRACT."

There is no absolute requirement as to what an instrument shall contain, to be susceptible of reformation, and it is not required to be certain and complete in any respect, it only being necessary that there be an honest attempt to reduce the contract to writing; and a writing reciting an agreement between plaintiff and defendant, by which plaintiff agreed to sell defendant the property described, and defendant agreed to sell and convey to plaintiff certain other property, defendant agreeing to assign a certain mortgage, though imperfectly expressed, contained all the elements of a contract within Civ. Code, § 1550, making parties capable of contracting, their consent, a lawful object, and a sufficient consideration essential to every contract, and hence was susceptible of reformation on the ground of mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 5-19; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1513-1530; vol. 8, pp. 7615, 7616.]

3. EVIDENCE (§ 460*)—PAROL EVIDENCE—CONTRACTS OF SALE—DESCRIPTION OF PROPERTY.

A written agreement to sell real property must contain, either in terms or by reference, such a description of the property agreed to be sold that it can be ascertained without parol evidence; but parol evidence is admissible to identify the description contained in the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2118; Dec. Dig. § 460.*]

4. REFORMATION OF INSTRUMENTS (§ 11*)—MATTERS SUBJECT TO REFORMATION.

A written contract, reciting an agreement between plaintiff and defendant by which plaintiff agreed to sell lots 7 and 8 in block 64, known by a certain name, and defendant agreed to sell plaintiff a certain numbered house on the corner of the streets named, could be reformed by substituting the word "exchange" for the word "sell" and inserting a more particular description of the property.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 24-27; Dec. Dig. § 11.*]

5. REFORMATION OF INSTRUMENTS (§ 36*)—PLEADING—ALLEGATIONS AS TO INSTRUMENT INTENDED.

In an action to reform a written contract to make it conform to the intention of the parties, plaintiff must allege that the parties agreed to the terms of the contract sought to be established.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 141; Dec. Dig. § 36.*]

6. REFORMATION OF INSTRUMENTS (§ 36*)—PLEADING—ALLEGATIONS AS TO INTENDED INSTRUMENT.

The complaint, in a suit to reform a contract for the sale of land, alleged: That the parties made a written contract as set out, and afterward added a certain provision which was intended to be, and in fact was, one of the stipulations of the agreement; that at the execution of the contract the parties intended that the instrument should mean, and the legal consequences be, those alleged, stating them; that a certain provision was omitted from the writing by mistake, and such provision was one of the

9 Cal. App. 664

HOUSE v. McMULLEN. (Civ. 517.)

(Court of Appeal, Third District, California.
Jan. 19, 1909.)

1. REFORMATION OF INSTRUMENTS (§ 44*)—PAROL EVIDENCE—ADMISSIBILITY.

In an action to reform a contract because of mistake or fraud, parol evidence is admissible

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

terms of the contract between the parties; and that another provision was inserted by mistake, it being in fact a part of another contract. *Held*, that the complaint sufficiently alleged an agreement to the terms and provisions of the contract as sought to be reformed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 142; Dec. Dig. § 36.*]

7. REFORMATION OF INSTRUMENTS (§ 41*)—PLEADING—PROOF.

Pursuant to Civ. Code, § 1636, providing that a contract may be interpreted so as to effectuate the mutual intention of the parties, under an allegation that the parties intended the word "sell," as used in an agreement to sell each other certain property, to mean an "exchange" thereof, the parties could show that fact; that, as well as the identification of the property to be exchanged, involving the construction of the contract, and not its reformation.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 153; Dec. Dig. § 41.*]

8. APPEAL AND ERROR (§ 907*)—PRESUMPTIONS—FACTS NOT SHOWN BY RECORD—DOCUMENTS OMITTED.

In an action to reform a contract for the sale of land, if the description of the property in the written contract alleged was uncertain and defective, reference being made therein to the abstracts furnished, it must be presumed on appeal by defendant on the judgment roll that the abstracts contained all that plaintiff claimed they did.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3674; Dec. Dig. § 907.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Joseph H. House against R. A. McMullen. From a judgment for plaintiff, defendant appeals. Affirmed.

Miles Wallace and S. L. Strother, for appellant. N. C. Caldwell, for respondent.

BURNETT, J. The action was brought for the reformation of a written instrument and for specific performance. From the judgment in favor of plaintiff, defendant appealed on the judgment roll.

The said instrument is in the following words and figures: "Fresno, Cal., Nov. 5, 1906. This agreement entered into by and between J. H. House, party of the first part, and R. A. McMullen, party of the second part, whereas, the party of the first part agrees to sell to the party of the second part the following described property, to wit, lots 7 and 8 in block 64 known as the Demento, and the party of the second part agrees to sell and convey to J. H. House, party of the first part, property in Berkeley situated on the corner of Dwight Way and Etna, number of house 2720 Etna street: The party of the second part agrees to assign that certain mortgage held by McMullen and due from Mrs. Graham, \$5,920, certificate of title to the Berkeley property furnished by McMullen, also an abstract furnished by J. H. House. The said J. H. House agrees to purchase from McMullen the furniture in the building 2720 Etna street for the sum of

\$125. [Signed] J. H. House. R. A. McMullen. Witness: A. S. Blair." On the next day the following was written on the back of the instrument: "J. H. House hereby agrees to assume a certain mortgage on the Berkeley property of two thousand dollars, interest paid to Nov. 1st, 1906. [Signed] J. H. House."

The only question before us is as to the ruling of the court upon the demurrer to the complaint, since it is admitted by appellant that the findings are a literal transcription of the allegations of the complaint, except in two immaterial instances, and that the judgment must be upheld if the objections to the complaint be not well taken. The particulars wherein it was sought to revise the written agreement are, as stated by respondent: "First, to substitute the word 'exchange' for the word 'sell'; second, to insert a more particular description of the real property which is the subject matter of the contract; third, to strike out a certain term in the contract; and, fourth, to insert a certain other term in the contract." The ground upon which the reformation was sought is the mutual mistake of the parties whereby the said written instrument does not express their intention or the agreement actually entered into. The cause, or rather the occasion of the mistake, is fully set out in the complaint, which will sufficiently appear when we come to consider specifically the particulars in which the instrument was reformed.

The general principles of equitable cognizance involved in the determination of the question before us may be stated by the following quotations from the Code, from certain decisions, and from Prof. Pomeroy's great work on Equity Jurisprudence:

Section 3399 of the Civil Code provides that: "When, through fraud or a mutual mistake of the parties * * * a written contract does not fully express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Section 3401 is as follows: "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." Section 3402 provides: "A contract may be first revised and then specifically enforced."

In the note to *Williams v. Hamilton*, reported in 65 Am. St. Rep. 501, the statement, supported by the citation of a large number of cases, is made that: "Notwithstanding some little diversity of opinion upon the subject, particularly with respect to executory contracts, it is clear that, in most of the cases, courts of equity reform con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tracts, both executed and executory, irrespective of the statute of frauds. In other words, the statute does not prevent a court from reforming the written evidence of a contract within the statute, by enlarging or restricting the terms or the subject-matter of the contract, so as to make it express the real agreement whenever it is clearly shown that by reason of fraud or mistake, either the terms or the subject-matter of the contract, as it was intended and understood by the parties to it, is not embraced in the writing. * * * A contract required by the statute to be in writing cannot, of course, be enforced, until it is in writing; but the statute does not interfere with the power of a court of equity to reform deeds or other instruments in which the parties intended to comply with the statute, but were prevented by fraud, accident, or mistake." In the same note many cases are cited to the effect that: "Deeds may be reformed in equity for fraud or mutual mistake, so as to affect the intention of the parties, and this may be done upon parol evidence, where the proof is clear, convincing, and satisfactory. It makes no difference how the mistake originated, or whether the object of the reformation is to correct a misdescription, to include lands omitted by mistake, to enlarge or restrict the character of the estate, to insert or qualify covenants and conditions, or to correct in other respects."

In 2 Pomeroy's Eq. § 845, we find this language: "In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases; but the rule is not confined to these instances." In section 862 it is said: "The doctrine is well settled in the United States that where the mistake or fraud in a written contract is such as admits the equitable remedy of reformation, parol evidence may be resorted to by the plaintiff in suits brought for a specific performance. The plaintiff in such a suit may allege and by parol evidence prove the mistake or fraud, and the modification in the written agreement made necessary thereby, and may obtain a decree for the specific enforcement of the agreement thus varied and corrected." In section 866 the author declares: "The doctrine in all its breadth and force is maintained by courts and jurists of the highest ability and authority, which hold that, whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement,

and to prove the modifications necessary to be made, whether such variation consists in limiting the scope of the contract or in enlarging and extending it so as to embrace land or other subject-matter which has been omitted through the fraud or mistake, and that he may then obtain a specific performance of the contract thus varied, and such relief may be granted although the agreement is one which by the statute of frauds is required to be in writing. This view, in my opinion, is not only supported by the overwhelming preponderance of judicial authority, but is in complete accordance with the fundamental principles of equity jurisprudence. * * * No such relief, however, can be granted, either when the contract is executory or executed, and no parol evidence can be used to modify the terms of a written instrument, and most emphatically when that instrument is required by the statute of frauds to be in writing, except upon the occasion of mistake, surprise, or fraud. One or the other of these incidents must be alleged and proved before a resort can be had to oral evidence in such cases. This is certainly the general rule, and the exceptions to it are more apparent than real."

The same principles have been affirmed in various cases by the Supreme Court of this state. They are all in harmony with the declaration of Chief Justice Field in *Lestrade v. Barth*, 19 Cal. 672, that: "The jurisdiction of courts of equity to correct an error in any material particular of a written agreement, either executory or executed, so as to make the instrument conform to the intention of the parties is well settled; and it matters not whether the error be in the insertion or omission of a material stipulation, or, as alleged in the present case, in an inaccurate description of the subject-matter of the agreement. Nor does it make any difference whether the error be the result of fraud in one of the parties, or be committed under a mutual mistake, contrary to the intention of both parties."

The foregoing quotations should set at rest the contention of appellant that the instrument in question here is "so radically and materially deficient in certain elements required by the rules of the law to be contained in writings of its character" that it cannot be made the subject of reformation so as to express a complete contract; but appellant is mistaken in his understanding of the significance of the writing before us, and he has placed an unwarranted limitation upon the operation of the equitable doctrine of reformation for fraud or mistake. The said instrument does contain, although imperfectly expressed, all the elements of a contract as required by section 1550 of the Civil Code, to wit: (1) "Parties capable of contracting"—*J. H. House and R. A. McMullen*. (2) "Their consent"—"this agreement entered into." (3) "A lawful object"—the sale of

land. And (4) "A sufficient cause or consideration"—the mutual agreement to convey. So it is perfectly clear that a case for reformation is presented if we accept the rule as stated by respondent that "When contracting parties have given evidence of the existence of a contract between them, by signing a paper purporting to contain the terms of that contract, and that paper shows their consent to a contract and that it has a lawful object and a consideration, and when such writing contains an indefinite or erroneous or insufficient statement of either the subject or consideration of the contract, equity will interpose for purpose of revision." The rule, however, is thus stated by respondent more favorably to appellant than is warranted. The theory upon which equity interposes is that through mistake or fraud the written instrument does not set forth the contract actually entered into, and that justice requires that it should be made to express the intention of the parties. There is no hard and fast rule as to what the written instrument shall contain, or in what respects it shall be deficient as a prerequisite to the invocation of equitable interposition. The written instrument is not required to be certain or complete in any respect. The only condition is that there shall be an honest endeavor to reduce the contract to writing where the statute of frauds requires it, and that the mistake shall be such as is recognized in this branch of equitable jurisdiction, as to which there can be no doubt here.

Certain cases are cited by appellant, which are deemed antagonistic to the foregoing doctrine, but a brief consideration will show that none of them is inconsistent with the overwhelming weight of authority as stated by Prof. Pomeroy. In *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179, the action was in law for damages for the breach of a contract of sale of real estate, and it was very properly held that "the contract must be complete and certain in its terms, and the parties must have consented to the same subject-matter in the same sense, and the burden is upon the plaintiff to show that a contract definite and certain in its terms was entered into between the parties as a condition of obtaining any relief." In *Ward v. Waterman*, 85 Cal. 489, 24 Pac. 930, a declaration of trust was reformed by adding a provision not contained in the agreement as written, on the ground that there was a mutual mistake, and that the instrument should embody what the parties had actually agreed upon. In *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644, 47 Pac. 689, 928, was not an action in equity, but it was brought to recover a sum of money for commissions upon a contract of agency, and it was properly held that parol evidence was not admissible to add to or vary the terms of the written instrument. The case of *Mabb v. Merriam*, 129 Cal. 663, 62 Pac. 212, was an action to reform a contract, but it was

brought by a person not a party to the written instrument, and the Supreme Court said: "While a court of equity will reform contracts under many varying circumstances, still it has no power to make a new contract. Its power is simply to reform a contract already made. *J. W. Mabb* is not a party to the contract, and a court of equity can neither add additional parties nor substitute other parties for those already appearing upon the face of the writing." *Craig v. Zelian*, 137 Cal. 105, 69 Pac. 853, was an action for damages for the breach of an agreement to convey real property. No question of fraud or mistake was involved, but an attempt was made by parol evidence to supply what the statute provides shall be in writing. It is properly said: "An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated and supplying a description thereof which they have omitted from the writing." This is in harmony with the universally accepted rule as to the evidence of a contract contained in a written instrument and embodied in section 1856 of the Code of Civil Procedure, as follows: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings," etc. In view of the foregoing general observations, it is easy to reach the conclusion that none of the changes made in the case at bar is beyond the domain and contemplation of the equitable principles to which we have referred.

A more technical objection to the complaint is urged by appellant to the effect that there is no specific allegation that the parties did agree to the terms of the contract as sought to be established. Appellant says: "It is true that, when a contract is sufficient to authorize a court of equity to revise it at all, it is the duty of the court to ascertain the intention of the parties and to carry that into effect; but it must be pleaded as a fact that the parties did agree on the matter alleged. The trouble is that, while the complaint shows identical intentions, it does not show that they were ever communicated and accepted, which is necessary to legal agreements. A mere allegation that the parties in-

tended that it should mean thus and so is not an allegation of any fact at all and is wholly insufficient to admit parol evidence of what the facts underlying it were. *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 646, 47 Pac. 690, 928." The rule is correctly stated, but the complaint before us is not obnoxious to the objection. It does appear by sufficient averment that the parties agreed to the terms of the contract as established by the trial court. This is apparent from a consideration of the whole complaint. It is alleged "that on the 5th day of November, 1906, the plaintiff and defendant made and entered into a certain contract and agreement in writing, which said contract and agreement was and is in the words and figures following, to wit:

* * * That on the back of said written agreement there was on the 6th day of November, 1906, written the following: * * * And said words * * * were intended to be and in fact are one of the covenants and stipulations of said agreement." An allegation that the parties entered into an agreement, and that a certain provision is one of the covenants and stipulations of said agreement, is a sufficient allegation that they agreed to said provision. Again it is alleged: "That at and before the making and execution of said written contract and of the indorsement thereon by the plaintiff, the plaintiff and the defendant intended that said instrument should mean, and that the legal consequences should be"—then follows the agreement as found by the court. In other words, the parties entered into a certain agreement which was erroneously expressed as signed by them, but which should have been expressed as found by the court. Any one with common understanding would infer from this language that the parties agreed to the contract as they intended and believed it to be written. But, again, as to the meaning attached to the word "sell" and the identification of the property agreed to be exchanged, these particulars involve the construction or interpretation and not the reformation of the contract, and after the allegation of the execution of the agreement it is sufficient to declare the meaning of the parties as to these terms employed in order that the intention may be more artificially and accurately expressed. Section 1636 of the Civil Code provides that "a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Under this and the other rules prescribed for the interpretation of contracts there can be no doubt that plaintiff, upon an allegation that it was so understood by the parties, could prove that "sale" was used for "exchange," which is indeed a species of sale. So, likewise, with the terms defining the property. It cannot be said that any new

element in that respect is introduced. If the specific description in the written contract should be deemed uncertain and defective, reference is made therein to the abstracts which we must presume contained all that is claimed by respondent.

As far as the particulars which may be considered as enlargement of the written instrument are concerned, we find in reference to the loan to one Rose the allegation that it "was omitted from said written agreement by error, mistake, and unconscious forgetfulness of all the parties to said instrument and of said Blair, that such provision and covenant was one of the terms of the contract between the plaintiff and the defendant," and there is the same allegation in reference to the discharge of the deed of trust to the Sacramento Bank. The one provision of which excision is sought is alleged to have been "inserted by mutual mistake of the parties and by error of the said A. S. Blair," and that it was in fact a part of another contract in reference to the sale of another piece of land. How it was mistakenly incorporated in the instrument in question is also fully explained. Thus it is that the principal objection of appellant to the complaint is fairly and completely met.

There is no other point of sufficient importance to require specific attention.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J

WHITE v. SUPERIOR COURT IN AND FOR VENTURA COUNTY.

(Civ. 648.)

(Court of Appeal, Second District, California. Jan. 19, 1909. Rehearing Denied by Supreme Court March 18, 1909.)

Petition for writ of prohibition by Earl D. White against the Superior Court for the county of Ventura. Denied.

Snook & Church, for petitioner.

PER CURIAM. The application for writ of prohibition in this case is denied, upon the authority of *Lindley v. Superior Court*, 141 Cal. 220, 74 Pac. 765. There is nothing involved in this case which would take it out of the rule there declared.

9 Cal. App. 650

GROSSE v. BARMAN et al. (Civ. 543.)

(Court of Appeal, Second District, California. Jan. 18, 1909. Rehearing Denied by Supreme Court March 18, 1909.)

1. LANDLORD AND TENANT (§ 235*)—FINDINGS—SUFFICIENCY TO SUSTAIN JUDGMENT.

In an action for a percentage of the net profits of leased premises due under the lease, which contemplated the erection of a building by the lessee before a designated date and provided for the payment of a percentage of the net profits, defined as the gross income minus the cost of repairs and alterations of the building, where

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the pleadings raised no issue as to the time of the completion of the building, though there was a conflict in the evidence on that subject, and the court found that specified items were necessary to a completed building, and refused to recognize the same as alterations, the omission to find the date of the completion of the building was not fatal to the judgment, as the findings made implied a finding that the specified items were furnished before the completion of the building.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 946; Dec. Dig. § 235.*]

2. LANDLORD AND TENANT (§ 152*)—LEASE—CONSTRUCTION—"ALTERATION."

Where a lease contemplated the construction by the lessee of a building according to specifications, and called for payment to the lessor of a percentage of the net profits, defined as the gross income, minus the cost of "repairs and alterations" of the building, the lessee was entitled to deduct from the gross income the cost of changes and alterations in the building, or any part thereof, for the proper use of the building, but he could not deduct the cost of additions to the building, nor to alterations in the specifications under which the building was constructed, the word "alteration" not contemplating initial construction, but a modification of that already constructed.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 541; Dec. Dig. § 152.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 360-365.]

3. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where, in an action for a percentage of the net profits of leased premises due under a lease calling for the payment of a percentage of the net profits, defined as the gross income minus the cost of repairs and alterations in the building, etc., the court properly construed the lease so as not to permit the lessee to deduct from the gross profits the cost of enumerated items, the error in admitting evidence that the enumerated items were a necessary part of the construction of the building was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

4. LANDLORD AND TENANT (§ 39*)—LEASE—CONSTRUCTION—"TIME."

A lease contemplating the construction by the lessee of a building before a designated date provided for semiannual payments of a percentage of the profits earned for the half year, authorized the issue by the lessee of interest-bearing bonds before the completion of the building, required a monthly deposit by the lessee for a fund out of which to pay rent, taxes, insurance, interest, and as a sinking fund for the payment of the bonds, and provided that the deduction from the profits of the building of any payment should be made "at the time of and not prior to the time of the respective actual payments thereof." *Held*, that the word "time" referred to the half-year period at the expiration of which the net profit should be calculated and paid, and payments during a half-year period where there was no income could not be carried forward to a succeeding half-year period and deducted from the income during such profit-earning period.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 39.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 6973, 6974, 7816.]

5. CONTRACTS (§ 169*) — CONSTRUCTION — INTENTION OF PARTIES.

Under Civ. Code, §§ 1633, 1639, providing that the language of the contract, if clear and unambiguous, must govern the interpretation

thereof, and that the intention of the parties must be ascertained from the writing alone if possible, etc., evidence of the circumstances under which an unambiguous agreement was made is inadmissible, notwithstanding section 1647, permitting a reference to such circumstances to explain contracts, the sections being required to be construed together.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 752; Dec. Dig. § 169.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by John Grosse against Fred Barman and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Herbert J. Goudge, Williams, Goudge & Chandler, and Harry L. Dearing, for appellants. Henry J. Stevens and O'Melveny, Stevens & Millikin, for respondent.

SHAW, J. This action was instituted by plaintiff, as assignee of the Abbot Kinney Company, a corporation, to recover the sum of 12½ per cent. upon the net income and profits derived from certain demised premises during the half year ending December 31, 1906, alleged to be due to plaintiff as such assignee under and by virtue of a certain agreement, dated the 4th day of March, 1905, and made and entered into between said defendants and plaintiff's assignor.

Among other things, it appears from said agreement that the Abbot Kinney Company did, on December 1, 1902, make a lease of the premises therein described to defendants and one Pirtle, the term of which was, by agreements dated July 1, 1903, and February 17, 1904, made between the same parties, extended as therein provided; that on September 3, 1904, the said company, at the request of defendants and said Pirtle, and concurrently with the cancellation of said prior lease and agreements for the extension thereof, made a lease of the same premises to the Development Company of Los Angeles, a corporation; that thereafter said defendants became the owners of said leasehold by said Abbot Kinney Company so demised to the Development Company of Los Angeles; that thereupon said defendants applied to said lessor for a new lease of said premises, to and including an extension of the term thereof for the period of 10 years, and to be made to a new corporation to be created for the purpose of taking and holding said leasehold of the premises and constructing a building thereon and maintaining and operating the same for profit, which said corporation so to be created was to be designated the "Development Building Company"; that thereupon, and upon cancellation of the lease made by said Abbot Kinney Company to said Development Company of Los Angeles, said Abbot Kinney Company did agree to make, execute, and deliver to the Development Building

Company a lease in form and substance fully set forth in said agreement.

Following the copy of said lease, it is further stated in said agreement:

"3rd. And as further consideration for the making of said lease to the Development Building Company, a copy of which has hereinbefore been set out in full, the parties of the first part agree with the party of the second part that at all times during the currency of said lease, they, the parties of the first part, will pay to the party of the second part twelve and one-half ($12\frac{1}{2}$) per cent. of the net income and profits derived from the said demised premises by the lessee under said lease, payable to the party of the second part half yearly as follows:

"The payment of the net profits or income payable to the party of the second part that shall have been earned prior to and including the 30th day of June, 1906, if any shall then be earned, shall be paid to the party of the second part on or before the first day of August, 1906, and thereafter the portion of the net profits or income payable to the party of the second part shall be calculated and paid half yearly as follows, to-wit:

"The portion of the net profits or income earned for the half year from and including the first day of July in any year to and including the 31st day of December of the same year payable to the party of the second part shall be paid to the party of the second part on the first day of February next following, and the portion of the net profits or income earned for the half year from and including the first day of January in any year to and including the 30th day of June of the same year payable to the party of the second part shall be paid to the party of the second part on the first day of August next following.

"The expression 'net income and profits' as used in this paragraph means, and is hereby defined to mean—

"The gross income and profits derived from said demised premises after deducting therefrom—

"(1) The rental payable by the lessee under the foregoing lease; the taxes and assessments payable by the lessee under the foregoing lease; the cost of arbitration payable by the lessee under the foregoing lease, and the premiums upon the insurance maintained upon the building to be constructed upon the demised premises.

"(2) The cost of repairs and alterations made upon the building upon the demised premises during the currency of said lease, and the cost of any reconstruction or repairs thereof made necessary by reason of the destruction thereof or damage thereto by fire or required by the provisions of said lease, to the extent only that any insurance money received by the lessee will not pay for the same.

"(3) Operating expenses and expenses of maintenance including reasonable charges for

clerical and other services rendered in connection with the operation, management, rental, preservation or care of the demised premises. Provided, however, that the parties of the first part shall not, nor shall any officer or director of said Development Building Company, receive at any time any salary or compensation for any service rendered by him in or about the demised premises or in connection with the operation or management thereof or of the building thereon.

"(4) A bond issue in the amount of \$150,000 United States gold coin bearing interest at nine per cent., represented by two sets of coupons, one set for six per cent. thereof, payable semi-annually and one set for three per cent. thereof, payable annually (the latter set of coupons representing a conditional interest payment, depending upon the payment of taxes upon the property and secured indebtedness at the volition of the grantor in said deed of trust), evidenced by 150 serial bonds of \$1,000 each and interest coupons attached (including said extra interest coupons for a three per cent. payment, which shall be an equivalent of a rebate agreement for taxes, if the same shall not be paid by the corporation or the trustee). Such bond issue shall be dated January 2, 1905, or a date approximate thereof; of the amount of indebtedness represented by said bond issue \$10,000.00 shall be due and payable each year, commencing on the 2nd day of January, 1908; said bond issue shall be secured by a deed of trust to the Title Insurance & Trust Company, as trustee, and shall contain the terms and conditions, and the agreement for payment of compensation to the trustee agreed upon between the parties of the first part and the said trustee and Messrs. Joseph F. Sartori and Maurice S. Hellman.

"The trust deed shall also provide for the payment of a monthly deposit by the said Development Building Company as a fund out of which to pay rent, taxes, insurance, interest and as a sinking fund of the principal of said bonds; said monthly payment shall be \$1,250.00 per month beginning July 2, 1905, and to and including January 2, 1907, and \$2,750.00 per month from January 2, 1907, until and including July 2, 1913, and thereafter said monthly payments shall be an amount which shall be equal to one-twelfth ($\frac{1}{12}$) of the six per cent. of the appraised value of the demised land as ascertained by the method provided in the lease, plus $\frac{1}{12}$ of the annual interest to accrue upon the interest coupons, plus $\frac{1}{12}$ of the taxes and of the insurance and of the principal sum of said bonds, required to be paid.

"The trust deed shall also provide that the said bonds, either part or all as may be agreed upon between the parties of the first part and said Sartori and Hellman, may at the option of the said Development Building Company be paid off upon payment therefor

of the par value of said bonds, accrued interest and a premium of not exceeding six per cent. of the principal.

"The deduction from the income and profits of said building of any payment made of said bonds or coupons or of said monthly payment or of any payment made under said trust deed, shall be made at the time of and not prior to the time of the respective actual payments thereof.

"4th. And it is further agreed by the parties of the first part that for the purpose of securing the payment of said share of profits to be paid to the party of the second part as aforesaid, the parties of the first part agree to forthwith assign and transfer and vest 12½ per cent. of the capital stock of said Development Building Company in the hands and name of First National Bank of Los Angeles, California, as trustee, under the trust, to pay and deliver unto the party of the second part all dividends and profits derived from said stock during the currency of said lease.

"Provided, however, and it is hereby agreed between the parties hereto that should at any time any assessment or assessments be levied against the capital stock of said Development Building Company, the parties of the first part shall in the first instance pay said assessment or assessments levied against said 12½ per cent. of said stock in the hands of said trustee as aforesaid, but shall be entitled to deduct and retain the amount thereof out of the net income payable to the party of the second part as aforesaid for the half year in which said assessment or assessments were levied or to repayment thereof by the trustee out of the dividends declared on the stock held by said trustee during the half year in which said assessment or assessments were levied—the intent and meaning of this agreement being that if any assessment is levied in any year, it shall be a charge on and payable out of the income payable to the party of the second part for that half year, but shall not be a charge on or payable out of the income payable to the party of the second part for any succeeding or other half year.

"It is further agreed that any dividends paid to said trustee on said stock held by said trustee, shall be deemed payments pro tanto of the net profits to be paid by the parties of the first part to the party of the second part under this agreement.

"5th. The parties of the first part shall at all times during the currency of the agreement for the payment to the parties of the first part of a share of the net profits hereinbefore provided, have the right of access to and examination of the records of said corporation Development Building Company, the books of account, accounts, dividend sheets, vouchers and the like and all other records and documentary matter which may appertain to said corporation, including in said

right, the right to take extracts from the same.

"6th. And the parties of the first part further agree with the party of the second part that upon the due incorporation of the said Development Building Company, the said company will guarantee to the party of the second part the payment of said 12½ per cent. of the net incomes and profits to the party of the second part in accordance with this agreement.

"In witness whereof," etc.

The Abbot Kinney Company duly executed the lease in accordance with said agreement, and the Development Building Company entered upon the premises so demised thereby, and have ever since held the same under and in accordance with the terms of said lease.

The lease was for a term of 30 years from July 1, 1903, and, among other things, provides for the payment monthly, in advance, of the rental reserved therein to be paid to the lessor. The lessee therein, the Development Building Company, covenants that it will, on or before September 1, 1906, unless prevented by conditions over which it has no control, erect and complete upon the demised premises a seven-story building, "in conformity with the plans and specifications to be submitted to and approved by the lessor, * * * and, if unsatisfactory, to be rejected by the lessor, * * * within ten days after presentation thereof, * * *; otherwise, to be deemed satisfactory and accepted," the value of which building should be not less than \$170,000. The lessee further covenanted that it would during said term, and before the same became delinquent, pay all taxes, assessments, and license charges properly assessed against the lands so demised and improvements thereon, and, at its own expense, keep said premises and all improvements thereon in good repair and condition, and during the currency of the lease keep the improvements to be constructed on said premises insured to the amount of their insurable value.

The court gave judgment for plaintiff, from which, and an order denying their motion for a new trial, the defendants prosecute this appeal.

The court made findings as to the gross income of the demised premises for the half year ending December 31, 1906, found the amount of costs and expenses to be deducted therefrom for said half year, and made a finding fixing the difference between said two sums as the net income and profits derived from said demised premises by the lessee thereof during said period, as defined in said agreement. In connection therewith the court further found that during said half year, in addition to the costs and expenses and charges so found to have been made, disbursed, and paid, said lessee during said half year expiring December 31, 1906, on account of the

building so erected upon said premises pursuant to the terms of the lease, did make certain other expenditures as follows:

July 26, 1906—Six mahogany doors at side of freight elevator, same being omitted when freight elevator contract was made, at \$18.00.....	\$ 98 00
July 26, 1906—Six angle iron at freight elevator openings put in place at \$2.25.....	13 50
July 26, 1906—Additional sidewalk lights where freight elevator was cut down, 10 feet at \$1.90.....	19 00
July 31, 1906—Three gross door stops.....	4 05
Aug. 2, 1906—100 square feet copper wire vent at store front.....	15 00
Aug. 2, 1906—100 feet galvanized wire vent store front.....	5 00
Aug. 2, 1906—Two wood stops for vents.....	6 36
Aug. 2, 1906—Carpenter work in placing wire for vent, three days at \$3.50.....	10 50
Aug. 6, 1906—Galvanized vent in basement toilet rooms at price agreed upon.....	50 00
Aug. 6, 1906—Rain water leader from light well to alley.....	27 00
Aug. 8, 1906—One Cowel ventilator on roof extending to coiling joist, of galvanized iron.....	25 00
One vacuum sweeper and machinery exclusive of compressed air piping.....	2,100 00
One Collier patent mail chute.....	896 00
Window shades and fixtures.....	609 25
Electric fixtures.....	1,650 00
Total	\$5,529 20

"That the foregoing work and material were not specified or shown in the plans or specifications for said building in evidence and approved by Abbot Kinney, but that said work and material were an improvement of and reasonably necessary for the convenient use of said building, and were incidental and reasonably necessary to a completed building, and are not proper items of expense to be deducted from the gross income from said leased premises under the terms of said agreement."

1. Appellants contend that that portion of the above finding, to the effect that the items and disbursements set forth and specified therein are not, under the terms of said agreement, proper items of cost, charges, and expenses to be deducted from the gross income derived from said premises for the half year expiring December 31, 1906, is not supported by the evidence. Appellants insist that the evidence shows that all of said items were added to the building after it had been completed, and, as they were not included in the plans and specifications, the lessee was not by the terms of the lease required to furnish them. There is a substantial conflict in the evidence as to the time when the building was completed, and an absence from the record of any finding thereon. There being, however, no issue raised by the pleadings as to the date of completion, the omission of an independent finding of such date by the court is not necessary in support of the judgment. The court finding that the items were incidental and necessary to a completed building, and by its judgment refusing to recognize the same as alterations, it must follow that the intendments always

indulged in support of a judgment must be recognized here as amounting to an implied finding that these items were furnished before completion. The lease contemplated the construction of a seven-story building upon the leasehold in accordance with certain plans and specifications submitted to and approved by the lessor. The "repairs and alterations" mentioned in the agreement have reference to this building as a completed structure in accordance with the plans and specifications, and such added work and installation as the lessee might deem necessary for the convenient and proper use thereof. Alteration implies the existence of that which is altered. As here used, it does not contemplate initial construction or installation of that which has no existence, but a modification or change of that already constructed or installed. "Alteration, *ex vi termini*, means a change or substitution of one thing for another." *Am. & Eng. Ency. of Law*, vol. 2, p. 179. As we interpret the agreement, the term "the cost of * * * alterations made upon the building," as used therein, applies, not to additions to the building, nor to alterations in the specifications under which the building was constructed, but to changes, modifications, and alterations in the building or in any part thereof constructed or installed for the convenient and proper use of the building, irrespective of whether such construction or installation was called for by the specifications.

2. On cross-examination one of the defendants was interrogated as to the time when the lessee contracted for the vacuum sweeper and mail chute, to which question defendants objected, and the objection was overruled. Plaintiff was also permitted to introduce evidence, over defendants' objection, to the effect that some of the items mentioned in said finding were a necessary part of the construction of a modern, seven-story office building. These questions and the evidence sought to be elicited thereby were immaterial. Notwithstanding this fact, under our interpretation of the agreement, we are unable to perceive in what manner appellants' rights could have been prejudiced by the questions or by the answers thereto. Hence the errors may be disregarded for the reason that they were harmless.

3. Defendants offered evidence to the effect that prior to July 1, 1906, the lessee had made expenditures on account of the sinking fund of \$1,250 per month, as provided for in the agreement, and that prior to said date it had made disbursements aggregating a large sum on account of taxes, rent, alterations, clerical services, and other expenditures in connection with the care, operation, and preservation of said leasehold premises, the stated purpose of said offer being to show that up to December 31, 1906, there had not inured to the lessee, or defendants herein, any net income or profit whatsoever; to all of which

plaintiff objected, and said objection was sustained upon the ground that, under the terms of the agreement, defendants were not entitled to show any expenditures made prior to July 1, 1906. This ruling, which was excepted to, calls for an interpretation of that part of the agreement whereby defendants obligated themselves at all times during the currency of said lease to pay to the Abbot Kinney Company a further consideration for the making of the lease of $12\frac{1}{2}$ per cent. of the net income and profits derived from the demised premises, which sum was made payable half yearly as follows: That part earned prior to June 30, 1906, was payable on or before August 1, 1906; and thereafter the portion of the net profits or income payable to plaintiff's assignor was to be calculated and payable half yearly, the earnings for the first half of the year being payable on August 1st, and that for the second half year being payable on the 1st day of February. Notwithstanding the fact that by these provisions of the contract each year of the term of the lease is divided into two earning periods of six months each, at the expiration of which the net income and profits derived from said leasehold during such period shall be calculated and ascertained in the manner fully provided in the agreement, and $12\frac{1}{2}$ per cent. thereof paid by defendants to plaintiff's assignor on the first day of the month succeeding the expiration of such half-year periods, appellants earnestly contend that the net profits referred to and made payable to the Abbot Kinney Company mean the net profits for the entire term of the lease. It would do violence to the language used to accept this construction of the agreement.

The term of the lease is an entirety, but it is divided into rental earning and paying periods of one month each; so, by this agreement, "all times during the currency of said lease," which is the term of the lease, is divided into profit-earning periods of six months, at the expiration of each of which periods there shall be deducted from the gross receipts received by the lessee during such period all expenditures on account of operation, etc., made by the lessee during said six months period only; and, if there be a net profit for such half year, the Abbot Kinney Company, or its assigns, shall by defendants be paid $12\frac{1}{2}$ per cent. thereof. While this portion of the agreement seems to be plain and explicit in its terms, our attention is directed to other parts thereof which appellants claim support the construction for which they contend. The agreement provides that the lessee shall issue interest-bearing bonds in the principal sum of \$150,000, to be dated approximately January 2, 1905, \$10,000 of which principal sum shall be made payable each year, commencing January 2, 1908, secured by deed of trust, which, among other conditions, shall contain a provision for the payment of a

monthly deposit by said lessee of \$1,250 per month, commencing on July 2, 1905, and increased, commencing with January 2, 1907, to \$2,750, which deposit shall constitute a fund out of which to pay rent, taxes, insurance, interest, and the sinking fund of the principal of said bonds. It is then provided that "the deduction from the income and profits of said building of any payment made of said bonds or coupons, or of said monthly payment, or of any payment made under said trust deed, shall be made at the time of and not prior to the time of the respective actual payments thereof." As the building was not to be completed until approximately September 1, 1906, little or no revenue could be expected to be derived from the leasehold; hence, as to the period expiring June 30, 1906, it is provided that the net profits, "if any shall then be earned, shall be paid," etc. Nevertheless, it was necessary to make provision for paying the rent, taxes, insurance, and bond interest which was to accrue and become payable prior to the occupancy of the building. The provision of the agreement above quoted excludes the idea that such payments and monthly deposit required to be paid by the lessee during the half-year period when there was no income should be carried forward to a succeeding half-year period of profit-making and deducted from the income derived from the leasehold during such profit-earning period. This seems clear from the language used, to the effect that the monthly deposits and payments required to be made by the lessee under the terms of the deed of trust shall be deducted from the income and profit of the building "at the time of * * * the respective actual payments thereof." "Time," as here used, has reference to the half-year period at the expiration of which the net income and profit shall be calculated and paid the lessor. The words, "shall be made at the time of," exclude the idea that such deduction might be made either prior or subsequent to the time (half-year period) of the actual payment. While the words, "and not prior to the time of," would seem unnecessary, they neither add to nor detract from the scope and meaning of the provision. Their use, however, occasions no inconsistency or conflict in the provision. On the other hand, to hold with appellants that these payments should be deducted at a period subsequent to that (the half-year period) of the "respective actual payments thereof," would be to wholly disregard the provision that such deductions "shall be made at the time of * * * the respective actual payments thereof."

Pursuant to the terms of the agreement, and for the purpose of securing the payment of said $12\frac{1}{2}$ per cent. of the net income and profits, defendants placed in the hands of a trustee $12\frac{1}{2}$ per cent. of the capital stock of said Development Building Company, said

trustee being authorized to collect the dividends thereon during the currency of the lease. These dividends when paid to said Abbot Kinney Company by said trustee were to be deemed payments pro tanto of said 12½ per cent. of said net income and profits. It is further provided that should an assessment be levied upon said capital stock so transferred to the trustee the defendants should in the first instance pay the same, and out of the 12½ per cent. of the net income for the half year in which such assessment was levied retain the amount of said assessment so paid by them, or the trustee, out of any dividends declared on said stock during the half year wherein such assessment was levied, might reimburse defendants for payment of such assessment—"the intent and meaning of this agreement being that if any assessment is levied in any year, it shall be a charge on and payable out of the income payable to the party of the second part for that half year, but shall not be a charge on or payable out of the income payable to the party of the second part for any succeeding or other half year." If there were no dividends declared, nor accrual of net profits during the half year in which the assessment was levied upon the capital stock, payment of such assessment devolved upon defendants without right to reimbursement out of net profits earned in subsequent half-year periods, or dividends declared therein. Although its interpretation is not involved here, reference is had to this provision for the purpose of showing that one central idea is made prominent throughout the agreement, namely, that it was the intention of the parties that the term of said lease was to be divided into half-year periods, each of which was, under the agreement, separate and distinct from the other; that at the expiration of each period an accounting should be had, wherein the lessee should be charged with the gross income for such period and credited with disbursements made under the terms of the agreement during such half year only. If the disbursements were less than the gross income, the Abbot Kinney Company, and its assigns should be entitled to receive from defendants 12½ per cent. upon such difference, which should be deemed to constitute the net income and profit for such period. If the disbursements exceeded the gross income for any half year, the Abbot Kinney Company, and its assigns, should not be entitled to anything whatsoever for such period, but such excess of disbursements over income for any such period should not be carried into any subsequent half-year period and made a charge against the gross income for such subsequent period.

We perceive no conflict in the provisions with reference to the mode of ascertaining the net income and that establishing half-year earning periods. To us it seems clear

that the rental, taxes, assessments, etc., were such only as might be paid during such period. Not only is the language of the agreement inconsistent with appellants' contention, but it is inconceivable, if the intention of the parties was in accordance with such contention, that they did not, in the draft of such an important document, elaborate in its completeness and reference to detail, make provision therein for accountings, interest, and repayments in event the last or intervening years of the lease should consist of an unprofitable series.

There was no error in excluding evidence as to expenditures made prior to July 1, 1906, by the lessee in operating the leasehold.

4. Appellants contend that the court erred in excluding evidence as to the circumstances under which the agreement was made, citing in support of such contention section 1647, Civ. Code. The provisions of this section are qualified by preceding sections of title 3, "Interpretation of Contracts." There is no occasion for invoking the provisions of said section where a written contract is free from uncertainty and ambiguity. In such case the intention of the parties must be ascertained from the writing alone, when possible. Sections 1638, 1639. Our conclusion is that the intention of the parties is clearly disclosed by the writing, and that the agreement is susceptible of but one construction; hence it follows the evidence was properly excluded. *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 Pac. 876; *San Diego Flume Co. v. Chase*, 87 Cal. 561, 25 Pac. 756, 29 Pac. 825.

We are unable to find any prejudicial error in the record, and, therefore, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

(155 Cal. 253)

BUCHNER v. MALLOY et al. (Sac. 1,590.)

(Supreme Court of California. Feb. 26, 1909.)

1. MINES AND MINERALS (§ 38*)—QUIETING TITLE—WHO MAY SUE—EQUITABLE TITLE.

One holding the equitable title to land cannot sue to quiet title against one holding the legal title, the remedy being to compel conveyance of the legal title, and hence, where mining claims were sold to satisfy liens to a trustee for the lienholders, one who purchased the interest of one of the lienholders under execution cannot sue to quiet title against one claiming under a deed from the trustee.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

2. MINES AND MINERALS (§ 38*)—ACTIONS TO DETERMINE TITLE.

Code Civ. Proc. § 738, authorizing suits to determine conflicting claims to land, authorizes suit to determine the superiority of equities, but does not apply where the property in dispute consists of mining claims on lands owned by the United States, as the interest of a locator in a mining claim on such land is a title in fee, except as to the government.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 38.*]

3. APPEAL AND ERROR (§ 1201*)—PLEADINGS—AMENDMENT—JUDICIAL DISCRETION.

Whether a holder of equitable title to land suing to quiet title against the holder of the legal title may file an amended complaint after remand to compel defendant to convey the legal title is to be decided primarily by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673-4683; Dec. Dig. § 1201.*]

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Mrs. C. F. M. Buchner against Daniel Malloy, W. R. McDowell, John Hendersee, and W. E. Fleming. From a judgment for plaintiff and from an order denying a new trial, defendant Malloy appeals. Reversed.

See, also, 92 Pac. 1029.

Gillis & Tapscott, Charles J. Luttrell, Tapscott & Gillis, Gillis & Gillis, Jas. R. Tapscott, and Taylor & Tebbe, for appellant. Coburn & Collier, L. F. Coburn, and B. K. Collier, for respondent.

SLOSS, J. The plaintiff commenced this action against the four defendants above

named to quiet her title to an undivided $\frac{9}{22}$ of six mining claims in Siskiyou county. The complaint contained merely the usual allegations that plaintiff was the owner and entitled to the possession of the property, and that defendants, without right, claimed adversely to her. The defendants McDowell, Hendersee, and Fleming disclaimed any interest except such as was held by McDowell under a contract of purchase made by him with Malloy. At the trial the court, on motion of plaintiff, ordered a dismissal as against these three defendants. Malloy answered, denying plaintiff's title to any part of the claims, and alleging that he was the owner of the whole of said property, subject to the paramount title of the United States. From a judgment in favor of plaintiff, as well as an order denying a motion for new trial, Malloy appeals.

The evidence shows that, in an action brought in 1895 by F. Kuschel and A. O. Yeager against Harry Hunter and others, a decree was made declaring that certain parties, including one John W. Pierpont and the defendant Malloy, were entitled to liens upon said claims for work done and materials furnished to the Siskiyou Mining Company, a corporation, then the owner of the claims. The decree ordered the sale of the premises to satisfy such liens. A sale was had; the sheriff's return showing that the premises were struck off to H. J. Eldredge "on behalf of the lienholders" for the sum of \$989.11. The certificate of sale set forth a sale to H. J. Eldredge and a sheriff's deed to the purchaser followed in due course. Both parties claim as successors to the title so sold and conveyed in the foreclosure proceedings. The plaintiff commenced an action in the justices' court against John W. Pierpont, one of the successful lien claimants in the former suit, and in that action caused an attachment to be issued and levied upon Pierpont's interest in the claims in question. She recovered judgment, and purchased Pierpont's interest at execution sale, receiving the sheriff's certificate and deed for such interest. The defendant relied on, and introduced in evidence, two conveyances from H. J. Eldredge to himself, one a grant, bargain, and sale deed of $\frac{16}{22}$ of said claims, and the other a quitclaim deed of all of Eldredge's right, title, and interest therein.

Upon this showing it must be held that the plaintiff failed to establish a case entitling her to the relief claimed against the defendant Malloy. The evidence offered by her showed that Pierpont, to whose interest she had succeeded, never had any legal title to the property, but was at most the holder of an equity as against Eldredge, to whom the title had passed under the foreclosure sale. Eldredge's conveyance to Malloy vested the legal title in the latter. Malloy, if he obtained Eldredge's deed with notice of Pierpont's

rights, took subject to those rights; but he did, nevertheless, become the holder of the legal title. That an action to quiet title will not lie in favor of the holder of an equitable title as against the owner of the legal title is a proposition settled by repeated decisions of this court. *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Harrigan v. Mowry*, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48; *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565; *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319; *Nidever v. Ayers*, 83 Cal. 39, 23 Pac. 192; *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421; *Chase v. Cameron*, 133 Cal. 231, 65 Pac. 460; *Robinson v. Muir*, 151 Cal. 118, 90 Pac. 521. Under the doctrine of these cases the finding that plaintiff "is the owner and entitled to the possession" of the property in dispute is contrary to the evidence.

It is no doubt true that, where both parties assert merely equities in the land, an action under section 738 of the Code of Civil Procedure to determine adverse claims, or, as it is usually termed, an action to quiet title, may be maintained to determine which party has the superior equity. *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806. But this rule has no application here. While the property in dispute consists of mining claims, on land owned in fee by the United States, the interest of locators in such land has always, except as against the government, been treated as virtually a title in fee. "From an early period of our state jurisprudence, we have regarded these claims to public mineral lands as titles. They are so practically. * * * Our courts have given them the recognition of legal estates of freehold." This declaration, contained in the opinion in *Merritt v. Judd*, 14 Cal. 59, has been quoted with approval in later cases. *Hughes v. Devlin*, 23 Cal. 501; *Spencer v. Winselman*, 42 Cal. 479. In *Hughes v. Devlin*, the court said, further, that: "Although the ultimate title in fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions and all rights, interests, and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons but the United States, as the owners of the land and the mines therein." See, also, *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348.

Under the views stated by us, the plaintiff's remedy was not to quiet title as owner, but to seek, on appropriate averments, a decree compelling defendant Malloy to convey to her a title claimed to be held by him in

trust for her. Whether in this action she should be permitted to file an amended complaint with such object is primarily a question to be decided by the trial court in the event of an application for leave to so amend. As any new trial must be had on entirely different pleadings, we do not, on these appeals, undertake to consider any points made by appellant with the exception of the one hereinabove discussed.

The judgment and order appealed from are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

155 Cal. 237
(Cr. 1,486.)

PEOPLE v. MOORE. (Cr. 1,486.)

(Supreme Court of California. Feb. 23, 1909.)

1. CRIMINAL LAW (§ 1159*)—REVIEW—FINDINGS OF FACT.

A court of review, having jurisdiction of questions of law alone, cannot disregard findings of fact, in a criminal prosecution, supported by direct evidence strongly corroborated by disinterested and unimpeached witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3077; Dec. Dig. § 1159.*]

2. RAPE (§ 53*)—ASSAULT WITH INTENT—SUFFICIENCY OF EVIDENCE.

In a prosecution for assault with intent to commit rape, in which prosecuting witness is corroborated, evidence held sufficient to show defendant's felonious intent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 80, 81; Dec. Dig. § 53.*]

In Bank. Appeal from Superior Court, Colusa County; H. M. Alberty, Judge.

Cleveland Moore was convicted of assault with intent to commit rape, and appeals. Affirmed.

I. G. Zumwalt and Ernest Weyand, for appellant. U. S. Webb, Atty. Gen., Seth Millington, Dist. Atty., and J. Charles Jones, Deputy Atty. Gen., for the People.

BEATTY, C. J. The defendant was convicted of an assault with intent to commit rape. His appeal from the judgment and from an order denying his motion for a new trial presents the single question whether there was credible evidence of any facts which would warrant the inference that the defendant was actuated in what he did by the alleged felonious intent. The justices of the District Court of Appeal, having been unable to agree upon this point, it remains to be decided here.

There is a sharp conflict in the evidence as to the character and circumstances of the assault, and especially between the testimony of the prosecuting witness and that of the defendant—each of whom is to some extent corroborated by witnesses apparently disinterested and wholly unimpeached. But, since our appellate jurisdiction extends only to questions of law, we must accept as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

proven the facts as detailed by the witnesses for the state. The prosecuting witness was a girl 16 years of age, a member of a vaudeville troupe which had been performing at various points in the interior, and was at the time of the assault giving a series of performances at the town of Arbuckle in Colusa county. She, her father and mother, and other members of the troupe, were housed in a traveling car which stood on a siding near the railway depot. Opposite, and facing the depot, at a distance of about 150 feet, stood the Hotel Ash, separated from the street by a sidewalk 10 feet in width. Connecting the street and sidewalk in front of the hotel was a bridge across the gutter seven or eight feet long—called in the evidence a “runway.” The defendant was in charge of a bootblack stand on the sidewalk near this runway. At 20 minutes to 6 p. m., on the 21st of December, 1907, when one of defendant’s customers had just left the stand and was not more than 80 feet distant, the prosecuting witness, returning to her car with some parcels she had been purchasing in the town, encountered the defendant just as she was turning from the sidewalk to the runway for the purpose of crossing the street. At that hour of the shortest day of the year it was, of course, quite dark in the absence of artificial light; but the sidewalk in front of the hotel and the runway were lit up by the lamps burning in the office of the hotel and shining through its glass front, so that persons passing could be readily recognized by their acquaintances. As to these general facts there is no conflict in the evidence. The testimony of the prosecuting witness was that, when she was about 20 feet from the runway, defendant called out “hello” to her. She did not answer, and as she turned to the runway he said “hello” again. She kept on, and he again said “hello” and touched her arm. She went a little farther, and, becoming frightened, turned back for the purpose of putting herself under the protection of a member of her troupe whom she had parted with at the place where she had made her purchases. Meeting the defendant on the sidewalk, she asked him: “Who are you talking to?” He said: “Well you, you damned little amateur.” Then he caught her by the arm, and when she tried to get away he struck her more than once, and she fell on the runway. He held her down with his face close to hers. She tried to scream, but at first could not command her voice. He put his hand under her clothes and tore her drawers. Then she screamed, and he struck her again, and said, “You damned little bitch.” Then again he put his hand under her clothes and hurt her by scratching the inside of her thighs. Then she screamed again, and again he struck her and used other language which she was unwilling to repeat on the witness stand. Then people came, and he left her.

Her cross-examination did not shake her direct testimony, and she was corroborated by a physician and by the woman who had charge of her wardrobe as to the scratches on her thighs and the marks of the blows about her head, and by the latter as to the torn condition of her underclothing. Three men who were in the hotel and were attracted by her screams found her lying on the runway and the defendant stooping over her and in the act of rising. She was dazed and sobbing. When she was raised to her feet, she merely said that the defendant had struck her and called her names.

The defendant’s version of the affair is: That when he saw the prosecuting witness approaching the runway where he was picking up some tacks, he mistook her for a girl of his acquaintance, and said “hello” to her only for that reason. That when he called to her a second time she turned on him and angrily demanded to know what business he had speaking to her, at the same time slapping him in the face. He caught her by the arm, when she commenced screaming and struggling, slipping from his grasp, and falling on the runway. He was just in the act of stooping to lift her up when the parties in the hotel came out and saw him in that attitude. Three witnesses testified that they were on the sidewalk near enough to see and hear all that passed. Their testimony is corroborative of the defendant’s in most particulars, but not more strongly or directly so than the testimony of the doctor and attendant of the prosecuting witness in corroboration of her testimony as to the scratches on her thighs and the bruises on her head and her torn underclothing. We are therefore bound to assume that the jury and the judge of the superior court must have disbelieved the defendant and his witnesses, and evidence which they rejected cannot be considered here. We attach no importance to the negative fact that the prosecuting witness did not at the time she was raised from the ground refer to the indecent handling of her person to which she testified at the trial, or to her failure to accuse defendant then of attempting to outrage her. She was surrounded by strange men, and natural modesty would have restrained any innocent girl from entering into such details under such circumstances. She was, moreover, according to the evidence, in a dazed condition, and it is still a question what the purpose of the defendant really was. In all such cases the intent with which an assault is committed is a fact which can only be inferred from the outward act and the surrounding circumstances. It is, in other words, a question of fact for the jury, and not a question of law for the court, except in a case where the facts proven afford no reasonable ground for the inference drawn.

We are cited to a number of cases decided in this court in which verdicts have been

set aside upon the ground that the evidence was insufficient to sustain the charge of rape or assault with intent to commit rape. The case of *People v. Benson*, however, in which there was a conviction of rape (6 Cal. 221, 65 Am. Dec. 506), does not appear to have been decided upon the question of fact but upon a question of law—the exclusion of proper evidence offered by the defendant—and the remarks of the court as to the untrustworthy character of the evidence of the prosecuting witness in view of the surrounding circumstances, however just they may have been, were not the ground of the decision. In several subsequent cases the language of that part of the opinion in the *Benson* Case in which the weakness and inconsistency of the evidence is commented upon has been adopted as a ground of decision; but they were all cases in which the prosecuting witness was uncorroborated as to the assault, and where circumstances inconsistent with her testimony were clearly proven. *People v. Hamilton*, 46 Cal. 540; *People v. Ardaga*, 51 Cal. 372; *People v. Castro*, 60 Cal. 118; *Lind v. Closs*, 88 Cal. 13, 25 Pac. 972. The principle underlying those decisions is that a charge so easily fabricated should not be sustained upon the sole testimony of the prosecutrix, where it is not only uncorroborated, but is contradicted by the surrounding circumstances. It has no application to a case like this, in which all the outward facts are clearly established, and the only question is what the defendant intended. Here there can be no question, so far as this court is concerned, of the fact of the assault or of its brutal or indecent character. The case of *People v. Fleming*, 94 Cal. 308, 29 Pac. 647, is more nearly, but not precisely, in point. There the desire of the defendant to have connection with the prosecutrix was not in doubt, and he did commit a technical assault; but the circumstances clearly showed that he did not intend to accomplish his purpose by force. He was not interrupted, and he voluntarily refrained from using his superior strength. Here the assault was forcible and brutal to a degree, and there is every reason to believe that the defendant would have carried out his purpose, whatever it was, in spite of any resistance which the prosecutrix could have made. The sole question is what was his purpose. As to this counsel for defendant contend with great earnestness and force that it is impossible to believe that any man in his senses could have entertained the thought of committing a rape at that time and place. It must be confessed that such a purpose, harbored under such circumstances, would seem incredible; but such an assault under such circumstances would have seemed equally incredible if it had not been proven to the satisfaction of the jury and the trial judge. A court of review, hav-

ing jurisdiction of questions of law alone, cannot disregard findings of fact supported by direct evidence strongly corroborated by disinterested and unimpeached witnesses; and neither can it be said as a legal conclusion that the facts so found are insufficient to warrant the inference as to the felonious intent.

The judgment and order of the superior court are affirmed.

We concur: HENSHAW, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

155 Cal. 242

PETITPIERRE v. MAGUIRE et al.
(S. F. 5,006.)

(Supreme Court of California. Feb. 25, 1909.
Rehearing Denied March 25, 1909.)

1. EASEMENTS (§ 17*)—WAYS—CONVEYANCE OF LAND.

Where one sells land as fronting on or bounded by a space designated in the deed as a street or way which he also owns, he is estopped to thereafter deny it, as against his grantee or the grantee's successors; it being immaterial that the lines of the land conveyed run along the sides of the way instead of to the center thereof, and that the way is not the only means of access to the land.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 46; Dec. Dig. § 17.*]

2. EASEMENTS (§ 17*)—DEEDS—STREETS.

Where one lays out land into lots, and makes a plan thereof showing streets, and sells, according to such plan, lots as bounding on such streets without any limitation, he irrevocably devotes such parts marked as streets, as to the grantees and their successors, to use as streets; it being immaterial that the tract subdivided is small, e. g., 100 by 275 feet, or that the street shown is a cul-de-sac.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 47; Dec. Dig. § 17.*]

3. EASEMENTS (§ 17*)—STREETS—DEEDS.

The rights of one who purchased land described as bounded by a street owned by the grantor in such street are the same as if the grantor had previously made and filed a plat showing the street and had sold according to the plat.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 46; Dec. Dig. § 17.*]

4. JUDGMENT (§ 710*)—EFFECT—EASEMENTS.

A judgment quieting plaintiff's title to a private way against a city did not affect the rights of his subsequent grantees under deeds to adjoining tracts described as bounded by such way.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 710.*]

5. EASEMENTS (§ 30*)—NONUSER—EFFECT.

An easement in land acquired by deed, and not by mere enjoyment, is not lost by nonuser.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 78; Dec. Dig. § 30.*]

6. HOMESTEAD (§ 118*)—CONVEYANCES—SUFFICIENCY.

Under St. 1862, p. 519, c. 396, requiring conveyances of homestead property to be executed and acknowledged by the wife, a deed executed by husband and wife, describing the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land as bounded by a private way, sufficiently passed an easement in such way.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 118.*]

7. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting evidence is harmless where it did not affect the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160; Dec. Dig. § 1050.*]

8. Costs (§ 32*)—RIGHT TO—QUIETING TITLE.

Under Code Civ. Proc. § 1022, entitling a successful plaintiff in an action involving title to land to costs, plaintiff, in an action to quiet title, was entitled to costs, where she was decreed to own the fee, though an easement was decreed to defendants.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 32.*]

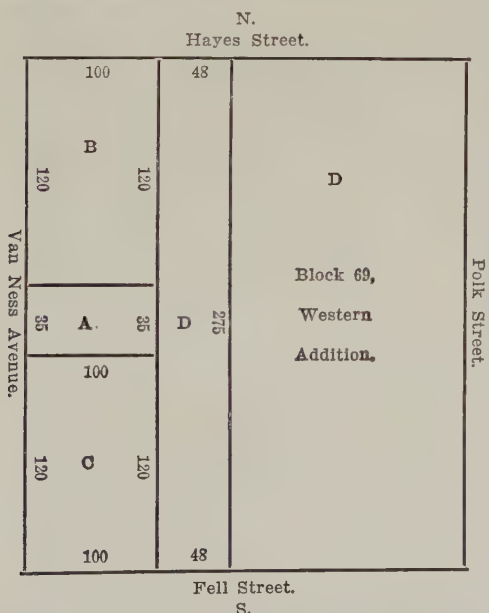
Department 1. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Adella Petitpierre against Michael Maguire and others. From the judgment and from an order refusing a new trial, plaintiff appeals. Judgment modified and affirmed. Order affirmed.

Milton Shepardson, for appellant. Campbell & Baldwin, Edmund Tauszky, Hugo K. Asher, and Andrew G. Maguire, for respondents.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment and order denying a new trial, in an action brought by her to quiet her title to a lot of land in the city and county of San Francisco.

The material facts of the case can be more easily understood with the aid of the following diagram:



The land in controversy is the strip 35 by 100 feet, marked "A" on this diagram. On August 16, 1860, Elihu F. Baldwin was the owner of the portions of block 69, marked "A, B, C and D," a parcel fronting 275 feet on Van Ness avenue, with a uniform depth of 148 feet on Hayes and Fell streets, and was then residing on the same with his wife and daughter. On that day he and his wife duly selected the said property as a homestead, in the manner required by law. On November 18, 1863, Baldwin and his wife, by a deed duly executed and acknowledged by both of them and duly recorded, sold and conveyed to one Bartlett the portion marked "D," and this deed contained the following provision: "With the understanding that whenever Linden avenue, a street thirty-five (35) feet wide, running east and west through the center of block No. 69 is opened for travel, it shall be opened so as to divide the premises hereby conveyed, leaving an equal portion north and south of said street." On December 29, 1863, Baldwin and his wife, by a deed duly executed and acknowledged by both and duly recorded, sold and conveyed to one John H. McCloskey the portions marked "B" and "C," describing them as follows:

"First. Commencing on the northeasterly corner of Van Ness avenue and Fell street; thence running easterly along the northerly line of Fell street one hundred (100) feet; thence northerly parallel with Van Ness avenue, one hundred and twenty (120) feet to the southerly line of Linden avenue or street; thence westerly along said line of Linden avenue or street one hundred (100) feet to the southeasterly corner of Van Ness avenue and Linden avenue or street; thence southerly along the easterly line of Van Ness avenue one hundred and twenty (120) feet to said northeasterly corner of Van Ness avenue and Fell street, the point of beginning. Being a portion of 50-vara lot No. 3, in block 69, Western addition.

"Second. Commencing on the southeasterly corner of Van Ness avenue and Hayes street; thence running easterly along the southerly line of Hayes street one hundred (100) feet; thence southerly, parallel with Van Ness avenue, one hundred and twenty (120) feet to the northerly line of Linden avenue or street; thence westerly along said line of Linden avenue one hundred (100) feet to the easterly line of Van Ness avenue; thence northerly along said line of Van Ness avenue one hundred and twenty (120) feet to said southeasterly corner of Van Ness avenue and Hayes street, the point of beginning. Being a portion of 50-vara lot No. 4, in block 69, Western addition." (The italics are ours.)

The defendant B'nai B'rith Endowment Fund Association has succeeded to all of McCloskey's interest so far as the property firstly described in said deed is concerned.

being the portion marked "C," and the defendants Maguire have succeeded to all of his interest so far as the property secondly described is concerned, being the portion marked "B." Baldwin died January 15, 1878, and his wife died September 12, 1899, and plaintiff is the successor in interest of all property left by both of them.

On December 18, 1863, 11 days before the execution of the McCloskey deed, a judgment was duly given and made in the district court of the Fourth judicial district, in an action wherein Baldwin was plaintiff and the city and county of San Francisco was defendant, by which it was adjudged that Baldwin was the owner of the portion marked "A," and quieting his title thereto against said city and county, and enjoining said city and county from making or asserting any claim thereto. The evidence showed that the Baldwins resided on the portion of the block composed of parts "A," "B," and "C" until the sale to McCloskey, when they left it. Since the McCloskey deed, the portion marked "A," has not been inclosed on the Van Ness avenue side, and the same has constituted a blind alley or cul-de-sac, encircled on three sides by a board fence. It was originally used by the Maguires as a means of access to the rear of a coal shed built on "B," and which has a back door fronting thereon, and the windows in the rear of the barn on B opened thereon. During recent years it has not been used to any great extent as a means of access to any of the property fronting thereon, but has been used both by occupants of B and C as a place for dumping manure and keeping wagons and other articles, and for a long time was occupied by a man who used it for mixing loam for sale to people in the neighborhood. During the last two years, a small office building on C had its front door facing on A, 40 inches east of Van Ness avenue, and still further east is a sliding door to permit access by teams to C. The foregoing constitute all the facts that can reasonably be claimed to be material in view of the findings of the trial court. Plaintiff was found to be the owner of A, subject only to the ownership by the defendants Maguire and B'nai B'rith Endowment Fund Association, and the successors in interest of McCloskey, of a right of way over the same for purposes of travel, light, and air, and as a means of ingress to and egress from their respective lots.

We think it necessarily follows that upon the facts stated, in view of the language used in the McCloskey deed, he and his successors acquired, as against the grantors and their successors, the right to the use of A as a street or way. It appears to be thoroughly settled that where an owner of land sells the same as fronting on or bounded by a certain space designated in the conveyance as a street or way, which he also owns, he covenants that the same is a street or way, and will not

be heard thereafter to deny it as against his grantee or his successors. In Jones on Easements, § 227, the rule is declared as follows: "That an owner of land does acquire an interest in the street abutting on his property, where the conveyance of such property to such owner bounds the property by the street, and where the grantor owned the fee of the street, even though the conveyance excludes the fee of the street, separate and distinct from the right of the public to use the street as a public road or highway, is clear upon principle, and is settled by authority, and such right arises from the implied covenant in the deed, when it conveys the property bounding it by the street, that there is a street, and that, so far as the property of the owner of the fee in the street is concerned, such parts of the street as abut on the property conveyed shall remain open as a street for light, air, and right of access to such abutting property. This * * * is a right that binds and controls the grantor's interest in the street, whatever it may be, and gives to the grantee the right to insist that the grantor or those claiming under him shall not so use his interest in the street as to interfere with this right or easement acquired by the implied covenant contained in the grant. If the boundary is in fact a way, it is immaterial whether it is called a way, or a street, avenue, lane, road, place, or court. The grantor in either case is estopped to deny the existence of the way for the benefit of the grantee." This is the established rule in California. It was declared in *Breed v. Cunningham*, 2 Cal. 361, to be firmly established. It was applied in *Kittle v. Pfeiffer*, 22 Cal. 484, where the description in a mortgage, subsequently foreclosed, as follows: "Commencing at the southeast corner of Stockton and Francisco streets; running thence easterly 122 feet 6 inches to Belle Air street; thence southerly along Belle Air street, 122 feet 6 inches, to Pfeiffer street; thence westerly along Pfeiffer street to Stockton street; thence to the place of beginning"—was held to give to those claiming under the mortgage, as against the mortgagors and their successors, the right, appurtenant to the lot described in the mortgage, to use the spaces designated as Belle Air street and Pfeiffer street as streets, and to prevent any obstruction thereof. In that case it appeared that neither the city and county of San Francisco nor the public had ever accepted these streets, and that they had never been opened or used as streets or highways. It was held in that case to be immaterial whether the description was such as to carry the fee to the center line of the designated street or only to the side line, "because," as the court said, "the plaintiff has a right of action, whether he is vested with the fee or only a right of way." The general rule, as was said by the Oregon Supreme Court in *Lankin v. Terwilliger*, 22 Or. 97, 29 Pac. 268, "rests upon the fact that the gran-

tor, by describing the land as bounded by a way, when he is the owner of the soil under the way, intends thereby to confer upon the grantee, as appurtenant to the granted premises, the right to use such way, and whether it be deemed to operate as an implied grant, covenant, warranty, or estoppel, binding on the grantor, his heirs or assigns, is immaterial."

It is sought by appellant to bring the case within the limitation declared in some cases that a mere reference to a road or way for purposes of description solely, as any other mark or monument might be referred to, does not convey an easement in such road or way or raise any estoppel on the owner. Whatever the extent of this limitation may be, we are clear that it is not applicable here. We say this without regard to the decision in *Kittle v. Pfeiffer*, supra, where the description was practically the same as the description in the case at bar, so far as this question is concerned. The effect of the descriptions in the McCloskey deed was unmistakably to bound the parcels conveyed, one on the north and one on the south, by the strip 35 feet wide dividing the same, declared by the grantors to be a street. It was not a case of reference to a public highway established and marked on the ground or on any map or survey, or to an abandoned public highway, for there had never been any such establishment or marking anywhere, and the reference could in no degree aid in the identification, and cannot be held to have been inserted for that purpose. Upon the conceded facts of this case, the language used by the grantors in that deed was a plain, straight declaration that the strip 35 feet wide dividing the two parcels conveyed was and should continue to be, so far as their grantee and his successors were concerned, a street, and is susceptible of no other construction. The cases principally relied upon in this connection by learned counsel for appellant were all cases in which there was some basis for the conclusion that the street or highway was referred to for purposes of description only.

Upon the facts stated, the case appears further to fall within the well-settled rule that where one lays out a tract of land owned by him into lots, and makes a plan thereof showing streets, and sells, according to such plan, lots as bounding on such streets without any limitation, he irrevocably devotes such portions marked as streets, so far as the grantees and their successors are concerned, to use as streets. It can make no difference that the tract so subdivided is small, consisting, as here, of only one lot 275 by 100 feet (see *Stone v. Brooks*, 35 Cal. 489), or that the street shown is a mere cul-de-sac (*Id.*). The deed to McCloskey itself constituted a plat showing the subdivision by the owners of this land into two lots divided by a street to be known as "Linden street," and a sale according to such plan. It cannot be doubted that McCloskey's rights under the deed were the

same as they would have been had the owners prior to the sale to him made and filed in the recorder's office a plat of this land showing these two lots with Linden street dividing the same, and he had purchased according to such plat. See *Prescott v. Edwards*, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186.

The fact that the descriptions run simply to and along the northerly and southerly lines of Linden avenue, respectively, instead of to the center thereof, is not at all significant, either in the determination of the question of the intent of the grantors or the effect of the deed so far as the right of the grantee and his successors to use the street is concerned. As is suggested by respondents, there is no inconsistency between an intent not to grant the fee of a parcel of land, and the intention to grant certain rights against that fee. The reference to Linden avenue is the same in this regard as are the references to Van Ness avenue and Hayes and Fell streets, as to each of which the reference is to the easterly, southerly, and northerly lines, respectively, which renders wholly inapplicable what is said in regard to a similar point in *Neely v. Philadelphia*, 212 Pa. 551, 61 Atl. 1096, cited by appellant; and as was said in *Kittle v. Pfeiffer*, supra, clearly it is immaterial so far as the right to use the property as a street is concerned, whether the grantee acquired the fee in Linden avenue, or only a right of way for street purposes under the rule we have discussed. We cannot see that the judgment of December 18, 1863, of Baldwin against the city and county of San Francisco, is at all material in the determination of the private rights of the defendants based on their later deeds from the Baldwins. It is suggested that the deed to McCloskey did not define the extent of the tract over which the rights for street purposes should exist, but we think it did so with the greatest particularity. The rights of defendants, not having been acquired by enjoyment, but by deed, could not be lost by mere nonuser. *Currier v. Howes*, 103 Cal. 431, 437, 37 Pac. 521. Of course, it is not essential to the existence of the alleged rights of defendants that the land in controversy should afford the only means of access to their several parcels of land. They are not claiming a way by necessity, but one given them by grant.

Much reliance is placed by appellant on the fact that at the date of the McCloskey deed, the whole property, A, B, and C, constituted the homestead of the Baldwins, and that such homestead has never been abandoned. We are unable to see anything in the homestead statutes or decisions cited by appellant that renders this fact of any avail to her in this case. The statute then provided that: "No alienation, sale, conveyance or mortgage or other lien of or upon the homestead property shall be valid or effectual for any purpose whatever, unless the same be executed, and acknowledged by the wife, if the owner be

married, and the wife be a resident of this state, in the same manner as provided by law in the case of the conveyance by her of her separate real property." St. 1862, p. 519, c. 396. The McCloskey deed, as we have said, was so executed and acknowledged by the wife, and thus fully complied with the requirements of this provision. There was absolutely nothing in the statute that prohibited, even by inference, the subjecting of the homestead property or any portion thereof to any kind of a claim or burden, provided the instrument creating the claim or burden was executed and acknowledged by the wife in the manner declared by this provision. The precise question here presented was presented in *Kittle v. Pfeiffer*, supra, where the mortgaged premises, together with the alleged streets referred to in the description, constituted the homestead of the mortgagors. The mortgaged premises were sold on foreclosure of such mortgage, and the question was as to the rights of the purchasers at the foreclosure sale and their successors, in said alleged streets. Disposing of the claim based on the fact of homestead, this court said: "The mortgage was duly executed and acknowledged by the wife, and she and her husband were parties to the suit for its foreclosure. The homestead claim, so far as it relates to the property covered by the mortgage, is barred by the decree of foreclosure and sale and deed under it. This right of way passed to the purchasers as one of the appurtenances of the lot, and is therefore equally free of the claim of homestead." We see no distinction material to the question between the homestead statute that was in effect at the time of the execution of the Pfeiffer mortgage, and that in effect at the time of the McCloskey deed. It is true that the statute of 1862 contained a provision as to the method by which a homestead might be "abandoned," which does not appear to have been contained in the original act; but we are not confronted here with the question of abandonment. We are satisfied that, under the homestead law in force at the date of the McCloskey deed, any instrument duly executed and acknowledged by the husband and wife in the manner required by that law is to be given the same force against the homestead property affected thereby, as it would be given if there were no homestead and the instrument was duly executed by the owner thereof.

Various errors are alleged to have been committed on the trial; but they are all immaterial and without prejudice, in view of the conclusion of the trial court, and the undisputed evidence upon which that conclusion rests. The Bartlett deed, admitted in evidence over the objection of appellant, could not have affected the result so far as the findings as to the private rights of defendants based on the McCloskey deed are con-

cerned. The same is true of certain official maps and resolutions of the supervisors of the city and county of San Francisco made subsequent to the McCloskey deed, designating or referring to Linden avenue as a street, received in evidence over the objection of appellant. These were undoubtedly admitted solely on the issue of public highway, as to which defendants did not prevail. Judgments of dismissal, in two actions brought by the executrices of Baldwin against the defendants Maguire and the predecessor of the other defendant, were received in evidence over the objection of appellant; but the trial court found that neither of these judgments constituted a bar to this action. If there was any error in admitting them, the error was therefore harmless. The same is true as to the rulings in rejecting certain evidence offered by plaintiff to show that these judgments were not given on the merits.

The judgment provides that none of the parties herein recover any costs in this action from any of the other parties herein. Plaintiff's final point is that, inasmuch as she was decreed to be the owner of the fee, the defendants having denied her alleged ownership, she was entitled to her costs as a matter of right under the provisions of section 1022, Code Civ. Proc. Defendants make no reply to this contention, which appears to be fully sustained by the cases of *Sierra Union, etc., Co. v. Wolff*, 144 Cal. 430, 77 Pac. 1038, and *Gibson v. Hammang*, 145 Cal. 454, 78 Pac. 953.

The judgment is hereby modified by striking out the provision "that none of the parties herein recover any costs in this action from any of the other parties herein," and inserting in lieu thereof the following, "that plaintiff recover from the defendants her costs in this action"; and, as so modified, the judgment is affirmed. The order denying a new trial is affirmed. Appellant shall not recover her costs on these appeals.

We concur: SHAW, J.; SLOSS, J.

155 Cal. 228

BLOOD v. MUNN et al. (L. A. 2,203.)

(Supreme Court of California. Feb. 20, 1909.)

1. HOMESTEAD (§ 103*)—MORTGAGE—FORECLOSURE—EXHAUSTION OF OTHER PROPERTY.

A wife became a voluntary bankrupt and claimed that a homestead held by her and the husband should be set apart as exempt. The bankruptcy court, following the state law (Civ. Code, §§ 1245-1253), appraised and partitioned the property; a portion being set apart as exempt, and the other portion being sold to a purchaser whose bid was conditioned that the property be clear of incumbrances. The sale was confirmed clear of incumbrances. Prior to the acquisition of the homestead, there was a mortgage on the property given by the husband and wife. The trustee in bankruptcy on making the sale procured a release from the mortgagee of the nonexempt portion without the consent of the mortgagors for a consideration

less than the value of the property sold. The mortgagee brought suit to foreclose the mortgage. *Held* that, since there was a homestead on a portion of the mortgaged land, the mortgagors were entitled to have the mortgagee subject the nonexempt portion of the property first, and hence the mortgagors were entitled to a credit on the mortgage debt of the value of the land released.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 167; Dec. Dig. § 108.*]

2. HOMESTEAD (§ 108*)—MORTGAGE—RELEASE OF NONEXEMPT PROPERTY—CREDIT ON MORTGAGE DEBT.

The mortgagor in such case is entitled to have credited the full value of the released property unaffected by the fact that the trustee paid for the release a sum less than its full value.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 167; Dec. Dig. § 108.*]

3. BANKRUPTCY (§ 400*)—EXEMPTIONS—FOLLOWING STATE LAWS.

Held, also, under Bankr. Act July 1, 1898, c. 541, § 2, cl. 11, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), giving the court jurisdiction to determine all claims of bankrupts to their exemptions, that the court in appraising and partitioning the property properly followed the state laws.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 670; Dec. Dig. § 400.*]

4. BANKRUPTCY (§ 400*)—EXEMPTIONS—SETTING APART HOMESTEAD—EFFECT.

Also, *held* that, the mortgage being prior to the homestead, and the mortgagee, relying on his security alone and not appearing in the bankruptcy court, was not affected by the bankruptcy proceedings, and the only effect of the partition was to give the mortgagee a lien on two parcels of land, instead of one.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 670; Dec. Dig. § 400.*]

5. BANKRUPTCY (§ 400*)—EXEMPTIONS—SETTING APART HOMESTEAD—RELEASE OF NONEXEMPT PROPERTY—RIGHTS OF HUSBAND.

The husband in such case could insist that the released nonexempt property be first sold to satisfy the mortgage debt, though not a party to the bankruptcy proceedings, and though he had no interest in the property sold, where it was admitted on the foreclosure of the mortgage that the orders in the bankruptcy court were duly made and filed, since it being provided by Civ. Code, § 1248, which statute the bankruptcy court followed in setting apart the homestead, that a notice of the time and place of hearing must be served on claimant, etc., the husband, having an interest in the homestead, is a claimant, and was bound by the partition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 670; Dec. Dig. § 400.*]

6. BANKRUPTCY (§ 264*)—TRUSTEE'S SALE—CONFIRMATION—EFFECT.

The fact that the sale in bankruptcy was confirmed clear of all incumbrances cannot operate as an estoppel by judgment precluding the right to have the nonexempt property first sold to satisfy the mortgage debt, where the mortgagee and the husband were not parties to the bankruptcy proceedings and were not notified of the sale, and this though the wife might be bound by the judgment of confirmation, and the husband was bound by the partition made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 369; Dec. Dig. § 264.*]

7. MORTGAGES (§ 512*)—STIPULATION AS TO SALE—WAIVER.

Held, also, that by the release the mortgagee waived any right to insist on a stipula-

tion in the mortgage that the property be first sold as a whole and not in parcels.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1515; Dec. Dig. § 512.*]

8. HOMESTEAD (§ 108*)—MORTGAGE—RELEASE OF NONEXEMPT PROPERTY—AMOUNT OF CREDIT ON MORTGAGE DEBT.

The mortgagors, under the facts stated, have not the right to credit on the mortgage debt the full value of the land released and in addition what the mortgagee obtained from the trustee in bankruptcy for the release.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 167; Dec. Dig. § 108.*]

9. HOMESTEAD (§ 108*)—MORTGAGE—FORECLOSURE—RELEASE OF NONEXEMPT PROPERTY—SUFFICIENCY OF EVIDENCE.

In an action to foreclose a mortgage, in which it was claimed that a portion of the land released to a trustee in bankruptcy of the mortgagor should have been first sold to satisfy the mortgage debt, and that the mortgagor was entitled to a credit of the value of the land released, evidence *held* to show that the mortgagee had knowledge that the property mortgaged was partitioned in the bankruptcy proceedings, and the property released was non-exempt and the remainder exempt.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 108.*]

10. APPEAL AND ERROR (§ 1033*)—REVIEW—FAVORABLE ERRORS.

An error favorable to a party complaining will not be noticed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4052; Dec. Dig. § 1033.*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by C. A. Blood against Alice F. Munn and others to foreclose a mortgage. From the judgment rendered, plaintiff appeals, and defendants appeal from an order denying a new trial. Order reversed, and plaintiff's appeal dismissed.

Hahn & Hahn and William J. Carr, for plaintiff. J. G. Rossiter and Harris & Swanwick, for defendants.

SHAW, J. Two appeals are here presented, one by the plaintiff from part of the judgment, the other by the defendants from an order denying their motion for a new trial. We will first consider the appeal from the order.

The action is to foreclose a mortgage, executed by the defendants Alice F. Munn and O. B. Munn, her husband, to the Union Savings Bank, to secure payment of their note for \$2,250. The bank assigned the note and mortgage to the plaintiff, after maturity, shortly before the beginning of the action and after the occurrence of the transactions which gave rise to the dispute upon the trial. The court found that there was due on the note, at the time of its decision, the sum of \$2,319.53. The case depends upon the accuracy of this finding. Two principal questions are presented: First, whether or not the defendants are entitled to a credit on the mortgage debt for the value of a

part of the mortgaged premises which the mortgagee released without their consent; the part not released being the homestead of the mortgagors. Second, whether or not, if otherwise entitled to such credit, they are estopped to claim the same by reason of certain proceedings and orders in the matter of the bankruptcy of Alice F. Munn.

1. With regard to the first proposition, the facts are as follows: Prior to the execution of the mortgage the entire mortgaged premises had become the homestead of the mortgagors by virtue of a declaration of homestead thereon by Alice F. Munn, duly executed and recorded. The property was the separate estate of Alice F. Munn, and she then resided thereon with her husband. On November 23, 1904, upon her voluntary petition, she was duly adjudged a bankrupt by the United States District Court. In her schedule filed in that proceeding she claimed the premises mortgaged as exempt property and asked that they be set aside to her as her homestead. Thereupon an appraisal and partition of the premises was made by proceedings in the bankruptcy court, in conformity with the provisions of sections 1245 and 1253, inclusive, of the California Civil Code, whereby it was ascertained and declared that a certain described part thereof was worth \$5,000, and the same was set apart to her as an exempt homestead, and the remainder, which was appraised at \$500, was declared subject to sale in the bankruptcy proceeding for the payment of her debts. The latter tract was afterwards sold in the bankruptcy proceeding to one Nelson. Thereafter on April 30, 1906, at the request of the trustee in bankruptcy, and upon payment by the trustee to the mortgagee of \$425, the same being a part of the price paid by Nelson to the trustee for the purchase of said tract, the bank released the said tract from the mortgage, without the consent and against the will of the mortgagors. The court found that the value of the tract released at that time was \$900. This finding is contrary to the evidence. The lowest estimate of any witness as to its value was \$1,100. The court gave credit on account of the release of the same for \$425 and no more; that being the amount received therefor by the mortgagee.

Upon these facts we think it is clear that the defendants were entitled to have the value of the property released credited upon the mortgage debt. Both parties apparently concede that it was within the power of the District Court of the United States in the bankruptcy proceeding to adopt the mode provided in our Civil Code for the appraisal and partition of the homestead of the bankrupt so as to segregate the portion representing the \$5,000 exemption from the remainder of the premises, and thus ascertain what part was subject to the payment of debts. The bankruptcy act gives that court

jurisdiction to "determine all claims of bankrupts to their exemptions." Section 2, cl. 11, of the bankruptcy act of July 1, 1898 (chapter 541, 30 Stat. 546; 1 Fed. Stat. Ann. p. 535; 3 U. S. Comp. St. 1901, p. 3421); Loveland on Bankruptcy, § 186. Under this authority it seems reasonable to conclude that the United States court could adopt any convenient procedure provided by state laws for that purpose. It is suggested that although the appraisal and partition would be binding upon the bankrupt, Alice F. Munn, it could not be binding upon her husband, O. B. Munn, who had not submitted himself to the jurisdiction of the bankruptcy court. Upon the trial it was admitted that the orders of the bankruptcy court appointing the appraisers and confirming their partition were duly given and made. Our Code provides (Civ. Code, § 1248) that "a notice of the time and the place of hearing must be served upon the claimant, at least two days before the hearing," in proceedings for the partition of a homestead in such cases. Inasmuch as both the husband and the wife have an interest in the homestead and both must be considered as claimants thereto, and as a proceeding against one would be of no effect whatever unless it was binding upon the other, it must be conceded either that the word "claimant" in the above quotation is to be read in the plural, and that notice must be served on both, or that a notice upon the debtor who is proceeded against is sufficient to bind both. In either case the admission that the orders were duly given and made would be an admission that all the notice which the law requires was given. See, on the general subject, *Estate of Delaney*, 37 Cal. 180; *Bank v. Stephens*, 144 Cal. 663, 79 Pac. 379. The effect of these proceedings was to subject such excess to sale as part of the bankrupt estate, and to divest it of its homestead character. They did not affect the mortgage lien, however, and the whole tract still remained subject to the mortgage as before. The consequence was that the mortgagee, by its mortgage, thereafter held the lien on two parcels of land; one being the homestead of the mortgagor and the other a tract not having that character.

Under such circumstances it is held in this state that the homestead claimants, with respect to the enforcement of the lien, stand in the same situation as a surety for the payment of a debt, or in the situation of a third person who had a lien upon or interest in only one of two mortgaged parcels, with respect to a prior mortgage upon both. The latter has the right to demand that the property on which he has no lien, or in which he has no interest, be first sold to pay the prior mortgage. The surety has the right to have the principal debtor's property first sold to pay the debt. And in either case, if the creditor, without the consent of

the surety or the one holding the lien or interest, release the debtor's property first chargeable with the burden, it will operate as a credit upon the debt of the surety, or in favor of the person holding the subordinate interest or lien, to the extent of the value of the property so released. The right of the homestead claimants to their statutory exemption is, for reasons of public policy looking to the preservation of homes and families, held to be as sacred as that of a surety or one in the situation of a surety. For these reasons it has been decided that the homestead claimant may have his homestead protected and preserved as far as possible, when it is covered by a mortgage which also includes other property, by requiring the other property to be sold and applied upon the debt before the sale of the homestead. *McLaughlin v. Hart*, 46 Cal. 638. In substance *McLaughlin v. Hart* is the same as the case at bar. The mortgage appears to have been executed before the homestead was selected, and the homestead did not include all of the mortgaged land. The court decided that the mortgagors could insist that the outside lands be exhausted before resorting to the homestead tract. Similar decisions are found in *Frick Co. v. Ketels*, 42 Kan. 532, 22 Pac. 580, 16 Am. St. Rep. 507; *Horton v. Kelly*, 40 Minn. 193, 41 N. W. 1031; *McArthur v. Martin*, 23 Minn. 74, 80; *McCreery v. Shaffer*, 26 Neb. 179, 41 N. W. 996; *Mitchelson v. Smith*, 28 Neb. 583, 44 N. W. 871, 26 Am. St. Rep. 357; *Armitage v. Toll*, 64 Mich. 412, 31 N. W. 408; *Equitable L. I. Co. v. Gleason*, 62 Iowa, 277, 17 N. W. 524; *Wilson v. Patton*, 87 N. C. 318. The same principle applies where successive alienations of different parts of the mortgaged property have been made. The grantees may insist that the parcels retained by the mortgagor be first sold to satisfy the mortgage. Civ. Code, § 2899. In all such cases the rule is well settled that if the party holding the prior or paramount lien covering all the property knowingly releases that which is primarily liable under the rules of equity, without the consent of those interested in that which is only secondarily liable, the latter may insist that the value of the property so released be credited on the debt secured by the prior or paramount lien. 2 Jones on Mortgages, § 1631; 19 Am. & Eng. Ency. of Law, 1267-1269; 26 Cyc. 934. This is a necessary result of the rule previously stated, for if the person interested in the property secondarily liable could not claim such credit when the primary property is released without his consent, he would, in such a case, be deprived of all benefit of the rule entitling him to have the primary property first exhausted; and as this reason applies as well to a homestead claimant as to others of the class, the effect of a release must be the same in one case as in the other.

2. The alleged estoppel to claim this privilege rests upon a clause inserted in the bid of Nelson, the purchaser of the segregated tract at the bankruptcy sale, that the sum offered was "conditional upon a clear title to the property clear of all incumbrances," and a statement in the order of the bankruptcy court confirming said sale that "the sale of said property free and clear of all incumbrances to said Nelson aforesaid be and the same is hereby confirmed." There is no stipulation that this order was duly given or made, nor is it shown that either of the mortgagors or the mortgagee were made parties thereto or were notified thereof. This does not constitute a sufficient estoppel by judgment. It may be binding upon the bankrupt, Alice F. Munn, who upon her petition in bankruptcy had submitted all her property and rights to the adjudication of that court; but she was not the only party interested, nor the only party here sought to be bound. The mortgagee did not prove its debt, nor in any way become a party to the bankruptcy proceeding for the sale of the property. It chose to rely on the security of its mortgage, and although, as we have stated, it is to be presumed that O. B. Munn was notified of the partition proceedings, and although his position in this cause precludes him from objecting thereto, and is in effect a ratification thereof, nevertheless it did not bind him to ratify a subsequent sale free and clear of all incumbrances. He was not a party to the proceedings for the sale, and the order confirming the sale did not bind him. The petition for the sale, so far as appears, did not pray for a sale free from liens, nor did the order of sale so provide. The only mention of such a thing was in the bid and the order confirming the sale, as above quoted. Manifestly such a sale could not be made without the consent of the third parties interested therein unless they were duly notified of this proceeding. As we have seen, the mortgage lien remained upon all the premises, and notwithstanding the partition the mortgagee was under no obligation either by reason of the partition, or of the sale, to release the tract sold. Its action in that respect was wholly voluntary. The husband had a right in the homestead and an interest in its preservation. As he was not affected by the proceedings in bankruptcy, except as to the segregation of the homestead property from that which was not exempt, he is clearly entitled to have the value of the released property deducted from the mortgage debt upon his homestead, so as to reduce by that much the sum he will have to pay to remove the lien therefrom.

The claim that the release was executed by the mortgagee without notice or knowledge of the segregation of the homestead is without substantial foundation. The evidence is uncontradicted that it knew all about the sale of the property under the bankruptcy

proceedings and the fact of the appraisal and partition thereof segregating it from the homestead claim. It was expressly informed by the attorney of Alice F. Munn, acting both for her and her husband, a day or two before the release in question was finally delivered and before the money therefor was paid, that if it made such release it would be liable for the value of the released property. Even if it had not been thus notified by the mortgagors, it appears that it knew all the facts bearing upon the question, and it must be presumed to have known the law on the subject and to have been aware that it could make the release only at its peril. The fact that the release was signed at that time and was then in escrow for delivery upon payment of the \$425 is not material. It still had power to refuse the payment and revoke the authority to deliver the release, but it chose not to do so and to release the property and take the consequences.

The mortgage contained a clause declaring that upon a foreclosure sale the mortgaged premises should be sold as a whole and not in parcels. We do not perceive that this deprived the mortgagors of the right to have the mortgage lien preserved as to all the property, or of the right to object to having the entire burden thereof loaded exclusively upon the part eventually determined to constitute the homestead and thereby to that extent impair their homestead right. The mortgagee, by its voluntary release, has prevented the sale of the whole premises and consented to the sale of a part thereof, so far as it is concerned. The mortgagors have, in this situation, a clear right to waive this stipulation of the mortgage, so far as it operated for their benefit, and accept the act of the mortgagee as a waiver on its part, and to claim the proper credit upon their homestead burden on account of the unauthorized release by the mortgagee.

3. The appeal of the plaintiff is based wholly upon the proposition that the court erred in giving credit upon the mortgage debt for the \$425 received by the mortgagee from the trustee in bankruptcy. As we have concluded that it should have included the entire value of the property released, it is obvious that the plaintiff was not injured by this error, even if it were conceded to be such. The conclusions we have reached, however, make this appeal immaterial. Defendants are entitled to credit for the value of the property released, but not to the total credit of this sum and the amount received by the mortgagee in payment for the release in addition.

The order denying a new trial is reversed, and the plaintiff's appeal is dismissed.

We concur: ANGELLOTTI, J.; SLOSS, J.

155 Cal. 270

HOLLYWOOD LUMBER CO. v. LOVE et al.
(L. A. 1,942.)

(Supreme Court of California. March 2, 1909.)

1. MORTGAGES (§ 138*)—EFFECT—ESTATE ACQUIRED BY TRUSTEE—"TRUST DEED."

Under Civ. Code, §§ 865, 866, providing that the grantee of real property subject to a trust acquires a legal estate as against all persons except the trustee, etc., a "trust deed" is substantially a mortgage with power of sale, and the trustor or his successor is the holder of the legal title, entitled to exercise the ordinary incidents of ownership subject to the execution of the trust.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 277; Dec. Dig. § 138.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7125, 7126.]

2. COURTS (§ 90*)—STARE DECISIS.

The decision of the Supreme Court that a deed of trust is an incumbrance within Code Civ. Proc. § 1186, providing that mechanics' liens are preferred to any incumbrance of which the lienholder had no notice, and which was unrecorded, and does not convey an interest within section 1192, providing that every building constructed on any lands with the knowledge of the owner or the person claiming an interest therein shall be entitled to a lien unless the owner or person claiming an interest shall give notice that he will not be responsible for the same, etc., and that a lien of a materialman furnishing materials for the construction of a building, with knowledge of the existence of a deed of trust, is inferior to the deed of trust, will, under the rule stare decisis, be affirmed, since the decision has been the law for almost 25 years.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313-321; Dec. Dig. § 90.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Hollywood Lumber Company against W. A. Love and another. From a judgment for plaintiff, defendants appeal. Reversed.

Frank G. Finleyson, for appellants. Borden & Carhart, for respondent.

MELVIN, J. The sole question presented by this appeal is whether or not property held under a trust deed is subject to the lien of the materialman who furnished lumber after the execution of the trust deed, and with knowledge of its existence. The Hollywood Lumber Company, plaintiff and respondent, secured a personal judgment for \$426.03 against the contractor, Love. This sum was decreed as a lien upon the premises, and the sheriff was directed to sell the property for the satisfaction of said judgment. At the time when the contract was made with Love to construct a building on the land in question, Paul W. Boehncke and wife were the owners. Before the Hollywood Lumber Company commenced to furnish material, the Boehnckes executed to the California Safe Deposit & Trust Company a trust deed to secure a loan of \$1,300 from the Continental Building & Loan Association. This money was borrowed for use in the con-

struction of the building on this very land. Subsequently the property was sold pursuant to the terms of the deed of trust, and was purchased by the Continental Building & Loan Association for a sum equal to the amount of principal and interest due. The respondent's theory of the case is that the facts bring it within the scope of section 1192 of the Code of Civil Procedure, and great reliance is placed by counsel for respondent upon the case of *Fuquay v. Stickney*, 41 Cal. 583, decided under a statute similar to the aforesaid section. In that case it was distinctly held that a deed of trust conveys such an interest as imposes upon the trustee the duty of giving the notice prescribed by section 1192 of the Code of Civil Procedure, if he would prevent the subordination of his claim to the lien of the person furnishing labor or material. A different doctrine is announced in the case of *Williams v. Santa Clara Mining Association*, 66 Cal. 193, 5 Pac. 85, in which it is held, in effect, that a deed of trust should be treated as an incumbrance. In that case the deed of trust having been recorded before the work was begun, it was held to be unaffected by the lien, under the provisions of sections 1186 and 1192 of the Code of Civil Procedure. Counsel for appellants believes that this case overrules in effect and in principle the doctrine of *Fuquay v. Stickney*, supra, and the representatives of both sides of this litigation contend that their respective theories find support in later decisions, particularly in the case of *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706, which contains the latest expression of this court upon the subject. In that opinion the following language was employed by Mr. Justice Shaw: "The case which seems to hold that a deed of trust is an incumbrance and not an interest in the land is *Williams v. Santa Clara Mining Ass'n*, 66 Cal. 200, 5 Pac. 85. The question was raised whether section 1192 of the Code of Civil Procedure, requiring any person 'claiming an interest' in land upon which a building was being erected to give notice that he will not be responsible for the same, in order to avoid the enforcement of a lien for the cost of the building against such interest, was applicable to a deed of trust. The court in effect held that, so far as that section is concerned, the estate created by the trust deed should not be deemed an interest in the land, so as to require the trustee to give such notice and said the the deed should be 'treated' as an incumbrance, and that, the deed having been recorded before the building was begun, it was exempt from the lien by the provisions of section 1186 of the Code of Civil Procedure. The court merely says that in the application of sections 1186 and 1192 of the Code of Civil Procedure a deed of trust must be 'treated' as an incumbrance. * * * The point received no thorough treatment in the opinion, the Code definitions were not mentioned,

and although we do not in the least impugn the authority of the decision as a construction of the section of the Code there involved, we do not consider ourselves bound to adopt the doctrine as a general principle, and, in the face of the provisions of the Civil Code above given, apply it also to section 1475 of the Code of Civil Procedure."

Perhaps if this were a new question, we might be inclined to hold that, under the reasoning of *Weber v. McCleverty*, supra, a deed of trust need not be "treated as an incumbrance" for the purpose of applying sections 1186 and 1192 of the Code of Civil Procedure. In section 2872 of the Civil Code a lien is defined as "a charge imposed in some mode other than by transfer in trust upon specific property by which it is made security for the performance of an act." Section 1114 of the same Code is as follows: "The term 'incumbrances' includes taxes, assessments, and all liens upon real property." It might well be asserted that a deed of trust, not being "a lien, mortgage or other incumbrance," does not fall under the exceptions enumerated in section 1186 of the Code of Civil Procedure, and that, being an interest in the land, it is subject to the provisions of section 1192, Code Civ. Proc.; but we are confronted with the fact that *Williams v. Santa Clara Mining Association* has for many years expressed the law upon this subject. Doubtless Mr. Justice Shaw had that fact in mind when he wrote, as a part of the opinion in *Weber v. McCleverty*, supra, that he did "not in the least impugn the authority of the decision (in *Williams v. Santa Clara Mining Association*) as a construction of the section of the Code there involved." There is good reason for treating a trust deed as an incumbrance for the purposes of this discussion. The functions of such a deed are well described by Mr. Justice Angellotti in *MacLeod v. Moran*, 153 Cal. 99, 94 Pac. 604. Of the deed of trust he there writes: "It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. See *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383, 53 Pac. 813; *Tyler v. Currier*, 147 Cal. 31, 36, 81 Pac. 319; *Weber v. McCleverty*, 149 Cal. 316, 320, 86 Pac. 706. The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. Civ. Code, §§ 865, 866. Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the

holder of the legal title. *King v. Gotz*, 70 Cal. 236, 11 Pac. 656. The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always, of course, to the execution of the trust." See, also, *Warren Co. v. All Persons*, etc., 153 Cal. 771, 96 Pac. 807. It seems reasonable that the limited title conveyed by a deed of trust should be exempted from the dangers incident to a failure to notify builders or materialmen in accordance with the provisions of section 1192, Code Civ. Proc. The decision in the case of *Williams v. Santa Clara Mining Association*, supra, was the first one upon the subject after the adoption of the Codes. It has probably been generally followed. Attorneys have doubtless advised their clients upon the law there announced, and property rights have been acquired upon the faith of it. The rule stare decisis should be applied, and we must reverse that part of the judgment in this case which is in conflict with *Williams v. Santa Clara Mining Association*, supra. For almost a quarter of a century that case has been the leading authority in California upon the interpretation of the statutes now before us. If there were any good reason for a change in the rule with reference to trust deeds, the Legislature has had abundant opportunity for an unequivocal declaration of such change. No statute having been enacted with a view to the alteration of the declared doctrine, we feel all the more willing to affirm *Williams v. Santa Clara Mining Association*. See *Pioche v. Paul*, 22 Cal. 109; *Vassault v. Austin*, 36 Cal. 696; *Smith v. McDonald*, 42 Cal. 486; *In re Dorris*, 93 Cal. 612, 29 Pac. 244.

We therefore reverse that part of the judgment which declares a lien upon the property described in the complaint and judgment, and that portion decreeing that the said property be sold by the sheriff and the proceeds applied to the payment of the plaintiff's claim and costs.

We concur: HENSHAW, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.

155 Cal. 275

JAMESON et al. v. JAMES et al.
(L. A. 2,189.)

(Supreme Court of California. March 4, 1909.)

1. PUBLIC LANDS (§ 110*)—HOMESTEAD LAW—FINAL PROOF.

It is good ground for denying an application to make final proof and to procure a patent under the federal homestead law that the land is of mineral character, and hence, under Rev. St. U. S. § 2302 (U. S. Comp. St. 1901, p. 1410),

not open to entry, or that sections 2280-2291 (U. S. Comp. St. 1901, pp. 1388-1394), relating to residence, cultivation, and entry, have not been complied with.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 308; Dec. Dig. § 110.*]

2. PUBLIC LANDS (§ 117*)—PATENTS—CONCLUSIVENESS.

The issuance of a patent by the federal land department is an adjudication that the grantee has performed the acts necessary to entitle him to a patent, if the land belongs to the United States and provision has been made for its sale; the adjudication having the same force in favor of the patentee as any adjudication by a tribunal having jurisdiction, and not being subject to collateral attack.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 324; Dec. Dig. § 117.*]

3. PUBLIC LANDS (§ 116*)—PATENTS—CONCLUSIVENESS.

Where the power of the federal land department to issue a patent depends upon a finding that the land is of certain character, the issuance of a patent is an adjudication that the land is of that character.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 323, 325; Dec. Dig. § 116.*]

4. PUBLIC LANDS (§§ 128, 122*)—PATENTS—EQUITABLE RIGHTS.

Equity may give relief against rights claimed under a patent to public land fraudulently obtained by declaring the patentee to be the holder of the legal title in trust for complainant or by canceling the patent; but the former relief can only be granted where the fraud prevented complainant from establishing in the proceedings before the officers of the land department his own right to a patent, and the patent can only be canceled at the suit of the government, since it is the party defrauded.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 344, 339; Dec. Dig. §§ 128, 122.*]

5. PUBLIC LANDS (§ 35*)—HOMESTEAD ENTRY—EFFECT.

So long as a homestead entry valid on its face remains uncontested and uncanceled, the land is withdrawn from the public domain and cannot be granted by the United States to a subsequent claimant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72, 76; Dec. Dig. § 35.*]

Department 1. Appeal from Superior Court, Kern County; W. P. Bennett, Judge.

Action by J. W. Jameson and another against Mary J. James and others. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

John S. Chapman and Fred E. Borton, for appellants. John R. Scott, H. L. Packard, and W. W. Kaye, for respondents.

SLOSS, J. The demurrer of the defendant John P. Cuddeback to plaintiffs' amended complaint having been sustained, and plaintiffs having failed to further amend within the time allowed by the court, judgment of dismissal was entered. The plaintiffs appeal from the judgment.

The amended complaint alleges that on March 31, 1899, the plaintiffs made a mineral location of 40 acres of land in Kern county. The land contained limestone in large quantities, and was far more valuable

for said limestone than for any other purpose. Immediately after said location the plaintiffs entered into possession of the claim, and did, in each of the years 1900 and 1901, perform labor thereon and expend money in the improvement thereof, to an amount in excess of the sum required by law. Plaintiffs entered upon said claim in the year 1902 for the purpose of performing the labor and making the improvements required by law, but the defendants forbade and prevented said plaintiffs from performing any labor or making any improvements upon the property. Prior to May 30, 1900, the defendant Mary J. James had made an application to the United States to enter a quarter section of land including the plaintiffs' location, and on April 13, 1900, she made application to the register and receiver of the United States Land Office at Independence to make final proof and payment for said land and to procure a patent therefor. Notice of the applicant's intention to make final proof and of the time when proof would be filed in support of her homestead entry was published by the register in a paper published at Kern City, more than 50 miles distant from the land; there being at the time a newspaper published at Mojave, Kern county, within 17 miles of the place where the land was situated. Plaintiffs had no notice of the application of Mary J. James to enter the land or to make final proof until after hearing had been had and patent issued. It is alleged that said Mary J. James appeared and made proof under her homestead entry, and that patent was issued to her by the United States of date October 23, 1901. At the time that said proof was made, Mary J. James knew that the land contained limestone in large quantities, that said land was more valuable for the limestone than for any other purpose, that said land was claimed by plaintiffs under their location, and that limestone had been developed thereon under said claim. Notwithstanding these facts said Mary J. James, through herself and her witnesses, misrepresented to the officers of the land department the true character and condition of the land and fraudulently concealed the fact that said land was valuable for limestone and the fact that a mining location had been made on said land. These misrepresentations and concealments were fraudulently made for the purpose of obtaining the title to said land and a patent therefor as agricultural land, under the homestead laws of the United States. Plaintiffs allege that when Mary J. James made her original application and entry many years before the final proof, she was not residing on the premises, nor did she ever reside thereon, erect any improvements thereon, except a cabin of the value of \$25, or cultivate or improve the land. At the time of making her final proof, however, she testified and represented to the register and receiver that she had resided upon the land

and cultivated and improved the same as by the homestead laws required, and the officers of the land department believed and acted upon her testimony and representations, and the patent was issued upon the faith of said representations. It is further averred that the homestead entry was not made by Mary J. James for her own benefit, but for the benefit of John W. Payne, to whom she conveyed on the day following the making of final proof. The complaint sets forth various conveyances by Payne and by his grantees (all of whom are named as defendants), but alleges that every defendant accepting a conveyance from Mary J. James or her successors took with knowledge of the fraud perpetrated by her. The prayer of the complaint is that the patent be canceled, and that it be adjudged and decreed that the defendants have no right, title, or interest in the land located by plaintiffs. The demurrer is based upon various grounds, but we shall consider only the specification that the facts alleged do not constitute a cause of action.

Under the showing made by the complaint, the defendant Mary J. James did not bring herself within the provisions of the homestead law and was not, in reality, entitled to a patent. By reason of the mineral character of the land, it was not open to entry (Rev. St. U. S. § 2302 [U. S. Comp. St. 1901, p. 1410]), and the conditions of the statutes regarding residence, cultivation, and entry for the benefit of the claimant (Rev. St. U. S. §§ 2289-2291 [U. S. Comp. St. 1901, pp. 1388-1394]) had not been complied with. These facts, if brought to the attention of the proper officers in the proper way, would have afforded good ground for denying her application; but under the legislation providing for the grant by the government of its public lands, the land department has been constituted a special tribunal, "vested with judicial power to determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them." *King v. McAndrews*, 111 Fed. 860, 50 C. C. A. 29. If the department has jurisdiction—that is, if the land belongs to the United States—and provision has been made by law for its sale, the issuance of a patent is an adjudication that the grantee of the government has performed the acts necessary to entitle him to receive the patent; and, where the power of the land department depends upon its finding that the land is of a certain character, the issuance of the patent is an adjudication that the land is of the character required. *Steel v. St. Louis Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44. These adjudications in favor of the patentee have the same force as any adjudication by a tribunal having jurisdiction. They are binding as against collateral attack

(see cases above cited), but equity may give relief against the enforcement of rights claimed under a patent fraudulently obtained. Proceedings based upon fraud in procuring the issuance of a patent have been of two classes. The bill may, while recognizing the validity of a patent as a conveyance of the legal title, seek to have the patentee declared a trustee of such title for the benefit of the complainant, or there may be a suit in which the relief sought is a cancellation of the patent itself.

In the case at bar the plaintiffs do not seek to have the defendants held as trustees of the legal title conveyed by the patent. "The purpose of the suit," as the appellants themselves declare in their brief, is "to cancel the patent * * * and for a judgment that the defendants have no title under or through the patent which was issued"; and, on the facts alleged, it would seem clear that there is no foundation for a decree declaring that the title passing to the patentee is held by her and her grantees in trust for the plaintiffs. Such relief may be granted only where the fraud complained of operated to prevent the complainant from establishing, in the proceedings before the officers of the land department, his own right to a patent. *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; *Carter v. Thomson* (C. C.) 65 Fed. 329; *Plummer v. Brown*, 70 Cal. 544, 12 Pac. 464; *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132; *Gage v. Gunther*, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141. It is not claimed by appellants that they, to quote the language of this court in *Plummer v. Brown*, supra, occupied "such a status as entitled them to control the legal title." They had never performed the acts necessary to vest in them the right to a patent. Furthermore, the original homestead entry of Mrs. James must have been made at least five years before the final proof (Rev. St. U. S. § 2291) and therefore antedated the location upon which plaintiffs rely. So long as the homestead entry, valid on its face, remained uncontested and uncanceled, the land was withdrawn from the public domain and could not be granted by the United States to a subsequent claimant. *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *Hastings*, etc., *R. R. Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; *Hodges v. Colcord*, 193 U. S. 192, 24 Sup. Ct. 433, 48 L. Ed. 677; *Thompson v. Basler*, 148 Cal. 646, 84 Pac. 161, 113 Am. St. Rep. 321.

The plaintiffs then, not being themselves entitled to acquire title to the land, ask that the patent conveying it to defendant James be canceled. That a patent obtained by fraud may be so canceled is well settled; but, inasmuch as the party injured by the

fraud is the government, whose title has been improperly obtained, the action to annul the patent can be maintained by the United States alone. A complainant in the position of these plaintiffs, must, as is said in *Steel v. St. Louis Smelting Co.*, supra, "apply to the officers of the government to take steps in its name to vacate the patent or limit its operation. * * * This can be accomplished only by regular judicial proceedings taken in the name of the government for that special purpose." See, also, *Lee v. Johnson*, supra; *In re Emblen*, 161 U. S. 52, 16 Sup. Ct. 487, 40 L. Ed. 613; *Emblen v. Lincoln Land Co.*, 184 U. S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736; *Carter v. Thomson* (C. C.) 65 Fed. 329.

For these reasons the amended complaint failed to show a case entitling the plaintiffs to any relief whatever.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

155 Cal. 266

BEYERLE v. BEYERLE. (L. A. 2,341.)

(Supreme Court of California. March 1, 1909.)

1. DIVORCE (§ 303*)—CUSTODY OF CHILDREN—RIGHT OF COURT TO MODIFY DECREE.

A decree, in a divorce proceeding, providing for the custody of a child, is not conclusive; but under Civ. Code, § 138, the court, during the pendency of the action or at any time after final hearing, during the minority of a child, may make such order for its custody as may seem proper and may modify or vacate such an order.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.*]

2. DIVORCE (§ 298*)—CUSTODY OF CHILDREN—WELFARE OF CHILD.

Where the question of the custody of a child of the marriage is presented in divorce proceedings, the paramount consideration is the welfare of the child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 781; Dec. Dig. § 298.*]

3. DIVORCE (§ 303*)—CUSTODY OF CHILD—APPLICATION FOR CHANGE—STRIKING ANSWER.

Where for more than 2½ years after an interlocutory judgment and more than 1½ years from a final judgment granting plaintiff a divorce and awarding her the custody of a child, defendant had had the actual custody and control of the child with plaintiff's consent, and plaintiff petitioned to obtain the child's custody, defendant's answer controverting allegations in the petition that he was not a proper person to have custody of the child, alleging that she had a good home, was well cared for and content to remain with him, denying that it was for the child's best interests that she be returned to plaintiff, and asking that he be allowed to retain her custody, was an application for a modification of the decree awarding the child's custody to plaintiff, and it was error to strike it out as sham and irrelevant.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 303.*]

In Bank. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Divorce action by Lulu M. Beyerle against William N. Beyerle. From an order requir-

ing defendant to restore to plaintiff the custody of a child as required by the decree of divorce, defendant appeals. Reversed and remanded.

Davis, Kemp & Post, for appellant. H. C. Head and Homer G. Ames, for respondent.

ANGELLOTTI, J. On November 29, 1904, an interlocutory judgment was given by the superior court of Orange county in an action for divorce by plaintiff against defendant, wherein it was adjudged that plaintiff was entitled to a divorce, and that plaintiff should have the care and custody of two minor children, the issue of the marriage, one of whom was La Verne Beyerle, a girl, then of the age of 14 months. On December 8, 1905, final judgment was given in said action; the same provision being made therein as to the custody of the children as was made in the interlocutory judgment. No appeal was ever taken from this judgment, and the parties have ever since been divorced and separated one from the other. On December 29, 1904, defendant assumed the care, custody, and control of said child, La Verne, and has ever since retained such care, custody, and control. On July 27, 1907, and again on August 3, 1907, plaintiff demanded of defendant that he surrender the care, custody, and control of said minor child to her, but he refused to do so. This proceeding was inaugurated by plaintiff in said superior court in August, 1907, by the filing of a petition wherein she alleged the foregoing facts. She further alleged that she is a fit and proper person to be awarded the care and custody of the child, that the defendant is not a fit and proper person to have such care and custody, and that it is for the best interest and welfare of said minor child that she be returned to and remain in the care, custody, and control of plaintiff. Other allegations we regard as immaterial to a decision on this appeal. She asked for a citation requiring defendant to show cause why the court should not make an order requiring him to return the child to the care and custody of plaintiff, and also why he should not be punished for contempt for disobedience of the provisions of said judgment. The citation was issued, and the defendant in response thereto presented a verified answer. In this answer it was made to appear that subsequent to the giving of the interlocutory judgment, which was based on the default of the defendant namely, on December 28, 1904, a written agreement relative to the custody of the children and division of property was executed by the parties, by which the care and custody of this child was given to defendant. Some question is raised as to the validity of this agreement; it being claimed that the same was against public policy and void, inasmuch as a part of the consideration was the agreement of defendant to

withdraw his pending motion for a vacating of the interlocutory judgment, and to allow the final judgment to be given at the expiration of the year without opposition on his part. We regard it as unimportant here whether the agreement was void or not. The important thing alleged in the answer in this connection is that it was with the full consent of plaintiff that defendant on December 29, 1904, assumed the care and custody of the child and retained such care and custody to July 27, 1907, a period of nearly two years and seven months, when the first demand was made by plaintiff. Defendant further alleged that he did not know that any such provision as to custody of this child had been inserted in the final decree, denied that he is not a fit or proper person to have the care, custody, and control of the child, alleged that she has a good home provided by him, is well cared for and content to remain in her present home, and denied that it is for the best interests and welfare of the child that she be returned to the custody of the plaintiff. He therefore asked that he be allowed to retain the care, custody, and control of the child. Plaintiff then made a motion that the answer of defendant be stricken from the files on the ground that it is sham and irrelevant. This motion was granted, and the court thereupon made an order reciting that it appeared to the court that defendant holds the care, custody, and control of the child contrary to the provisions of the final judgment and decree, "without any lawful cause or reason therefor," and that under said judgment plaintiff is entitled to such care, custody, and control, and adjudged that the child forthwith be given and restored to the care, custody, and control of plaintiff, and the defendant forthwith deliver the body of said child to plaintiff. This is an appeal by defendant from said order.

We are of the opinion that the lower court erred in striking out the answer of defendant, and in refusing to consider some of the allegations made by him in support of his claim that the care, custody, and control of the child should be given to him. The learned judge of that court was apparently of the view that the provisions of the judgment of divorce in regard to the custody of this child were conclusive in this proceeding. In this we are satisfied that he was in error. It may be assumed that, as long as the judgment remained unchanged in this regard, it did give plaintiff the legal right to the care, custody, and control of the child; but the answer of defendant was practically and substantially an application for the modification of the judgment in that respect, made in response to the demand and application of plaintiff that the child be delivered to her. The authority of the court to modify provisions in the judgment of divorce relative to the care, custody, etc., of the children of the marriage, as their in-

terests may demand, is too well settled for discussion, and we do not understand that counsel for plaintiff contend to the contrary. Section 138, Civ. Code, provides that in actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance, and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. It is furthermore settled beyond dispute and expressly conceded by counsel for plaintiff that the paramount consideration where the question of the custody, etc., of a child of the marriage is presented, is the welfare of the child. This question was squarely presented by the answer to plaintiff's petition, and if it was at all material in the determination of the matter before the court, it was, of course, error to refuse to consider defendant's claim in that regard and such evidence as he desired to offer in support thereof. It may be assumed that the question whether or not it was material in this proceeding depended upon the right of the court to consider defendant's answer to plaintiff's petition as an application for a modification of the divorce decree. As we have said, we think it was practically and substantially such an application, and should have been so considered. For more than 2½ years from the date of the interlocutory judgment and more than 1½ years from the date of the final judgment defendant had the actual care, custody, and control of the child with the full consent of plaintiff. When plaintiff sought to change the actual conditions that had existed for over 2½ years by asking the court for an order requiring delivery of the child to her, he answered her claim by practically asserting, among other things, that it is not now for the best interest or welfare of said child that she be given into the care, custody, and control of plaintiff, and asked that such care, custody, and control remain with him. Unless we are to sacrifice substance to mere form to a degree that would be inexcusable, this was an application for an order the effect of which would be to modify the terms of the decree, relative to the custody of the child, an order within the power of the court to make, and one which it was its duty to make if the best interests of the child required that it should be made.

The order of the superior court is reversed, and the matter remanded for such proceedings as are not inconsistent with the views here expressed.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

(155 Cal. 256)

ALLEN v. BRYANT et al. (L. A. 2,227.)

(Supreme Court of California. March 1, 1909.
Rehearing Denied April 1, 1909.)

1. APPEAL AND ERROR (§ 1099*) — REVIEW — SUBSEQUENT APPEALS—FORMER DECISION AS "LAW OF THE CASE."

The doctrine of the "law of the case" presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal, but the ruling adhered to in the single case where it arises is not carried into other cases as a precedent, and is rarely applied to matters of evidence as distinguished from rulings at law, especially where there is evidence in the second trial not before the appellate court on the first appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

For other definitions, see Words and Phrases, vol. 5, p. 4024.]

2. APPEAL AND ERROR (§ 994*) — REVIEW — CREDIBILITY OF WITNESSES.

The question of the credibility of witnesses is solely for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

3. DEEDS (§ 211*)—VALIDITY—EVIDENCE.

In a suit to quiet title, evidence held not to show that a deed was obtained by fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-649; Dec. Dig. § 211.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Nellie L. Allen against W. S. Bryant and others. From an order and judgment for plaintiff, defendants appeal. Affirmed.

Waterman & Wood and Smith, Miller & Phelps, for appellants. Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for respondent.

HENSHAW, J. This is a second appeal in the above-entitled cause. The first was taken to the appellate court of the second appellate district, and the opinion of that court will be found in 4 Cal. App. 371, 88 Pac. 294. Before the second trial defendants had filed a cross-complaint, which sought relief, charging upon the same matters of fraud that appeared in their answer. The cross-complaint does not materially modify or enlarge the issues joined under the complaint and answer. Appellants support their appeal upon two propositions: First, the law of the case; second, the insufficiency of the evidence to justify the decision of the court.

Upon the first proposition appellants' contention is that upon the former appeal the evidence then and there before the appellate court was reviewed, and declared to be insufficient to sustain certain findings; that upon the same evidence the trial court again made the same findings, when in point of law it should have been controlled, in its determination upon these matters, by the utterances of the appellate court in discussing the

evidence upon the former appeal. In this appellants mistakenly seek unwarrantably to extend the doctrine of the law of the case. The doctrine of the law of the case presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal. It presupposes error because, if the governing principle of law had been correctly declared, there would be no occasion for the invocation of the doctrine. The sole reason for the existence of the doctrine is that the court, having announced a rule of law applicable to a retrial of facts, both parties upon that retrial are assumed to have conformed to the rule, and to have offered their evidence under it, under which circumstances it would be a manifest injustice to either party to change the rule upon the second appeal. But, since the rule owes its very existence to error, it is not one whose extension is looked upon with favor. The ruling is adhered to in the single case where it arises, is not carried into other cases as a precedent, and the doctrine is rarely, and in a very limited class of cases, applied to matters of evidence, as distinguished from rulings at law. *Wixson v. Devine*, 80 Cal. 385, 22 Pac. 224; *Mattingly v. Pennie*, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87. The narrow class of cases in which the doctrine will be held to apply to evidence and the rigid limitation upon the application of the doctrine, will be found well expressed in *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000. It is there said: "But when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision. * * * And if in the opinion which it renders it assumes that the evidence sustains any fact, it is only the opinion of the court, and not the finding of that fact." Respondent does not stand alone upon the inapplicability of the doctrine of the law of the case to the present controversy, well taken as that position is, but further insists that the doctrine may not be applied because the evidence upon the second trial is different from that presented upon the first, and the particulars in which it is different are pointed out. That it is different is not denied by the appellants. They assert merely that it is not different in any essential particular. But one of two things is certainly true: Either it is essentially different upon this appeal, or the Court of Appeal upon the earlier hearing made a grave mistake in its discussion, by overlooking evidence bearing strongly in favor of respondent. A consideration of this evidence

will be apposite as directed to appellants' second contention—the insufficiency of it to sustain the decision—and will serve also to show the vice of attempting to extend the doctrine of the law of the case to matters of fact in controversy.

The charge against plaintiff's grantor is that of fraud, and fraudulent concealment in two particulars: First, in representing to his partner (the defendant Bryant) that he (the defendant Bryant) owed to him (Allen) \$989.97 excess moneys paid by Allen on account of the Cherrioto ranch, which in partnership they were managing with the view to its sale; the second, that by reason of this alleged indebtedness Bryant was induced to convey his half-interest to Allen, Allen at the time being in actual negotiation with others for the sale of an undivided half of the ranch, which sale he subsequently effected at great profit, and knowledge of which negotiation he concealed from his partner. Four times has the trial court passed upon the evidence adduced to support these charges of fraud, with the result that four times it has exonerated Allen from any unfair dealing. The circumstances of the case were these: Bryant had bought the Cherrioto ranch, paying for it not \$1 in cash, but giving a mortgage for the full purchase price of \$22,500. A railroad company had condemned a right of way through the ranch, for which it was to pay \$2,500, and the vendor agreed to apply that money, when received, on account of the purchase. The contract called for payments on account of the purchase price from time to time. This being the situation, Bryant conveyed one-half of his interest to Allen, under an agreement whereby each was to bear one-half of the expense, and make one-half of the payments on account of the purchase price, and upon sale reimburse themselves and divide the profits. A similar contract existed between the two as to another tract of land called the "Pardee tract," which Bryant had also purchased. Allen kept the books showing the ranch transactions. The real estate market was dull. Both parties had tried unsuccessfully to make a sale of the ranch. Progress payments were coming due, and Allen had advanced more money on account of the ranch than had Bryant, and had demanded of Bryant that the expenditures be equalized, or, as Bryant asserts, had demanded from him the sum of \$989.97. Bryant was 76 years old, and a minister of the gospel. The inference is sought to be drawn, and seems to have been accepted by the Court of Appeal, that by reason of his years and profession he was ignorant of business, and fell a ready prey to the impositions of the partner, whom he trusted, for reference in the opinion of the appellate court is made to the "helplessness of Bryant at that time in business matters, and the willingness and disposition of Allen to take advantage of his infirmity." But the truth of this matter, as disclosed by

Bryant himself, is that, while a minister of the gospel, he had been long "engaged in secular business and had been engaged in the business of buying and selling land for a long time before he met Mr. Allen." It is shown that he was not only familiar with land transactions, but with other matters of business as well. For instance, he seeks to sell and discount promissory notes held by him (and this after the transactions with Allen), stating that he wished to use the money to purchase other lands, and that his method was "to make money by allowing other people to make money." Bryant, under examination, when confronted with certain inconsistencies in his testimony, asserts a failing memory, but it must regretfully be said, as will be pointed out, that his memory fails where recollection would not benefit his cause. Instead, then, of a helpless, enfeebled old man with impaired memory, the record presents a man venerable in years, but long actively engaged, and after these transactions still actively engaged, in the very kind and class of business over which this controversy arose. Moreover, it is always to be remembered that the weight of the evidence in this case must largely be determined by the credibility of the witnesses, of which the trial court is the sole judge. The man charged with fraud was dead, and no defense of denial or explanation from him could be forthcoming. It is not too much to say, however, that wherever the evidence of defendant Bryant was susceptible of contradiction or disproof, it was fairly met and overcome. Here it is pertinent to add that the defendant had full and complete access to the books kept by plaintiff, had a copy made of them, and upon the trial no attack is made upon their veracity.

As to the item of \$989.97, Bryant testifies that Allen made demand upon him for the payment of this amount; that he believed Allen, who stated that this amount was due him; that he told Allen he would sell his store for \$3,500, and Allen advised him not to do so, the idea being that Allen so advised in furtherance of his nefarious scheme of compelling his partner to deed him his one-half interest in the ranch; that Allen spoke "harshly" to him; and that finally he conveyed to him his one-half interest in the ranch, with the personal property thereon, the consideration being the cancellation of the indebtedness of \$989.97 and Allen's note for \$1,500. Considering Bryant's own independent knowledge of real estate and of the real estate market, that by his testimony the latter was dull, and he and his partner had tried in vain to sell a ranch upon which they owed the full purchase price, with interest accumulating, and progress payments becoming due—considering these things, and that Bryant comes out whole, and with \$1,500 from Allen, evidenced by the promissory note, it will not be said that the transaction bears upon its face any conspicuous evi-

dence of iniquity, and doubtless nothing further would have been heard of it if Allen, a short time thereafter, had not succeeded in making an advantageous sale of a one-half interest.

But, coming to the first charge of fraud, the representation asserted by Bryant that Allen demanded from him \$989.97, the account presented to Bryant showed in detail the payments that each had made, and the moneys that each had expended on account of the Pardee tract, the Cherrioto ranch, and also the amount of moneys which Allen had advanced personally to Bryant. In no respect are these accounts or any of them shown to be false. As summarized, they were as follows:

Due Allen	
From ranch.....	\$ 989 97
" Pardee Tr.....	300 95
" W. S. Bryant.....	211 88
Total	\$1,502 80

Bryant's statement that Allen insisted that he owed him \$989.97, Allen being dead, was not susceptible of direct denial, but failing this, it is fairly well met by the evidence in the case. In the first place, Bryant, himself, testifies: "When Mr. Allen presented this account, and it showed that he had advanced \$989 and some cents, I understood that he had advanced that much more money than I had, and I made no objection to the amount. I found it substantially correct." Here, notwithstanding the witness' repeated declarations that Allen demanded \$989 from him, is a positive statement of what the witness understood, and that understanding was in accordance with the fact, namely, that Allen had advanced to the ranch account \$989 more than had Bryant. Again, the account itself shows three items, the first due to Allen upon account of the Cherrioto ranch, the second due to Allen on account of the Pardee tract, and the third due from Bryant personally. It is singular that if Allen had meant to defraud, his account would so honestly have shown that he did not claim the money from Bryant, but from the ranch, an account which obviously Bryant could settle either by paying into the ranch account the same amount that Allen had paid, or by paying to Allen personally one-half of that amount. But if it be said that Bryant, in his ignorance, did not understand the meaning of the item, this, in turn, is answered by the evidence, for it is proven that in another similar transaction, touching the Pardee tract, a statement of the accounts between the two showed that Bryant at one time had advanced \$152.52 more than Allen, and that one-half of this amount was paid by check by Allen to Bryant in the settlement of the account; the check being made to Bryant's order for \$76.26, and bearing upon its face the statement that it was in settlement of the account to date. In view of the fact, therefore, that the account itself as presented was not calculated to deceive an

intelligent man; that Bryant was an intelligent man versed in business affairs; that he had had a previous settlement with Allen of just such an account—the internal evidence is strong to the twofold effect that Allen did not attempt to deceive him in this particular, and that if he had attempted to deceive him, the attempt would have been unavailing. The finding of the court, therefore, upon this matter is fully sustained, and if it be that this evidence was before the Court of Appeal upon the former hearing, it was overlooked, to the great injury of the respondents. If it was not before the Court of Appeal, then clearly the doctrine of the law of the case cannot be invoked. The principal that is applicable is that declared in *Sneed v. Osborn*, 25 Cal. 619: "If this court states the evidence in a cause, whether correctly or incorrectly, the statement in no manner controls the court below, and cannot prejudice the parties where a new trial is had. It is upon questions of law that the decision of the appellate court becomes the law of the case, and not upon questions of fact."

The decision of the Court of Appeal discusses the transfer of the hay upon the ranch by Bryant to Allen, and a subsequent payment of Allen's note to Bryant by the sale of that hay. The appellate court, with the evidence before it, concluded that the hay was transferred by Bryant to Allen upon certain trusts. This is in flat contradiction of the allegations of Bryant himself under oath, even of his allegation under oath made after that decision was handed down. For it appears that in an action for an accounting against Allen, defendant made oath to the following: "That on, to wit, the 15th day of July, 1904, said defendant falsely and fraudulently, and with like intent to cheat this plaintiff, represented to this plaintiff that he (this plaintiff) was indebted to said defendant by reason of moneys laid out and expended in the management and sale of said Pardee tract, and in the maintenance and equipment of said Cherrioto ranch, and the transactions growing out of the same, in the sum of \$989.97. * * * And thereupon this plaintiff, believing the said statements of said defendant that this plaintiff was so indebted, and relying thereon, did deed to said defendant the remaining undivided half interest of said Cherrioto rancho, subject to the mortgage thereon as aforesaid, and did sell therewith to said defendant the personal property thereon." Here is a direct declaration of the defendant under oath that the hay was not sold upon any trust, but was sold as a part of the consideration of their settlement. Bryant's explanation as to why he should have accepted the hay in payment of the \$1,500 promissory note, if he believed that he owned one-half of the hay, is entirely unsatisfactory. He says: "I suppose in taking the hay for the note that I felt like this: That I would settle the matter up and get it off my mind, and get what I could out of it,"

And his testimony upon the transfer of the personal property, after laborious effort by counsel to arrive at the truth, comes only to this: "Do you desire to be understood now, leaving out of consideration these papers that you have signed, that that personal property, including the hay on the ranch, passed to Mr. Allen, or that it did not pass? Which way will you have it?" To this he answered: "I will have it simply as the matters stand before the court. It will be decided by them without my judgment in the matter, as I understand it. My judgment won't have any effect on that." Even the pleading and testimony of Bryant that Allen, to further his fraudulent scheme, advised Bryant not to sell his store, as the latter contemplated doing, is answered by the undisputed facts that, if Allen did so advise, Bryant did not accept the advice, but, acting quite independently of it, endeavored to sell the store, took a week for the consideration of Allen's proposition touching the transfer of the ranch, and only at the end of that time, and after his effort to sell the store proved abortive, made conveyance to Allen upon the terms indicated.

Moreover, the evidence in this case fairly establishes that there was a consideration in addition to the cancellation of Bryant's indebtedness and the \$1,500 note given to him by Allen, and that consideration was the payment of the existing outstanding debts against the ranch, and here again the evidence of Bryant is unsatisfactory. There was found amongst the papers and submitted to his inspection the following, in his own handwriting: "He is to have all hay and implements and all other personal property and pay all outstanding bills and debts of said ranch—personal property contracted by him, and also within four months he shall pay the Wilmington lumber bill used in building engine house, the pipe bill and wagon bill." It was shown that one of these bills, amounting to \$397, was paid by Allen. But Bryant testified that Allen did not pay all of the indebtedness, that he (Bryant) paid for one-half of the wagon and a large part of the store bill, which was over \$100—probably about \$90 of it. When cross-examined he denied that he had charged these payments against Allen in a subsequent adjustment of the account, saying: "I don't know whether these amounts were credited in the Pardee settlement or not. I have no expectation about getting these amounts in the settlement of the Pardee matter." Yet the plaintiff is able to show, and does show, that these amounts were repaid to Bryant, thus further supporting plaintiff's contention that this was a part of the consideration for the transfer, and that the obligation was lived up to and met by Allen.

The allegation touching the fraudulent concealment by Allen of his prospective sale of a half interest in the Cherrioto ranch is no better supported by the evidence. The purchaser of this half interest, and his half-brother,

Doctor Rhea, who was likewise interested in the purchase, were both witnesses, and their testimony is that their first talk with Mr. Allen concerning a possible purchase occurred after the date of the transfer by Bryant of his interest in the property. The evidence is thus amply sufficient to sustain the finding of the court that the deed of defendants was executed to Allen before any negotiations were had by the latter looking to a resale of the ranch. This discussion of the evidence might be much extended, but such discussions can never be of value to the profession generally, for whose enlightenment and guidance the opinions of an appellate tribunal are preserved and handed down. Upon questions of fact, therefore, so much only should be said as may be necessary to support the decision reached, and to this extent only has this discussion proceeded.

For the reasons given, the judgment and order appealed from are affirmed.

We concur: MELVIN, J.; ANGELLOTTI, J.

9 Cal. App. 690

Ex parte LEONARDINO. (Cr. 87.)

(Court of Appeal, Third District, California.
Jan. 23, 1909.)

HABEAS CORPUS (§ 92*)—NATURE AND SCOPE OF REMEDY.

The function of a writ of habeas corpus is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face and whether anything has transpired since it was issued to render it invalid, and is not designed to retry issues of fact or to answer the purpose of an appeal, except that under Pen. Code, § 1487, subd. 7, the evidence upon which a petitioner was committed by an examining magistrate may be reviewed to determine whether there was reasonable cause for the commitment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 81; Dec. Dig. § 92.*]

Petition by Michele Leonardino for a writ of habeas corpus. Writ dismissed, and petitioner remanded.

B. K. Collier and J. F. Farrahar, for appellant. J. Chas. Jones, for the People.

BURNETT, J. Petitioner was charged by a complaint filed in the justice court of Yreka township, Siskiyou county, with having "willfully and unlawfully engaged in and carried on the business of selling spirituous, malt, or fermented liquor or wines, without having first taken out and procured the county license" required by a certain ordinance of said Siskiyou county. The petitioner was regularly tried in said justice court and convicted of the offense charged. He moved for a new trial in said court, which was denied. He then appealed to the superior court upon a statement of the case, and the judgment of the justice court was affirmed.

There is no contention that the said complaint does not state facts sufficient to constitute a public offense. The regularity of the proceedings before the justice or the superior court is not called in question. No claim is made that the said ordinance was not properly passed, or that it is not within the scope of the legislative power of said board of supervisors. It is insisted, however, that it "is a police regulation measure and applies and can be held to apply solely to the business of retailing wines, liquors, and beers at a fixed place of business, such as a saloon or tipping place, and does not apply to and does not include the sale or business of selling such articles at wholesale." Petitioner goes one step further and argues that the evidence taken at the trial showed without conflict that he was engaged in the wholesale business, and therefore that he had not violated the provisions of the ordinance. The whole position of petitioner is therefore summed up in the proposition that he was shown to be not guilty of the offense charged in the complaint, and for the reason that there was an entire failure of proof of his guilt he seeks to be discharged through the medium of the writ of habeas corpus. Assuming that wholesalers are not included within the provisions of said ordinance, the case, then, from petitioner's standpoint, is no different in principle from what it would be had he been charged with any other offense known to the law, battery for instance, regularly tried and convicted, and had petitioned to be discharged on the ground that the evidence showed that he was not guilty. To grant this, however, would be to wrest the writ of habeas corpus from its primary purpose and to give it an operation that is not contemplated by the law. Its function is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face and whether anything has transpired since it was issued to render it invalid. It is not designed to retry issues of fact or to answer the purpose of an appeal. It has been so held by the Supreme Court in several decisions, among which is Ex parte Noble, 96 Cal. 362, 31 Pac. 224, wherein it is said: "Whether the ordinance was published, whether there was proof of publication, and whether the ordinance was properly passed, etc., were mere questions of fact to be passed upon by the trial court; and the writ of habeas corpus is not intended as a means of retrying issues of fact, or of reviewing errors alleged to have been committed in the course of a legal trial. If there were any such errors, petitioners had a remedy by appeal to the superior court." In Church on Habeas Corpus, § 196, it is declared: "The writ of habeas corpus was not intended to operate as a writ of review or certiorari, and where a relator has been sentenced to imprisonment by a court of com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

petent jurisdiction, a mistake made in the prisoner's age, even where that is a material fact, will not entitle him to have the testimony reviewed by a higher court upon this writ. Errors of evidence, no more than any other errors or irregularities, can be cured by it after indictment found or judgment rendered against the prisoner—so long as they do not affect the question of the jurisdiction of the acting officer or court." And in section 199 it is said: "The statute of New York running in these words, 'The party brought before such court or officer, on the return of any writ of habeas corpus, may deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials shall be on oath,' etc., was construed by Mr. Justice Cowen, in the well-known McLeod Case, as not intended to give the prisoner the right of a summary trial as to the question of his guilt or innocence, but merely to enable him by evidence aliunde the return to dispute the fact of his being detained on the process or proceeding set forth, to impeach it for lack of jurisdiction, or to show that it has ceased to be a lawful cause of detention, from the effect of some subsequent act or event." And in section 247 the author says: "It is a fundamental error to suppose or assume that an officer granting the writ of habeas corpus has the right to try the question whether a prisoner indicted is guilty or not guilty of the crime of which he is charged. The law of habeas corpus, both common and statutory, never contemplated that such a trial was to be had. As we have said above, the only way in which this question can be tried is by the intervention of a jury before a proper court."

There is, however, a clear distinction pointed out, which is recognized in the decisions, between a commitment after trial and the commitment of an examining magistrate. In the latter case the evidence may be reviewed to determine whether there is probable cause, but in the former the writ of habeas corpus is powerless to grant any relief. This is made a matter of statutory regulation in this state. Pen. Code, § 1487, subd. 7. By a reference to said section and the preceding one (section 1486), it can be seen that the Legislature has not attempted to extend the application of the writ beyond the limit that we have suggested. Here the petitioner is held by virtue of the process issued upon "the final judgment of a competent court of criminal jurisdiction in a case allowed by law"; the jurisdiction of such court has not been exceeded; nothing has taken place since the conviction to entitle petitioner to his discharge; the process is not defective in any manner; and "the person having the custody of petitioner is the person allowed by law to detain him."

It follows that the writ must be dismissed, and the petitioner remanded, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 686

MULLARKY v. YOUNG. (Civ. 544.)

(Court of Appeal, Third District, California.

Jan. 23, 1909.)

1. FRAUDS, STATUTE OF (§ 115*)—VALIDITY OF CONTRACT—EXECUTION.

Where a contract to convey real property, made between Y. and his wife, of the first part, and M. and his wife, of the second part, was intended to bind all four parties and was signed only by one of the parties of the first part and one of the parties of the second part, the contract was not completed and created no reciprocal rights or obligations; the statute requiring a contract relating to the conveyance of real property to be in writing and subscribed by the parties to be charged.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 244, 245; Dec. Dig. § 115.*]

2. APPEAL AND ERROR (§ 918*)—REVIEW—PRESUMPTIONS—CORRECTNESS OF TRIAL COURT'S ACT.

If a complaint to which a general demurrer was sustained could have been amended so as to successfully resist a demurrer without stating a different cause of action, it will be presumed, in the absence of a record showing to the contrary, that plaintiff did not offer an amendment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3710; Dec. Dig. § 918.*]

Appeal from Superior Court, Alameda County; Harry A. Melvin, Judge.

Action by J. J. Mullarky against J. H. Young. Judgment for defendant on demurrer to complaint, and plaintiff appeals. Affirmed.

L. W. Lovey and Walter E. Dorn, for appellant. Charles C. Boynton, for respondent.

BURNETT, J. The action was brought to recover damages for the breach of a contract to convey real estate. A general demurrer to the complaint was sustained, and the correctness of the ruling is the only question involved in the appeal.

The foundation of plaintiff's claim is disclosed by the following allegation: "That heretofore, to wit, on the 18th day of December, 1907, for a good and valuable consideration, plaintiff entered into an agreement in writing with defendant for the purchase of certain real property situate in the county of Alameda, state of California, by the terms of which agreement defendant agreed to sell and convey, and plaintiff agreed to buy, certain real property in the county of Alameda. A copy of said agreement is hereto annexed and marked 'Exhibit A' hereby specifically referred to and made a part of this complaint as though duly incorporated therein." Referring to said exhibit we find it does not contain any agreement whatever between plaintiff and defendant. It imposes no obligation

and confers no privilege upon either in behalf of the other. Plaintiff did not promise to pay the consideration to defendant, nor did defendant agree to convey the property to plaintiff. It is true that, if we consider it in any sense a contract, plaintiff and defendant were participants therein; but it cannot be said to be an agreement between them, as there were other parties of equal rank to share the common burden and benefit. A contract between A. and B., on the one hand, and C. and D., on the other, cannot be said to be an agreement between A. and C. But the correct position here is that the purported contract was not executed, and therefore it never created any reciprocal rights and obligations. It related to the conveyance of real property, and under the statute it was required to be in writing and subscribed by the party to be charged. But as the written instrument was signed by only two of the four parties to the agreement, it does not constitute a complete contract, and therefore it does not constitute the ground for a cause of action. This is clear from the exhibit which recites that "This agreement made this 18th day of December, 1907, between J. H. Young and Lizzie S. N. Young, his wife, the parties of the first part, and J. J. Mullarky and Marguerite Mullarky, his wife, the parties of the second part, witnesseth: That the said parties of the first part, in consideration of the covenants and agreements on the part of the said parties of the second part and the payments by them to be made, agree to sell and convey to the said parties of the second part, and they agree to buy, all that certain lot," etc. We cannot assume that the intention of the parties was other than as indicated by the language used to bind all or none at all.

But it is unnecessary to pursue the discussion further, as the identical question has been set at rest by the Supreme Court in several decisions, among which are *Jackson & Thomas v. Torrence*, 83 Cal. 521, 23 Pac. 695, and *Olson v. Lovell*, 91 Cal. 506, 27 Pac. 765. In the former the learned chief justice says: "The only contract he (the husband) executed or intended to execute was a contract in which his wife was to join for the conveyance of the whole property for a round sum. Until this contract was completed by the accession of his wife, there was no contract of which there could be any breach or failure to perform. As we have seen, the wife never did execute, and it never became binding upon the husband because it never bound her. His delivery of the contract to the purchasers, if he did deliver it, can make no difference in this conclusion. * * * It was not his fault that she was not bound, and, as his agreement was dependent on her concurrence, he cannot be compelled to convey without first making a contract for him and then enforcing compliance." In the *Olson Case*, supra, it is held, as stated in the syllabus, that: "A con-

tract for the exchange of land by the terms of which the party of the first part is to convey a tract of land owned by him, and pay a money consideration to two persons named as parties of the second part, who are to convey in exchange therefor a city lot owned by them as co-tenants, but which is signed only by one of the parties of the second part, cannot be specifically enforced by the party of the first part against the co-owner signing the contract, if the other co-owner has repudiated the contract and refused to comply with its terms. The co-owner signing the contract, not being liable for a breach of the contract, is not liable for damages therefor, upon his refusal to convey his interest in the land, and cannot be held liable in damages, unless it be for fraud or deceit."

The cases cited by appellant, when the facts are considered, are seen to be not inconsistent with the foregoing views. *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515, may be taken as an illustration. There the contract was really between Ezra Casselman and B. W. Cavanaugh alone, as shown by the written instrument, although it was signed by Ezra Casselman and Annie Casselman and not signed by Cavanaugh; but it appears that Annie Casselman was really not a party, and, as said by the Supreme Court: "The agreement was prepared by the direction and in the presence of both parties, on the 16th day of May, 1888. It was at that time signed by the defendant, who received from the plaintiff the sum of \$1,000 as part consideration for its execution, and who then delivered it to the plaintiff. The plaintiff accepted the same from the defendant and caused it to be recorded in the office of the county recorder. These acts made a contract binding upon both parties even without the signature of plaintiff." Therein, however, is reaffirmed the rule as stated by Bishop on Contracts, § 348, that, "if by parol stipulation or a fortiori if by the writing itself the contract was not to be deemed complete until other signatures should be added, it without such signatures will not bind those who have signed it." If in the case at bar the contract had been signed by both parties of the first part, the vendors, and although not signed by the parties of the second part, had been accepted and acted upon by them, then it would be deemed complete; but no such case is made to appear. Indeed, from the language of the complaint, in connection with the exhibit, it is quite clear that the contemplated contract was never completed.

If, in connection with the transaction, there was any circumstance opposed to this view, which, on account of fraud or mistake, was not incorporated in the written instrument, it was obviously the duty of plaintiff to allege it. He chose rather—and we must assume deliberately—to place himself upon ground that is entirely untenable. But it is contend-

ed by appellant that the court abused its discretion in refusing leave to amend his complaint. It is true that much liberality should be exercised in allowing amendments to pleadings in order that cases may be tried upon their merits, but granting that the complaint could have been amended so as to successfully resist a demurrer and without setting forth an entirely different cause of action, still every intendment must be indulged in favor of the judgment of the lower court, and we must assume that no offer nor suggestion of any amendment was made by appellant, and hence it cannot be said there was any abuse of discretion in denying something that was never sought nor contemplated by appellant until after the appeal was taken.

In conclusion it may be suggested that, if plaintiff paid the \$300 through mistake or by reason of deceit on the part of defendant, in an appropriate form of action he should be able to recover judgment for it, and the present proceeding would be no bar; but we obviously are dealing with the complaint as we find it, and we think the ruling of the trial court was correct, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 712

STEWART v. DOUGLASS et al. (Civ. 585.)

(Court of Appeal, Second District, California.
Jan. 27, 1909. Rehearing Denied by
Supreme Court March 25, 1909.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—ISSUES OF FACT—CONFLICTING EVIDENCE.

Where the evidence was substantially conflicting, a determination of the trial court that plaintiff did not make out a case by a preponderance of the evidence will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. WITNESSES (§ 222*) — RECEPTION OF EVIDENCE — PROCEDURE ON OBJECTIONS TO STATEMENTS OF ATTORNEY AS PRIVILEGED.

Where the admission of statements by an attorney is objected to on the ground that they were privileged, it was proper procedure for the court to take testimony to determine if they were made in the course of professional employment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 786; Dec. Dig. § 222.*]

3. APPEAL AND ERROR (§ 1011*)—REVIEW—QUESTION OF FACT—CONFLICTING EVIDENCE.

The evidence being conflicting as to whether statements of an attorney offered in evidence were made in the course of professional employment, the conclusion of the trial court is final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. WITNESSES (§ 406*)—TESTIMONY OF PARTIES—IMPEACHMENT AND CORROBORATION.

Where, in an action involving the right to certain mines, plaintiff testified positively that he had pointed out the location of one of the

mines as within the boundaries of certain property, and defendant testified positively in the negative, it was error to permit a witness for defendant to discredit plaintiff and corroborate defendant by testifying that the north line of such property was "by public reputation located" far enough north to take in the mine.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276, 1277; Dec. Dig. § 406.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The error was not substantially prejudicial, and a judgment against plaintiff should not be reversed on that account, as the testimony was of very slight consequence, and could not have influenced the mind of the court to which the case was tried.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by John Stewart against Nelson G. Douglass and others. From a judgment for defendants, plaintiff appeals. Affirmed.

See, also, 83 Pac. 699.

H. M. Barstow, Variel & Hannon and E. Edgar Galbreth, for appellant. Patterson Sprigg, Valentine & Newby, and Wright, Schoonover & Winnek, for respondents.

BORDWELL, Judge pro tem. Plaintiff claims to have been the original discoverer of valuable mineral deposits on unoccupied lands of the United States, the exact whereabouts of which he informed the defendant Douglass, who, in consideration thereof, agreed to locate mining claims covering such deposits in the name of the plaintiff and himself jointly; that the defendant made two locations, one thereof in his own name, and one in the name of the defendant Rosalind O. Butterfield; that said claims were known by the name of the "Stewart Mine" and the "Mission Mine," respectively; that the defendant Butterfield took whatever interest she had in the claim standing in her name with full knowledge of the understanding existing between Douglass and the plaintiff. The latter seeks judgment declaring a trust in his favor to the extent of an undivided one-half interest in the claims, and requiring the defendants to convey the same to him. Other parties are made defendants under the allegation that they have or claim some interest in the property in question, subject to the rights of the plaintiff. This case was before the Supreme Court on appeal from a judgment entered upon a ruling sustaining a demurrer to the complaint (148 Cal. 511, 83 Pac. 699), where it was decided that the complaint stated a cause of action. Upon the return of the case to the superior court, an answer was filed, and a trial of the issues of fact resulted in a judgment for defendants. The appeal here is from the judgment upon a bill of excep-

tions presenting the evidence. The plaintiff urges that the evidence is insufficient to support the findings, and that the trial court erred in receiving certain evidence over his objection. The evidence directed to the issues of fact was substantially conflicting. Under such circumstances, the determination of the trial court that the plaintiff has not made out a case by preponderance of evidence will not be disturbed.

The first assignment of error argued by plaintiff relates to the ruling of the court admitting evidence of certain statements made by him to an attorney at law over the objection that they were privileged. When this objection was made, and before passing upon it, the court took the testimony of witnesses to determine whether or not these statements were made in the course of professional employment. This was the proper procedure. The court found that the statements were not so made. It being within the province of the trial court to pass upon this, like any other question of fact, and the evidence being conflicting, the conclusion of the trial court will stand as final.

There seems to be no dispute but that the plaintiff pointed out to the defendant Douglass the location of the mineral deposits; also, that the principal deposit is on the land now known as the Stewart mine, then unoccupied government land. It was contended by the defendant that he was told by the plaintiff that the land, which now constitutes the Stewart mine, was within the boundaries of a patented forty acres known as the "Alvarado property." To the issue whether the plaintiff pointed out the location of the Stewart mine as within or without the boundaries of the Alvarado property, the plaintiff testified positively in the affirmative, and the defendant positively in the negative. To discredit the plaintiff and corroborate the defendant, the latter presented a witness who was allowed, against the objection of the plaintiff, to testify that the north line of the Alvarado property was "by public reputation located" far enough north to take in the Stewart mine. The plaintiff's objection to this and other similar questions should have been sustained. However, we do not feel that the error was substantially prejudicial, nor that the case should be reversed on that account. The testimony of this witness was of very slight consequence, and, we conclude, had no influence upon the mind of the court in determining the issue whether or not plaintiff told Douglass that the property now known as the Stewart mine was within the boundaries of the Alvarado property. It has been held by the Supreme Court that a case tried to the court should not be reversed "for the admission of irrelevant evidence, unless it appears that the court, in making its decision, relied on the irrelevant evi-

dence." *White v. White*, 82 Cal. 452, 23 Pac. 276, 7 L. R. A. 799.

It follows that the judgment should be affirmed. It is so ordered.

We concur: ALLEN, P. J.; TAGGART, J.

9 Cal. App. 694

In re MYERS' ESTATE.

ROCHE v. BAKER. (Civ. 528.)

(Court of Appeal, Third District, California.
Jan. 26, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 17*)—
RIGHT TO APPOINTMENT.

Code Civ. Proc. § 1365, in fixing the order in which certain classes of persons are entitled to administer a decedent's estate, provides (subdivision 2) that in the absence of a surviving husband or wife children shall be appointed. Section 1367 provides that, "when there are several persons equally entitled to the administration, the court may grant letters to one or more of them." Section 1379 provides that "administration may be granted to one or more competent persons, although not otherwise entitled to the same at the written request of the person entitled filed in the court." *Held*, that where three daughters survived, and one of them applied for administration, she should be appointed, though a competent person nominated by the other two daughters also applied; the court not having any discretion in such case.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 43, 59; Dec. Dig. § 17.*]

Appeal from Superior Court, Colusa County; H. M. Albery, Judge.

In the matter of the estate of Ann Myers, deceased, Ann Baker was appointed administratrix, and Thomas M. Roche appeals. Affirmed.

Seth Millington, Thos. Rutledge, and Ernest Weyand, for appellant. U. W. Brown and I. G. Zumwalt, for respondent.

CHIPMAN, P. J. It appeared that the heirs at law of deceased are three daughters, Kate Roche, Sophia Drier, and Ann Baker. Thomas M. Roche is a grandson of deceased, but is not entitled to succeed to any portion of the personal estate of deceased. He was nominated, in writing, by Kate Roche and Sophia Drier, each of whom is competent to act as administratrix, and their written request was filed herein with the petition of said Thomas M. Roche, asking that letters be issued to him. Ann Baker was competent to act as administratrix, and she also prayed for letters; the petitions being heard together. The court held that it had no discretion, and that Ann Baker was entitled "as a matter of strict legal right" to be appointed administratrix, and the judge so ordered.

Section 1365, Code Civ. Proc., fixes the order in which certain classes of persons are entitled to administer, in which order the court must make the appointment. The order is as follows: "(1) The surviving husband or wife, or some competent persons

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whom he or she may request to have appointed; (2) the children." The other eight classes need not be stated. Section 1366, Code Civ. Proc., provides that "of several persons claiming and equally entitled to administer, males must be preferred to females," etc.; but, all the claimants here being daughters of the deceased and equally entitled, no question arises under that section, for it will not be claimed that the nominee of two of the daughters has any greater right, because he is a man, than the daughters themselves have. Section 1367 of the same Code provides: "When there are several persons equally entitled to the administration, the court may grant letters to one or more of them," etc. Drawn into the discussion are: Section 1368, Code Civ. Proc., which provides that where any person entitled to administer is a minor "letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court"; and section 1379, Code Civ. Proc., which provides that "administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court." The three daughters named being equally entitled to letters, the question we are asked to decide is whether or not Ann Baker, a daughter of deceased, was as a matter of strict right entitled to letters in preference to the nominee of both of the other daughters.

In *Estate of Healy*, 122 Cal. 162, 54 Pac. 736, section 1379 was under consideration. In that case Ulty and James McCabe and a married sister were children of deceased, and, as residents of this state, were entitled to administer as belonging to the seventh class enumerated in section 1365. They did not themselves apply for letters, but nominated and requested the appointment of Abrahams, appellant therein, and he petitioned as their nominee. Thereafter the public administrator, belonging to an inferior class, namely, class 8 (section 1365), filed a petition asking for letters, and the petitions were heard together. The history of section 1379 and the cases decided before and since its adoption as part of the Code were fully examined, and the result reached that its provisions "must be construed as giving to the court the discretionary power to grant administration to any competent person who otherwise would not be entitled thereto at the written request of a person who would be so entitled," and the appointment of the public administrator, of the eighth class, was confirmed as against the nominee of persons of the seventh class. See *Estate of Richardson*, 120 Cal. 344, 52 Pac. 832; *Estate of Harrison*, 135 Cal. 7, 66 Pac. 846. These cases clearly establish the construction to be given section 1379, that the right to nominate is not absolute, but is a right which serves to invoke the discretion of the court, the exercise of which discretion cannot be

disturbed except in the case of abuse. It was held in *Estate of Carr*, 25 Cal. 585, that this section, then part of the practice act, applied only in cases where a vacancy in the administration existed; but in the cases cited the question as to the rights of a person of a particular class, as against the rights of a nominee of a person of the same class, was not before the court. The decisions referred to are far from deciding that where A., who belongs to class 7, nominates a representative not otherwise entitled, the latter thereby has equal rights with B. of the same class who also petitions for appointment, and that the court has the discretion to choose between B. and A.'s nominee.

Appellant relies upon *Estate of Turner*, 143 Cal. 439, 77 Pac. 144. In that case there were three brothers of deceased, one of whom was a minor and incompetent to serve as administrator. Section 1369. Section 1368, as we have seen, provides, in such case, that "letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." It was held in the *Turner Case* that this section removed the disqualification of the minor who has a guardian and allows him through his guardian, as his representative, all the rights to which he would be entitled as an adult, and that the court had a discretion, by the terms of the section, to appoint the guardian and was not compelled to appoint one of the adult brothers. The court said, however, that "members of an inferior class are never entitled to administer when there is a member of a superior class who is not disqualified," by which, we presume, is meant a member of a superior class applying for letters.

It is claimed by appellant that the nominee of a person of a particular class, as here the nominee of certain daughters, steps into the shoes of the nominators and is entitled to all the rights of another daughter of the same class, and by virtue of section 1379, the court is clothed with discretionary power to choose between the nominee and the daughter claiming the right to administer; but the result in the *Turner Case* was worked out under the special provisions of section 1368, which are specifically made applicable to the guardian of a minor. Appellant claims that the provisions of 1379 must be read into and made to apply to all the classes other than class 1, so as to practically make it discretionary with the court in all the classes to appoint a nominee when some other person of the same class seeks appointment. In the case of a husband or wife there can be but one who may be appointed, and it was as to him or her that the statute provided that a nominee might be named, and that a right absolute was thus conferred upon the latter. *Estate of Dorris*, 93 Cal. 611, 29 Pac. 244.

It seems to us that the effect of the action taken by the two sisters in appointing Roche,

who otherwise had no right to be appointed, was to renounce their right under section 1365, and that Roche then became clothed only with such rights as flowed from section 1379, but that the rights of Ann Baker were unaffected and remained absolute. Had each one of the sisters applied for letters, the court would have been authorized to use its discretion in making an appointment. Section 1367. But when the court was confronted with the petition of Roche, who claimed only as a nominee under section 1379, and had to decide between that petition and the petition of Ann Baker, applying in her own right, it had no discretion. Her right was absolute, and, as her competency and fitness and qualifications were not questioned, it became the duty of the court to grant her petition.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

9 Cal. App. 698

STEIGER TERRA COTTA & POTTERY WORKS v. CITY OF SONOMA et al.
(Civ. 509.)

(Court of Appeal, Third District, California. Jan. 27, 1909. Rehearing Denied by Supreme Court March 25, 1909.)

1. SALES (§ 3*)—SALE DISTINGUISHED FROM BUILDING CONTRACT.

A contract to furnish a movable thing and affix it to the freehold is not a contract for the sale of goods, but is a contract to make improvements on real estate; and, until the materials are affixed to the realty, the title does not pass.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 6, 9; Dec. Dig. § 3.*]

2. MECHANICS' LIENS (§ 111*)—DEFAULT IN PERFORMANCE OF PRINCIPLE CONTRACT—APPRAISEMENT—RIGHTS OF SUBCONTRACTORS.

A contract between a contractor for a building and a subcontractor required the latter to furnish the materials and perform the work necessary to set on the roof of the building certain tile and finishings called for, to the satisfaction of the architect, and bound the contractor to pay a specified sum on the completion of the work, and the balance within a specified time thereafter. The subcontractor manufactured the materials, and stored them at the building site to await use. The contractor abandoned the work without paying for the materials, and before the same were affixed to the building. *Held*, that the contract was not one for the sale of property, and the owner of the building could not take possession thereof and appraise their value, under Code Civ. Proc. § 1200, providing that, on the contractor abandoning the work, the portion of the contract price applicable to the liens of others shall be fixed in a manner specified.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 144; Dec. Dig. § 111.*]

3. MECHANICS' LIENS (§ 111*)—DEFAULT BY PRINCIPAL CONTRACTOR—PROTECTION OF OWNER AGAINST LIENS—STATUTE—"BELONG TO THE OWNER."

Code Civ. Proc. § 1200, providing that on the contractor abandoning the work the portion of the contract price applicable to the liens of others shall be fixed by deducting, from the value of the work and materials done and fur-

nished, including materials on the ground which shall belong to the owner, the payments then due and paid, etc., refers to a case where the owner has made and recorded a valid contract with a contractor who abandons the building in an unfinished condition, and contemplates its completion by the owner, whose liability to lien claimants is limited by his contract with the contractor, but does not define the contractual relation between the contractor and his subcontractors, until the latter have brought themselves within the lien law; the words "belong to the owner" not meaning materials which have never been sold and delivered to the contractor for use in the construction of the building, but which in fact belong to some other person.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 144; Dec. Dig. § 111.*]

Appeal from Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by the Steiger Terra Cotta & Pottery Works against the City of Sonoma and another. From a judgment for defendants, plaintiff appeals. Reversed.

James W. Oates, Bishop & Hoefler, and Alfred J. Harwood, for appellant. Robert W. Poppe and A. B. Ware, for respondents.

CHIPMAN, P. J. This is an action for the recovery of the possession of specific personal property, or, if delivery cannot be had, for the value thereof. The facts are not disputed so far as they concern the main question involved. One Mac Quiddy entered into a written contract with defendant city of Sonoma to erect a city hall. This contract was duly recorded, and its validity is not questioned. Mac Quiddy entered into a written contract with plaintiff, whereby plaintiff agreed to "furnish and set on the roof of the new city hall, * * * as per plans and specifications by architect, A. C. Lutgens, all of the Spanish 'S' tile and finishings required, said material and work to be satisfactory to said architect." Plaintiff also agreed to "complete said work" within a time stated "after receipt of full-sized detail drawings of said roof" and guaranteed "said roof against leakage caused by defects of workmanship or material for period of two years from and after completion of roof, * * *" and to "furnish said material and perform said work for the sum of \$875.00." It was also agreed that said Mac Quiddy will pay said sum "upon completion of the work on the roof of said building in accordance with the terms of" their contract, "\$650.00 and the balance \$225.00 in thirty-five days after said completion." The material was manufactured by plaintiff, and remained in its possession until it was shipped to Mac Quiddy under the contract and all expenses of shipping and delivering the material to the plaza at Sonoma, the site of the proposed building, where it was stored to await use, were paid by plaintiff and the material was charged on plaintiff's books to Mac Quiddy. It appeared also that nothing had been paid

for the material by Mac Quiddy, or by any person for or on his behalf. Before the completion of the building Mac Quiddy defaulted and abandoned the work, and defendant the city of Sonoma entered into a contract with defendant Newman to complete the building, took possession of the material in question, and caused its value to be appraised, proceeding under section 1200 of the Code of Civil Procedure, on the assumption that the material had become the property of defendant city of Sonoma. Plaintiff demanded possession of the property, and, being refused, commenced this action, at which time no part of the material had been used in the construction of the building. Defendant city of Sonoma gave the statutory bond, and the property was thereupon redelivered to said defendant. The cause was tried by the court without a jury, and defendants had judgment, from which plaintiff appeals upon bill of exceptions.

Appellant relies upon the proposition that the contract between it and Mac Quiddy is a contract for work and materials, under which no title in the materials passed to Mac Quiddy, and that this unmistakably appears from the terms of the contract itself. We think this is a sound interpretation of the instrument. Mr. Benjamin states the rule as follows: "Where a contract is made for furnishing a machine or a movable thing of any kind, and fixing it to the freehold, it is not a contract for the sale of goods. In such contract the intention is plainly not to make a sale of movables, but to make improvements on the real property, and the consideration to be paid to the workman is not for a transfer of chattels, but for work and labor done and materials furnished in adding something to the land." Benjamin on Sales (7th Ed.) § 108. The English rule on the subject is clearly stated in *Tripp v. Armitage*, 4 Me. & W. 687. In this case the contract was to make certain sash frames and attach them to a building. Baron Parke said: "The contract is that the bankrupt shall build a house; that he shall make, among other things, window frames for the house, and fix them in the house, subject to the approbation of a surveyor, and it was never intended by this contract that the articles so to be fixed should become the property of the defendants until they were fixed to the freehold. It is said that the approbation of the surveyor is sufficient to constitute an acceptance by the defendants, but that approbation is not given *eo animo* at all. It is only to ascertain that they are such materials as are suitable for the purpose; and, notwithstanding that approval, it is only when they have been put up, and fixed to the house, in performance of the larger contract, that they are to be paid for." Lord Chief Baron Abinger, in giving his opinion, said: "This is not a contract for the sale of goods as movable chattels. It is a contract to make up materials and to fix them; and, un-

til they are fixed, by the nature of the contract, the property will not pass." It was suggested as illustrative of the principle that had the sashes been destroyed by fire, the loss would have fallen on the builder, for the owner of the building was not bound to pay for anything until put up and fixed. So here plaintiff's undertaking was, not only to furnish certain materials, but plaintiff was itself to perform the labor of placing them on the roof to become a part of the building and freehold; and plaintiff was not to be paid for the materials alone, but was to receive an entire sum for the combined labor and materials, and that only after completion of the work. It is not possible to distinguish the two cases.

The principle was applied in *Chandler v. De Graff*, 22 Minn. 471. In that case the question was as to the title to certain railroad ties. Among other things, the court said: "They [the ties] were furnished, not on account of any agreement for the purchase or sale of ties, but in part execution of defendant's promise to build and complete a certain line of railroad, and of such quality, and to such an extent only, as might be necessary to fulfill that specific obligation and complete the undertaking. The risk of loss was clearly defendant's until the road was inspected and accepted as provided in the contract. * * * No property nor title in the ties vested in the railroad company until after they had been actually placed in the track." The same principle was applied where certain contracts were entered into to furnish materials and construct a street railroad. *Cameron v. Orleans & J. Ry. Co.*, 108 La. 83, 32 South. 208; *Orleans & J. Ry. Co. v. International Construction Co.*, 108 La. 82, 32 South. 218.

The learned judge who tried the case held that plaintiff's rights were limited to such as are found in section 1200, Code Civ. Proc.; that, the contractor having abandoned his contract and the work before the completion of the building, the portion of the contract price to which plaintiff was entitled was to be fixed by that section as follows: "From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, * * * shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections 1183 and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens." Section 1200, Code Civ. Proc. The trial judge held that because the contract of plaintiff and Mac Quiddy shows that the materials were to be used in the new city hall, the plaintiff "by the terms and words of its contract brings itself directly within the provisions of the statute it seeks now to evade," and in his ruling he added: "This was done doubtless

to protect itself in the event of the material being used and Mac Quiddy's failure, through insolvency or other causes, to comply with his contract." It may be said of this suggested motive, of which the record presents no proof, that appellant concedes that if the materials had been used as contemplated, had gone into the roof, the section of the Code referred to would have applied, although in this particular case, plaintiff would not have been entitled to a lien, because the building is a governmental instrumentality, and plaintiff would have been compelled to look to the contractor, or to the owner, for its proportionate share of the contract price for the building. But we have no such case here. Section 1200 and others on the subject relate exclusively to the liens of mechanics, laborers, and materialmen, and to the protection of the owner against lien claimants and the limitation of the owner's liability in his relation with the contractor and lien claimants. It does not purport nor does it attempt to define or interfere with the contractual relation between the contractor and his subcontractors until the subcontractor has brought himself within the provisions of the mechanic's lien law, by performing labor or by a sale and delivery to the contractor of the materials to be used in the building. Section 1200 refers to a case where the owner has made and recorded a valid contract with the contractor, who abandons the building in an unfinished condition. The section contemplates its completion by the owner, whose liability to lien claimants is limited by his contract with the contractor. The payments then (upon such abandonment) due, and actually paid, shall be deducted from the value of the work and materials already done and furnished, including materials actually delivered and on the ground, according to the terms of the contract and the provisions of sections 1183 and 1184, and the remainder becomes applicable to the liens provided for in said last-mentioned sections. Materials actually delivered and on the ground are, for the purposes of this equitable adjustment, declared to "belong to the owner," but this declaration cannot be held to mean materials which have never been sold to the contractor, and have never been delivered to the contractor to be by him used in the construction of the building, but which in fact belonged to some other person. The case here is very different from the cases contemplated by, and ordinarily arising under, the mechanic's lien law, where materials have been sold to the contractor and actually delivered and on the ground. The seller parts with his property as in any other case of sale and delivery, and, but for the lien given the seller, as a materialman, he would have no recourse except against the contractor. Nor can the fact that plaintiff charged the materials on its books to Mac Quiddy affect the question, for

their contractual relation was clearly defined by their written contract, and the evidence was that the materials were delivered under their contract. Besides, defendants do not claim that a sale and delivery of the property were effected to Mac Quiddy. They rely wholly upon the provisions of the statute referred to.

In *Los Angeles Pressed Brick Company v. Higgins et al.*, 97 Pac. 419, the court, in speaking of the constitutional provision and the lien law as we have it, said: "The statute is intended to supply the means for such enforcement, and will be construed with a view to accomplish the constitutional purpose. In so far as the act affects the right to contract it will be limited in its operation to the persons whom the Constitution and the statute were intended to protect by giving a lien, and to such contracts of these persons as relate to and affect the lien. In interpreting the mechanic's lien law it is not to be considered as a general law relating to contracts and contractual relations, but a means provided whereby a laborer, mechanic, or materialman may declare his intention to exercise his constitutional right, and enforce his lien." This was said in a case where the contract between the contractor and the owner was not recorded, and was therefore void as to lien claimants. But we think it equally true where the contractor abandons his contract. In such case the statute deals only with the relation of lien claimants with the owner in respect of their rights as lien claimants and his liability to them as such. But it does not affect the contractual relations between the contractor and subcontractors who claim no lien. The statute does not contemplate that the owner of the building may take property not belonging to the contractor. *Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635, and *McDonald v. Hayes*, 132 Cal. 490, 64 Pac. 850, relied on by respondent, were cases of foreclosure of liens where the parties brought themselves within the statute and proceeded under it. These cases throw no light on the present question.

We do not deem it necessary to pass upon the constitutionality of section 1200 as applied by the trial court in this case. Appellant cites authorities to show that so applied it is taking property without due process of law. We think the section, rightly interpreted and applied, does not warrant the view taken by the learned trial judge, and that is sufficient for the purposes of the appeal.

The judgment is not in the alternative, as is required in this form of action. Code Civ. Proc. § 667. Waiving this as an inadvertence, we think the judgment should be reversed for the foregoing reasons, and it is so ordered.

We concur: HART, J.; BURNETT, J.

9 Cal. App. 705

MONO COUNTY v. DE PAULI et al.
(Civ. 527.)(Court of Appeal, Third District, California.
Jan. 27, 1909. Rehearing Denied by Supreme Court March 25, 1909.)

1. COUNTIES (§ 55*)—ORDINANCES—PUBLICATION—STATUTES.

Under County Government Act (St. 1883, p. 299, c. 75), providing that every county ordinance shall be published with the names of the members voting for and against the same, publication is necessary to the validity of an ordinance, and the provisions of the act are mandatory, and must be substantially complied with.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 72; Dec. Dig. § 55.*]

2. COUNTIES (§ 55*)—ORDINANCES—PUBLICATION—STATUTES.

The operation of the mandatory provisions of the county government act (St. 1883, p. 299, c. 75), providing for the publication of county ordinances with the names of the members voting for and against the same, will not be defeated by reason of some trivial irregularity, or unimportant departure from the strict letter, which can be of prejudice to no one, and which is not inconsonant with the manifest intention of the Legislature.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 72; Dec. Dig. § 55.*]

3. COUNTIES (§ 55*)—ORDINANCES—PUBLICATION—STATUTES.

Under County Government Act (St. 1883, p. 299, c. 75), providing that a county ordinance shall be published with the names of the members voting for and against the same, a county ordinance is not inoperative merely because of the omission to publish the name of the chairman of the board as having voted "Aye"; there having been no other departure from a strict compliance with the act.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 72; Dec. Dig. § 55.*]

Appeal from Superior Court, Mono County; Wm. S. Wells, Judge.

Action by the County of Mono against James L. De Pauli and another, partners doing business under the firm name and style of Olcese Company. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

Pat. R. Parker and U. S. Webb, for appellant. C. L. Claffin, for respondents.

BURNETT, J. This is an appeal from a judgment in favor of the defendants, in an action brought by the county of Mono to recover the sum of \$550, alleged to be due under a county ordinance numbered 90, which regulates the business of raising, grazing, herding, and pasturing sheep in Mono county, and fixes as a license tax therefor the sum of 5 cents per head. In the court below, as stated by appellant, the ordinance was attacked on various grounds, to wit, that the county had no authority to regulate, or to attempt to regulate such business; that the ordinance is unconstitutional and therefore void; that the license tax demanded is unwarranted, unreasonable, and excessive; and that the ordinance never became effective, be-

cause not published as required by the statute.

The trial court, relying upon the decision of the Supreme Court in County of Plumas v. Wheeler, 149 Cal. 758, 87 Pac. 909, and in County of Sierra v. Flanigan, 149 Cal. 769, 87 Pac. 913, held with plaintiff as to all these propositions except the last, but in that respect it adopted the view of defendants, basing the conclusion upon the following finding: "That the names of all the members voting for and against said ordinance were never published in any newspaper published in said county or elsewhere, but that, when said ordinance was published, there was published together therewith the names of four of the members as voting for the same, and none voting against, as follows: 'This ordinance having been twice read and duly considered by the board was put upon its passage and adopted and passed on the 8th day of April, 1904, by the following vote: Ayes: David Hays, N. W. Boyd, C. W. Rick-ey, and J. A. Creaser. Noes, none. [Signed] R. G. Montrose, Chairman.' And the ordinance as published was duly attested by the clerk of said board, and authenticated by the seal of said board, it thus appearing therefrom that R. G. Montrose had not voted, while, as a matter of fact the said R. G. Montrose had voted 'Aye,' and the record of his vote had never been published." The materiality of this finding is evident from the provision in the county government act that: "The enacting clause of all ordinances of the board shall be as follows: 'The board of supervisors of the county of ——— do ordain as follows.' Every ordinance shall be signed by the chairman of the board and attested by the clerk. On the passage of all ordinances the votes of the several members of the board shall be entered on the minutes, and all ordinances shall be entered at length in the ordinance book. No ordinance passed by the board shall take effect within less than fifteen days after its passage, and before the expiration of the said fifteen days the same shall be published, with the names of the members voting for and against the same for at least one week in some newspaper published in the county, if there be one, and if there be none published in the county, then such ordinance shall be posted at the court house door at least one week." It is admitted that there was no departure from a strict compliance with the requirement of the statute save in the single instance of an omission to publish the name of the chairman as having voted "aye"; and the inquiry is thus presented whether for this reason it should be held that the ordinance is inoperative.

The publication is necessary to the validity of the ordinance, and the provision in reference thereto must be deemed, therefore, mandatory, and not directory merely. In San Luis Obispo v. Hendricks, 71 Cal. 264, 11 Pac.

684, it is said: "The essential thing to be done was to publish the ordinance in some newspaper published in the county, if there was one, for at least one week, with the names of the members voting for and against the same." And in *People v. Russell*, 74 Cal. 578, 16 Pac. 395, it is held that: "Under section 26 of the county government act of March 14, 1883, an ordinance of a board of supervisors of a county does not take effect until it has been published in its entirety, as required by that section, and a publication which omits the enacting clause of the ordinance is insufficient" (St. 1883, p. 309, c. 75). The only question, then, to determine is whether there has been a substantial adherence to the mandate of the statute.

It is not contested that the Legislature has authority to provide the procedure to be pursued by the board of supervisors in the enactment of ordinances, but it is claimed by appellant, and rightly so, that to this, as to other legislation, must be applied the rule which requires a reasonable construction, keeping in view the obvious purpose of the law; and it is insisted that, "granting that the provision commanding the act to be performed is mandatory, if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute." In other words, the operation of the law is not to be circumvented, and the purpose defeated, by reason of some trivial irregularity or unimportant departure from the strict letter, which can be of prejudice to no one, and which is not inconsonant with the manifest intention of the lawmakers. In *Sutherland on Statutory Construction*, § 611, the rule is stated as follows: "When a statute is affirmative, it does not necessarily imply that the mode or time mentioned in it is exclusive, and that the act provided for, if done at a different time, or in a different manner, will not have effect. Such is the literal implication, it is true; but, since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the Legislature intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission or a departure from it in some formal, incidental, or comparatively unimportant particular." And, further on, it is stated that: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory."

In the *Matter of the Estate of W. B. Johnson*, Deceased, 98 Cal. 538, the question of whether the provision of the statute in relation to adoption requiring the examination

of the child is mandatory was discussed by the Supreme Court, and it is there said, through Mr. Justice De Haven: "But the examination of a child whose consent to the contract is unnecessary, and who is of such tender years that it is incapable of exercising any judgment as to the effect of such contract upon its interests, would certainly be an idle thing to do, and the section should not receive such an extremely narrow and literal construction as to make the examination of such a child mandatory, and its omission fatal to the creation of a valid contract binding upon adults who have done everything required of them in order to manifest their full and free consent to such adoption." The court quotes with approval the following from *People v. Supervisors*, 34 N. Y. 272: "A strict and literal adherence to the letter and form of a statute in minor or nonessential particulars will often defeat a remedy, or destroy a right which it was the principal intention of the Legislature to create or provide. When the statute directs an act to be done in a certain way, or at a certain time, and a strict compliance as to time or form does not appear to the judicial mind to be essential, the proceedings are held valid, though the command of the statute has been disregarded." In *Kenaston v. Riker*, 146 Mich. 163, 109 N. W. 278, the Supreme Court of Michigan held that: "Though a city's charter provides that ordinances to be regularly enacted shall be immediately recorded by the clerk and the mayor and clerk shall authenticate the same by their official signatures on such record, failure of the clerk to copy an ordinance into the record book correctly does not invalidate it." In *Smith et al. v. Swain et al.*, 71 N. H. 277, 52 Atl. 857, it is said, by the Supreme Court of New Hampshire, that: "We think the statute requiring school district clerks to deliver to the selectmen of the town an attested copy of every vote of the district to raise money within 10 days after the meeting is directory, and not mandatory, in respect of time. * * * With this construction of the time limitation, which seems to have been established rather for the purpose of defining the clerk's duties than as a step necessarily precedent to the validity of his certification, we are of the opinion that the legality of the tax voted by the district is not affected by the failure of the clerk to certify it to the defendants until the expiration of 6 days beyond the statutory period." In *Allen v. Allen*, 114 Wis. 615, 91 N. W. 218, the Supreme Court of Wisconsin construed the provision requiring the affidavit of publication of the list of delinquent taxes to be filed within 6 days after the last publication as directory merely, the court saying: "The penalty attached to the 6-day requirement is a clear indication that its main object was to compel obedience on the part of the printer. So far as notice to the parties is concerned every substantial right is as well conserved by the

filing of the affidavit 10 days after the last publication as by the filing within 6 days thereafter." While the foregoing cases differ somewhat in their facts from the case at bar, they are illustrative of the modern spirit of judicial liberality in the interpretation of the law and the determination of the question of reasonable and substantial compliance with the requirement of the statute.

In this matter the primary purpose of the publication is obviously to give notice to the public of the terms of the ordinance, and of the votes thereon in order that it may be seen that the ordinance has been regularly passed. Indeed, in *County of Orange v. Harris*, 97 Cal., on page 600, 32 Pac., on page 594, it is said: "The object of publication is to impart notice to those who are or may be affected by its provisions. If an error occurs in the publication which does not affect the provisions of the ordinance affecting the defendant's liability, or his defense against such liability, it should be held immaterial." Here, as we have seen, the ordinance was published in full, the names of four of the supervisors are given as having voted for it, and it is declared that none voted against it. They were all present, as shown by the minutes. Therefore the only uncertainty contained in the publication is as to whether the chairman of the board voted for the ordinance or failed to vote at all. This uncertainty, however, could not possibly prejudice any one. No one's rights could be affected by this mistake—presumably of the printer. If any one desired to ascertain the fact in relation to the vote of the said chairman, he could do so by consulting the minute book, or the book of ordinances of the board, as therein the names of all the members were recorded as having voted for the passage of the ordinance. If it be contended that one purpose of the publication of the votes is to subserve sound public policy by imparting information to the public of how each supervisor has voted, we should say that this is merely incidental to the main purpose, and the inadvertent omission of one name under the peculiar circumstances of this case should not be held to invalidate an ordinance in every other respect properly enacted. It is suggested that this view would lead to the conclusion that all the names might be omitted and still the ordinance declared valid, but we think the argument loses its force when the purpose of the publication is properly considered. If there had been no publication of the vote, we should be constrained to hold that there had been a failure to comply with the law in a material respect, as was the case in *Summit Co. v. Gustavson*, 18 Utah, 351, 54 Pac. 977, wherein a similar provision was held to be mandatory. In that case the Supreme Court of Utah declared: "The ordinance in question does not contain the name of any member of the board. It does not contain the name of any member who voted for or against it.

It does not appear from the ordinance, as published that any member of the county court voted for its adoption."

It is true that in the Utah case the court calls attention to the consideration of public policy involved in the question as follows: "It was designed by the statute to fix upon each member of the court who participated in the proceedings to pass the ordinance the exact share of the responsibility which he ought to bear, and that, by such an unquestionable published record that he cannot, at any time thereafter, deny his participation therein, or the character of his vote, when questioned by his constituents, or when assailed in court. Whenever such ordinance is questioned, the county should not be required to sustain its authority by resorting to parol evidence of bystanders, or associates of the officials. The Legislature understood too well the unsatisfactory character of that kind of evidence, and they did not intend that the power to call an officer to account for misconduct or error of judgment in the performance of an official act should depend upon that class of evidence. The Legislature has therefore imperatively required that the ordinance as published should contain record evidence of a character that should not be open to contradiction or dispute." The inconvenience and uncertainty suggested, though, could not arise here, as we have seen, in view of the record in the minute book and ordinance book. The controlling reason for the requirement, however, is given by the court in the statement that it is designed "to show the public and those interested that the ordinance was in reality passed by a requisite vote."

We understand that the conclusion we have reached is not inharmonious with the views expressed by the Supreme Court in the cases cited by appellant. It is therein held that "the power to license comes from the Legislature, and the power is expressed through the adoption and publication of ordinances in the manner provided by the granting power," or, as stated in *Zottman v. San Francisco*, 20 Cal. 102, 81 Am. Dec. 96, "The rule is general, and applies to the corporate authorities of all municipal bodies. When the mode, in which their power on any given subject can be exercised, is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power." We hold that the mode prescribed for the enactment of the ordinance must be followed, but since there was an honest effort to do so, and no one can possibly be injured by the inconsequential omission, it should be held, under the peculiar circumstances of this case, that there was a substantial compliance with the requirement of the statute.

The judgment in favor of the defendants, as we have seen, was due to the trial court's opinion that the publication was insufficient. As we view it, this was erroneous; and, as

all other material facts are found in favor of plaintiff, the judgment upon the findings should have been in its favor. The judgment is therefore reversed, with direction to enter judgment in favor of plaintiff.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 674

PEOPLE v. LANTERMAN. (Cr. 96.)

(Court of Appeal, Second District, California. Jan. 22, 1909. Rehearing Denied by Supreme Court March 23, 1909.)

1. CRIMINAL LAW (§ 436*)—EVIDENCE—PRIVATE REPORTS.

In a prosecution for presenting false charges against a county, wherein one of the items was an alleged payment for railroad fare on a day specified, unverified reports of railroad conductors to the ticket auditor, showing that a pass of the number corresponding to that of defendant's was used on that day, is inadmissible to show that defendant did not expend for transportation the amount charged; the reports not showing the distance traveled on the pass, and there being no evidence as to the truth of the matters contained therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1023; Dec. Dig. § 436.*]

2. CRIMINAL LAW (§ 436*)—EVIDENCE—PRIVATE REPORTS.

The report of a railroad conductor to the ticket auditor, showing the use of defendant's pass on a certain date, is not shown to be true by the testimony of the conductor that the report is correct so far as he knows, and that he has not received any correction from the ticket auditor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1023; Dec. Dig. § 436.*]

3. CRIMINAL LAW (§ 441*)—EVIDENCE—PRIVATE REPORTS.

Where a railroad conductor was not beyond the jurisdiction of the court, but was present and able to testify, his report to the ticket auditor, showing the use of defendant's railroad pass on a certain date, is inadmissible without any verification or oral testimony as to the truth of the matters therein contained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 441.*]

4. FALSE PRETENSES (§ 49*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence, in a prosecution for presenting against the county a false charge for transportation on official business, held insufficient to sustain a conviction.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

R. S. Lanterman was convicted of making false charges against a county, and appeals. Reversed.

Earl Rogers, Paul W. Schenck, J. W. McKinley, Henry J. Stevens, and O'Melveny, Stevens & Millikin, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was charged by indictment with the commission of the crime

specified in section 72 of the Penal Code, and upon trial was convicted as charged. He appeals from the judgment and an order of the court denying his motion for a new trial.

Defendant interposed a demurrer to the indictment upon the grounds, among others, that the indictment did not substantially conform to sections 950, 951, and 952 of the Penal Code, and that the facts stated in the indictment did not constitute a public offense. This demurrer was overruled.

The parts of the indictment material to a consideration of the case are as follows:

That on or about the 26th day of February, 1907, and before the finding of this indictment, at and in the county of Los Angeles, state of California, the said R. S. Lanterman, with intent to defraud the said county of Los Angeles, state of California, did willfully, unlawfully, and feloniously present for allowance and for payment to the board of supervisors of said county of Los Angeles a certain false and fraudulent claim, bill, account, and demand on the treasury of the said county of Los Angeles, and against the said county of Los Angeles, the said board of supervisors of the said county of Los Angeles being then and there authorized to allow, pay, and order the same to be paid if genuine; which said false and fraudulent claim, bill, account, and demand was and is in the words and figures as follows, to wit:

"Demand of Dr. R. S. Lanterman. P. O. Address, Los Angeles. On the Treasury of the County of Los Angeles, State of California. For the sum of eight 40—100 dollars. Being for traveling expenses outside county seat on official business. [Here follows dates, items, and amounts thereof.] Expenditures authorized and approved by me.

"State of California, County of Los Angeles—ss. The undersigned, being duly sworn, says: That the within claim and the items and statements as therein set out, are true and correct; that no part thereof has been heretofore paid, and that the amount therein is justly due this claimant, and that the same is presented within one year after the last item thereof has accrued. [Sign here.] R. S. Lanterman.

"Subscribed and sworn to before me this day of Feb. 26, 1907. By Fred J. Williams, Notary Public in and for the County of Los Angeles, State of California.

"\$8.40. Demand of R. S. Lanterman on the treasury of the county of Los Angeles, state of California, for Traveling Expenses Coroner.

"Filed Feb. 26, 1907. C. G. Keyes, County Clerk, by P. B. Spears, Deputy Clerk.

"I have examined the within claim and find the same is a legal charge against the county for the sum of \$8.40. J. D. Freder-

icks, District Attorney, by Fleming, Actg. Chf. Deputy.

"Examined and approved. George Alexander, Supervisor.

"Allowed by the board of supervisors March 18, 1907, in the sum of \$8.40, payable out of general fund. Attest: C. G. Keyes, Clerk of the Board of Supervisors, by J. W. Powell, Deputy Clerk.

"Countersigned: C. E. Patterson, Chairman Board of Supervisors.

"Warrant No. 5805. \$8.40.

"Allowed Mar. 18, 1907, for the sum of eight 40/ dollars, payable out of general fund. H. G. Dow, County Auditor, by Deputy Auditor.

"I do hereby appoint my attorney to receive from the county treasurer the money on the within demand. [Sign here.]..... Dated190.....P. O. Address.

"(Paid Mar. 23, 1907. John N. Hunt, L. A. County Treasurer.)

"Received payment, 3—23—1907. R. S. Lanterman."

—followed by full allegations as to the falsity of said claim and defendant's knowledge of such facts.

There is nothing in the indictment showing that any part of the claim set out in full therein constituted indorsements thereon, but, as alleged, the entire matter following the jurat of the notary, down to and including the words, "Received payment, 3—23—1907, R. S. Lanterman," as written therein and constituted a part of the claim as presented to the board of supervisors on February 26, 1907. Appellant's counsel contend, however, that, although not directly alleged, it is apparent that all of that portion of the claim as set out in the indictment following the notary's jurat consists of and is indorsements made thereon after the presentation of the claim and by others than defendant.

Section 72 of the Penal Code, under which the indictment was found, is as follows: "Every person who, with intent to defraud, presents for allowance, or for payment, to any state board or officer, or to any county, town, city, ward, or village board, or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing is guilty of felony."

The chief objection which appellant urges in support of his contention that the indictment is insufficient is the absence therefrom of any allegation of fact which, conceding the claim to be genuine, would warrant the board of supervisors in allowing or ordering the same paid. According to section 957 of the Penal Code, the word "genuine," as used in section 72, must be construed according to its usual acceptance in common language. As so used it means true, real, correct, as distinguished, from false, fictitious, spurious, or simulated. Century Dictionary; Am. & Eng. Ency. of Law, vol. 14, p. 1003. As here

used, it has reference to the statement of amount, purpose for which, and date when the disbursements were made, as set forth in the account upon which the claim is based. It refers to the items of the account. That the claim is genuine means simply that the account and the items therein stated, and the purpose for which the expenditures are alleged to have been made, are true and correct. Now, assuming that in the sense we have stated, namely, that defendant had on account of traveling expenses outside county seat on official business made the disbursements as itemized and set forth in his account, it must, nevertheless, to constitute the offense, further appear that the claim was one which the board had authority to allow. If a claim based upon a false and untrue account be presented for allowance to a board of supervisors with intent to defraud, and it be apparent from the claim itself that the items thereof are such that in no event could the board allow it, then such presentation of the claim, though allowed and paid, constitutes no offense under section 72, for the reason that one of the essential elements of the crime is wanting. Even if genuine, it is not a claim which the board is authorized to allow. If, on the other hand, the authority to allow such claim so presented depends upon the existence of some fact not apparent from the account itself, then such fact, in order to warrant the board in allowing the claim if genuine, must be made to appear to the satisfaction of the board. Now, since the statute contemplates that there may be genuine claims presented which the board has no authority to allow, and since one of the essential elements of the offense is that the claim presented, "if genuine," must be one which the board is authorized to allow (People v. Howard, 135 Cal. 269, 67 Pac. 148), it necessarily follows that an indictment under said section 72 must contain allegations in proper and legal form from which the court may conclude, as a matter of law, that the accused is charged with presenting a claim which the board is authorized to allow.

The claim which defendant is charged with presenting is headed as follows: "Demand of Dr. R. S. Lanterman. P. O. Address, Los Angeles. On the Treasury of the County of Los Angeles, State of California. For the sum of eight 40—100 dollars. Being for traveling expenses outside county seat on official business." It will, we think, be readily conceded that there is nothing in this heading, nor in the body of the claim or items constituting the account, which would warrant the board in allowing defendant anything on account of traveling expenses outside the county seat on official business. Therefore the authority of the board to allow it must be predicated upon some fact which existed at the time of its presentation and by reason whereof the board possessed such power. We do not understand the Attorney

General to question this conclusion. He does contend, however, that the allegation contained in the indictment, to wit: "the board of supervisors of the said county of Los Angeles being then and there authorized to allow, pay and order the same (the claim) to be paid, if genuine," is a sufficient allegation of such fact. We are forced to a contrary view. Not only is this allegation objectionable by reason of its being in the form of a recital, but in substance it is, at most, a mere legal conclusion, which in the mind of the pleader might be based upon any one of a variety of circumstances affording to defendant no means of knowing what facts would be relied upon at the trial to justify the conclusion.

Respondent insists that the statute (section 118, Pen. Code) defining "perjury" contains provisions analogous to section 72, in that one of the elements of the crime is that the false testimony must be material to the issues tried, and cites, among other cases, *People v. De Carlo*, 124 Cal. 467, 57 Pac. 383, and *People v. Ah Bean*, 77 Cal. 12, 18 Pac. 815. In the latter case it is said: "There are two modes by which the materiality of the alleged false statement may be shown in criminal pleading: (1) By setting forth the nature of the issue and the evidence given thereon, so that, as a matter of law, it may be said the testimony upon which the perjury is assigned is material to the issue; (2) by showing an action at issue in a court of competent jurisdiction, the testimony given, its willful and felonious falsity, coupled with the averment that it was material to the issue." The approval of the second mode of pleading the materiality of the testimony is due to the fact that section 966 of the Penal Code, with respect to alleging this element of the offense, expressly provides that the indictment is sufficient if it set forth such fact, "with proper allegations of the falsity of the matter on which the perjury is assigned." For this reason the cases cited by respondent, wherein the sufficiency of an indictment for perjury was the subject of the controversy, have no application to the case at bar. Discussing another element of the offense of perjury (*People v. Cohen*, 118 Cal. 74, 50 Pac. 20), the court, in considering the sufficiency of an indictment wherein it was alleged that the oath was administered by an officer authorized by law to administer oaths, it also being alleged that such officer was a deputy county clerk, and the proceeding being a preliminary examination before a superior judge sitting as a magistrate, says: "One of the primary elements requisite to constitute the offense of perjury is that the violated oath shall appear to have been administered by competent authority. * * * But, assuming that the magistrate may competently employ a clerk or other officer to perform this function, it is obvious that it should, to show authority in such officer, be alleged that the act was done at the direction of the magistrate. There is no such averment here, except it be by mere

inference or legal conclusion, and that is not sufficient. The fact being material, it must be directly averred to satisfy the rules of pleading, even in a civil action, and, a fortiori, in a criminal pleading." Respondent cites *People v. Bibby*, 91 Cal. 470, 27 Pac. 781, wherein the court considered the sufficiency of an indictment for forgery; the charge being that a superintendent of schools had forged a certain order upon himself purporting to have been signed by two of the school trustees. It was there contended that the indictment was defective in not averring that the purported signers were school trustees. The court held the indictment sufficient upon the ground that the order forged was upon its face valid and fulfilled every requirement of the law, citing in support of its conclusion *Ex parte Finley*, 66 Cal. 264, 5 Pac. 223, wherein the court says: "The rule does not require that the indictment * * * shall contain an express allegation of the existence of every fact the existence of which is assumed in the forged writing." Clearly the principle there enunciated could have no application to the case at bar. The authority of the board to allow the claim in question is not a fact the existence of which is assumed by presenting a claim which upon its face shows it to be one which it could not allow. The question here involved was not one of the issues discussed in *United States v. Reichert* (C. C.) 32 Fed. 142, *Ingraham v. United States*, 155 U. S. 434, 15 Sup. Ct. 138, 39 L. Ed. 213, and *People v. Mahony*, 145 Cal. 104, 78 Pac. 354. There is no principle enunciated in these cases which, if applied to the indictment in question, could sustain it as being sufficient.

The question as to whether or not the board had authority to allow the claim, if genuine, is a question of law (*Branham et al. v. City of San Jose*, 24 Cal. 585; *Callahan v. Broderick*, 124 Cal. 83, 56 Pac. 782; *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133; *Spaulding v. Wesson*, 84 Cal. 141, 24 Pac. 377), depending upon the existence of facts which should be directly averred, and upon trial, unless admitted, established by legal evidence. The ground upon which the authority of the board was predicated is the fact, as proven at the trial, that at the time of presenting the claim defendant was coroner of the county of Los Angeles, and presented the claim for expenditures made by him in such official capacity. These facts should have been averred in the indictment. When taken in connection with subdivision 9 of section 159, County Government Act (Gen. Laws 1906, p. 178), which provides that such coroner is entitled to reimbursement for "his actual necessary expenses in traveling outside the county seat," they clearly disclose that the claim was one which the board was by law authorized to allow, provided it was genuine.

Conceding the necessity of averring facts from which the court may determine the authority of the board to allow the claim, it is

nevertheless insisted that, measured by such rule, the indictment is sufficient. This contention is based upon the fact that, immediately following the signature and official designation of the notary before whom defendant verified the claim, there is what appears to be an indorsement upon the claim, as follows: "Demand of R. S. Lanterman on the treasury of the county of Los Angeles, State of California, for traveling expenses coroner." Appellant insists, and it is not denied by respondent, that this is an indorsement upon the back of the original indictment; hence, no part of the claim, as presented by defendant. Appellant further contends that, if this so-called indorsement is considered part of the claim, then other indorsements showing the claim to have been allowed and paid must likewise be considered, from which it would appear that the board had no authority to allow the claim, for the reason that it was apparent from the face thereof that it was one already allowed and paid. However this may be, we are clearly of the opinion that the sentence above quoted cannot, whether regarded as an indorsement upon the back of the claim, or otherwise standing alone and disconnected, be construed as an allegation direct and certain showing the offense charged. Pen. Code, § 952. Every fact necessary to allege in the indictment should be stated positively, and where a direct allegation of a material fact is necessary it cannot be supplied by intendment or implication. *People v. Cohen*, 118 Cal. 79, 50 Pac. 20. Pleadings must be strictly construed against the party making them. Material allegations must be distinctly stated and not be inferred from doubtful or obscure language. *Gates v. Lane*, 44 Cal. 392. The obscure and disconnected use of the word "coroner" inserted in the manner here shown would not "enable a person of common understanding to know what was intended." Pen. Code, § 950. A complaint to recover in a civil action otherwise sufficient, but alleging the claim to be one which the board was authorized to allow, and stating the claim as presented contained an indorsement in the language above quoted, would be wholly inadequate to constitute a cause of action. Measured by the rules applicable to civil pleadings, the indictment is fatally defective, and the demurrer thereto should have been sustained.

Another assignment of error upon which appellant bases his claim for reversal is the fact that the court, over his objection, received in evidence certain reports made by two conductors of passenger trains operating over the Salt Lake Railway between Los Angeles and Pomona. In the demand made upon the board defendant claimed that he had on January 22, 1907, made a trip to Pomona upon official business, at which time he had paid the sum of \$1.50 for transportation. The theory of the prosecution and that upon which defendant was tried was that he did not pay any railway fare

upon this occasion, but, as a matter of fact, traveled upon a pass, No. 2,255, shown to have been theretofore issued to him by some official of said Salt Lake Railway Company. Upon the trial these two conductors, C. M. Hitchens and Samuel T. Gee by name, were called as witnesses on the part of the prosecution, each of whom was shown a document which he testified, as to the one so presented, was a report of passes and free transportation honored by him on January 22, 1907, while in charge of a train operating over said road. These reports were made to and filed with the auditor of the road pursuant to a rule of the railway company requiring such reports to be made of each trip by conductors of its trains. The report of each conductor was in his own handwriting and made on the said 22d day of January, or the day following. Upon each of said reports, in the column marked "Pass Number," are the figures "2255," indicating that a pass of that number was on that day honored for transportation; but there is nothing thereon, nor in the testimony of either witness, to show the distance for which or points between which such pass was so honored. As to the report made by the witness Gee, no evidence whatever was offered touching the truth of the matters contained therein. As to the statements by witness Hitchens contained in his report, he was by the district attorney asked the question: "Well, is this a correct report?" To which he replied: "Well, it is so far as I know. I haven't had any corrections from the ticket auditor saying that it was wrong or anything of that kind." Thereupon both reports were, over defendant's objection, admitted in evidence, exhibited, and read to the jury. The answer given by the witness Hitchens in reply to the question of the district attorney as to the correctness of his report cannot be regarded as a statement that the same was true, for the reason that it is apparent from the answer that the witness understood the question as referring to the form of the report rather than the truth of the matter therein contained. Therefore both reports were received in evidence contrary to the general rule which requires oral evidence to be delivered under the sanction of an oath. We may concede an exception to this general rule where the witness making the entry or report is dead or beyond the jurisdiction of the court, and that a showing of such fact entitles such evidence to admission. *Sill v. Reese*, 47 Cal. 342. No facts, however, are made to appear which would bring this case within such exception. The witnesses who made the entries are neither dead nor beyond the court's jurisdiction. On the contrary, both were present in court on the witness stand, and the sole fact sought to be established by the documents offered was that this pass had been honored for transportation on said January 22, 1907. Under these circumstances,

we can conceive of no ground which justified the proving of such fact by these unverified reports rather than by the sworn testimony of the witnesses on the stand who made them.

The documents do not purport to be official records the originals or duly certified copies of which are entitled as such to admission in evidence, neither are they a public record of a private writing the original of which record or certified copy thereof may be received in evidence. Code Civ. Proc. § 1919. At most they were mere private memoranda of the facts of a transaction made by a third party. As to such documents the Code (section 2047, Code Civ. Proc.) provides: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution." Under this section, the memoranda at most could only be used by the witnesses for the purpose of refreshing a tardy memory to enable them to testify; the defendant having the right as a part of the cross-examination to read them to the jury. Says Coen and Hill in their Notes to Phillips on Evidence: "He (the witness) will not be permitted to read his notes or memoranda to the jury, nor can they be admitted as evidence to the jury in any sense." 1 Phillips on Ev. (4th Am. Ed.) 586, note 170. This language is quoted with approval by our Supreme Court (*Reid v. Reid*, 73 Cal. 209, 14 Pac. 783), where it is said: "This general rule seems to be embodied in the Code of Civil Procedure, for, after providing that the adverse party may read the memorandum to the jury, it has the following: 'So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts.'" In view of the presence in court of the witnesses who made the reports, and the provisions of said section 2047, the cases cited by the Attorney General from other jurisdictions wherein reports of train dispatchers and like employes were admitted upon the ground of necessity as constituting the best evidence, can have no application to the case at bar.

The only evidence, other than that contained in these reports, tending to show that defendant had used the pass, was that given by one Sage, as follows: "I recall accompanying the defendant to Pomona on

January 22d in the case of J. Bermudes. I did not see defendant pay any car fare on that day. He tendered a pass on the Salt Lake Road. * * * I do not remember the exact date of the trip to Pomona on the Bermudes Case. I think it was in the latter part of January. * * * I sat with Dr. Lanterman. * * * I think Dr. Lanterman and I sat together all the way from Los Angeles to Pomona. * * * I paid my fare by presenting a pass. I did not examine Dr. Lanterman's pass on this particular trip. I did not pay any particular attention as to the way he paid his transportation." This testimony is vague, uncertain, and unsatisfactory, and it cannot be said that the jury would have rendered a verdict without the proof contained in these reports. It must therefore be conceded that their erroneous admission was prejudicial to the substantial rights of appellant.

The foregoing views render it unnecessary to consider other assignments of error.

The judgment and order appealed from are reversed.

ALLEN, P. J., and TAGGART, J. While we do not approve of the views expressed in the foregoing opinion in relation to the insufficiency of the indictment, we nevertheless concur in the judgment of reversal upon the grounds last stated.

155 Cal. 294

INDEPENDENCE LEAGUE v. TAYLOR,
Mayor, et al. (S. F. 4,999.)

(Supreme Court of California. March 6, 1909.)

ELECTIONS (§ 52*)—BOARD OF COMMISSIONERS
—REPRESENTATION OF POLITICAL PARTIES.

Where the records of the Secretary of State disclosed that a candidate for Governor was a candidate of the Democratic and Union Labor parties, that another was a candidate of the Independence League party, and that another was the candidate of the Republican party, and also disclosed the fact that the Democratic and Union Labor party candidate received 11,650 votes in the city and county of San Francisco, of which not more than 6,500 were votes of the Democratic party, and that Independence League candidate received 10,523 votes, and that the Republican candidate received 12,903 votes, the mayor of the city and county of San Francisco, in making appointments of election commissioners, as required by the charter, providing that two shall be chosen from each of the two parties casting the highest vote for Governor at the preceding election, must consult the official records of the Secretary of State, and appoint two from the Independence League, instead of from the Democratic party.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 46; Dec. Dig. § 52.*]

In Bank. Mandamus by the Independence League, a political party, against Edward S. Taylor, as Mayor of the City and County of San Francisco, and others, to compel the appointment of two persons selected from the Independence League as members of the Board of Election Commissioners. Peremptory writ awarded.

Daniel O'Connell and Hugh J. McIsaac, for petitioner. William B. Kollmyer, Hillyer,

Mann & O'Brien, and Kirk & Kirk, for respondents.

BEATTY, C. J. The opinion of the court overruling a general demurrer to the petition of the Independence League in this cause will be found reported in 97 Pac. 303. It was there held, upon the facts confessed by the demurrer, that it was the plain statutory duty of the mayor to appoint two members of the Independence League as its representatives on the board of election commissioners of the city and county of San Francisco, and, further, that the party as a corporate body could invoke any proper legal remedy for the enforcement of its statutory rights. There remained, to be tried, however, after the demurrer was disposed of, certain issues of fact raised by the answer of the mayor, wherein it was alleged in effect that at the general election of 1906 the Democratic party polled a larger vote in said city and county for its candidate, Theodore A. Bell, than the Independence League polled for its candidate, William H. Langdon. Other minor issues relating principally to questions of procedure were also presented, but they were practically eliminated at or prior to the hearing by agreement of the parties, and since there had been no question at any time as to the number of votes (10,413) received by Mr. Langdon in the city and county, the evidence at the hearing was limited to the question as to the number of Democratic votes cast for Mr. Bell. The evidence offered by the petitioner, and admitted subject to any objection to its competency, was the testimony of the registrar of voters of San Francisco and another witness to the effect that the duplicate returns made to the registrar in pursuance of the requirements of section 1261 of the Political Code, show that of the votes cast for Bell at said election in said city and county 6,634 were from Democratic voters, and 4,979 were cast by voters of the Union Labor ticket. The fact that Mr. Bell had been regularly nominated for Governor by both the Democratic party and the Union Labor party was admitted, and if we are to accept this evidence we are satisfied that the figures given show with substantial accuracy the number of Union Labor votes to be deducted from his total vote in order to determine whether the Democratic vote for Mr. Bell was equal to the vote for Langdon, the candidate of the Independence League. But the competency of this evidence is denied by the mayor, who insists that the best and only competent evidence of the number of Democratic votes cast for Mr. Bell in San Francisco is that contained in an official "statement of the vote of California at the general election held November 6, 1906," which was compiled and issued by the Secretary of State. This report embraces a detailed statement of the vote cast in every county of the state for each of the candidates for state offices, for representatives in Congress, for members of the Legislature, and

for and against proposed amendments to the Constitution. It is, in short, a transcript of the record of the official canvass, and with respect to the office of Governor it merely shows that in the city and county of San Francisco Theodore A. Bell (Democrat) received in the aggregate 11,650 votes, and William H. Langdon (Independence League) 10,523 votes. It was by this report that the mayor was guided in making his appointments to the board of election commissioners, and the question to be decided here is reduced to this: What was the evidence by which he should have determined which party had cast the highest vote for Governor in the city and county of San Francisco?

The provision of the city charter (quoted in our former opinion) which governs the action of the mayor in making these appointments seems to have been based upon the assumption that there was some authentic source of information to which he might have recourse for the purpose of ascertaining what had been the party vote for Governor at the last preceding election; and, in fact, the records in the office of the Secretary of State, including the official canvass and the party tickets filed in pursuance of those sections of the Political Code embodying the reform ballot law, would have afforded the necessary information in the case of all candidates who were nominees of only one party. But when, as in the case of Mr. Bell, the nominee of one party was indorsed by another party, and thereby made its nominee, there was no strictly legal provision, and there is not today any provision, for segregating his vote according to the party affiliations of his supporters. It seems from the evidence in this case that the various precinct officers in making their duplicate returns to the registrar did certify to the number of votes cast for Mr. Bell by persons voting the Democratic ticket, and separately the number cast by persons voting the Union Labor ticket, and it is conceded that the vote of each precinct was so recorded by the voting machine that this segregation could be correctly made; but the action of the precinct officers in making the segregation was purely gratuitous. Section 1174 of the Political Code, which prescribes the form of the poll lists and tally lists, which together with the ballots (where ballots are used) constitute the precinct return, does not even require any statement of the party affiliation of a person voted for. All that it requires is a list of all persons voting and the number of votes cast for each person voted for. Whatever else it may contain is extraofficial, and of no more conclusive force than other extraofficial acts. The board of supervisors, in making their return to the Secretary of State of the result of their canvass of the precinct returns, took no notice of the segregation of Mr. Bell's vote, merely reporting that Theodore A. Bell (Democrat) received 11,650 votes. We have not been cited to any provision of law which

made it their duty to even mention the fact that Mr. Bell was a Democrat. Section 1282 of the Political Code, which prescribes the character of record to be made by the board of supervisors of the result of their canvass of the county vote, does not require it to contain any indication of the party affiliation of the persons voted for, and everything in excess of its requirements is extraofficial.

The result of our inquiry thus far is to demonstrate the fact that in a case of this kind, where the same person is the nominee of two regular parties for the office of Governor, there would never be found in the strictly official records of the city and county of San Francisco, or of the Secretary of State, any segregated statement of his party vote, and if the charter provision governing the appointment of election commissioners is not to be treated as a dead letter in such a case, the mayor must resort to other than strictly official records in order to determine which of two or more parties with a common nominee for the office of Governor is entitled to representation on the board. We do not think that the charter provision can be disregarded in any case because there does not appear to be evidence of the highest and most authentic character of the number of votes cast by the several political parties for Governor or presidential electors. And we think that in this case there was evidence of a very cogent character which ought to have been entirely satisfactory to the mayor that the Democratic vote for Mr. Bell in the city and county of San Francisco was less than the Independence League vote for Mr. Langdon. That evidence was, moreover, of the same character, and was obtainable from the same source as that upon which the mayor acted without, as we think, sufficient consideration.

The Secretary of State, in order to perform his duty under the ballot law, must know what parties are entitled to present lists of nominees at any state election, and therefore must know the percentage of the party vote at the last preceding election. To guide him in making his estimate in the case of a party which has indorsed some of the candidates previously nominated by another party, it is expressly provided that: "In determining the question whether such political party had cast such three per cent of such vote as specified in this section the vote shall be considered and computed only, which was cast for a candidate or candidates, of such party at said last preceding election, who was not, or were not previously, nominated by a convention of any other political party or organization than the party holding the convention referred to in such certificate." Section 1186, Pol. Code, as amended in 1907 (St. 1907, p. 657, c. 345). This amendment, of course, was passed without any reference to the special provisions of the San Francisco charter, but it was the authority upon which the secretary acted in making up his record

of the vote for the different candidates for state offices at the election of 1906, for use in 1910. The Union Labor party, had indorsed the candidates of other parties for every state office except treasurer, for which office it had a candidate exclusively its own, Mr. F. E. Haskell, who received 5,582 votes in the city and county of San Francisco, against 6,075 votes for Mr. S. S. Bayley, the Democratic candidate. These figures indicate, roughly perhaps, but sufficiently for the purpose of solving the question before us, the relative vote of the Democratic and Union Labor parties for Governor. They prove, in other words, that, of the votes received for Mr. Bell, nearly one-half must have been cast by Union Labor voters, and that even allowing that not more than one-fifth of the number were Union Labor voters, the remaining four-fifths added to the Bell vote from other sources would not equal the vote for Mr. Langdon. We think that it was a very reasonable and proper course for the mayor to take to consult the official records in the office of the Secretary of State in his effort to determine the party vote for Governor in 1906; but we think he should have given equal consideration to other records of equal dignity and importance to the simple statement that Theodore A. Bell (Democrat) received 11,650 votes. He would have seen from the certificates of nomination that Mr. Bell was as much the candidate of the Union Labor party as of the Democratic party, and he would have seen by the vote for State Treasurer that in the city and county of San Francisco the vote of the two parties was nearly equal, and the conclusion to be drawn from these facts was that members of the Independence League were alone eligible to fill the vacancies in the board of election commissioners.

Upon this view of the sources of official information open to the mayor, it seems unnecessary to discuss the question as to the competency of the precinct returns which, if competent, would only confirm the official record. In any view, the evidence of the material fact is conclusive in favor of the petitioner.

The failure of the members and official representatives of the Independence League to present their claims to recognition, with the evidence supporting them, at or before the date when the vacancies in the commission occurred, relieves the mayor of any imputation of a deliberate purpose to ignore their rights as a party, and, if the controversy affected only private interests, might be deemed a sufficient ground for refusing a peremptory writ; but the enforcement of the charter provision in question here vitally concerns the public. It is a provision intended and adapted to secure fair elections, and the duty it imposes must be performed irrespective of default or negligence on the part of the individuals who may appear to be most directly interested.

It is ordered that a peremptory writ of mandate issue as prayed.

We concur: HENSHAW, J.; MELVIN, J.

ANGELLOTTI, J. I concur in the judgment. So far as this conclusion involves the holding that mandamus will lie to compel the making of an appointment to office in a case where the appointing power has already purported to act and his appointee is in fact occupying the office, on the theory that such appointment was illegal, the question should be regarded as settled for the purposes of this case by the ruling heretofore made in overruling the demurrer to plaintiff's petition. 97 Pac. 303. It was then held that mandamus would lie in such a case to compel the making of a legal appointment. The facts alleged in the petition showed a clear legal right on the part of plaintiff to have the two election commissioners then to be appointed to be selected by the mayor from members of the Independence League party, for the reason that they clearly and indisputably showed that such Independence League party had at the last preceding general election, the general election of 1906, cast the second highest vote for Governor.

While the answer of the mayor since filed raises an issue of fact as to this, I think that the official records of the Secretary of State relative to the general election in question practically demonstrate that the Independence League cast the second highest vote for Governor in the city and county of San Francisco at that election. The records of that office necessarily showed the nominations of each party for the various state officers. Gov. Gillett was the nominee of the Republican party, Mr. Langdon was the Independence League nominee, and Mr. Bell was the nominee of both the Democratic and Union Labor parties. Gov. Gillett received in San Francisco 12,903 votes, Mr. Bell 11,650 votes, and Mr. Langdon 10,523 votes. The records fail to show, as we have seen in the opinion of the Chief Justice, how many votes Mr. Bell received by reason of his candidacy on the Democratic ticket, and how many by reason of his candidacy on the Union Labor ticket. It is shown, however, in that opinion, that in the one case in which the Union Labor party had a candidate for a general state office, viz., the office of treasurer, that candidate, a Mr. Haskell, received 5,582 votes, and that the Democratic candidate for the same office received more than 5,000 votes less than Mr. Bell. The record showed that the Independence League nominee for the same office received 8,944 votes. I am by no means satisfied that the vote on this office alone would be sufficient to clearly show the relative vote of the various parties on the office of Governor; but taken in connection with the vote on the other general state offices, except the two justices of the Supreme Court for a long term, which af-

fords no information, the showing is too clear to admit of doubt. For the office of justice of the Supreme Court for the unexpired term, there was no Union Labor nominee, and no candidate had more than one nomination. Justice Sloss, Republican, received 15,600 votes, Mr. Mills, Independence League, received 8,728 votes, and Mr. Craig, Democrat, received 5,859 votes. For all the other offices, at least one of the candidates had two or more nominations. For the offices of Secretary of State, Surveyor General, and State Printer, the Republican nominees had also the nomination of the Union Labor party, receiving, respectively, 20,714, 20,118, and 20,590 votes; the Democratic candidates for the same offices receiving, respectively, 5,808, 6,032, and 5,842 votes, and the Independence League nominees receiving, respectively, 8,700, 9,012, and 8,834 votes. For the offices of Lieutenant Governor, Attorney General, and clerk of the Supreme Court, the Democratic nominees, had also the nomination of the Union Labor party, receiving, respectively, 11,593, 11,135, and 11,349 votes; the Republican nominees for the same offices receiving, respectively, 14,050, 15,166, and 14,846 votes, and the Independence League nominees receiving, respectively, 9,473, 8,861, and 9,004 votes. For State Controller, the Republican nominee had also the nominations of the Union Labor party and the Independence League, and received 29,262 votes, as against 5,957 votes received by the Democratic nominee. For the office of superintendent of schools, the Republican nominee had also the Independence League nomination and received 23,714 votes, as against 11,420 votes received by the candidate who had both Democratic and Union Labor nominations. It thus appears: That in each of the five cases where the Democratic party had a separate candidate, its vote was between 5,800 and 6,032; that in each of the eight cases where the Independence League had a separate candidate, its vote was between 8,700 and 10,523; that in each of the five cases where the Democratic candidate had also the Union Labor nomination, the vote for such candidate was increased by between 5,000 and 6,000 votes; and that in each case where the Republican candidate had also such Union Labor nomination, substantially the same result followed. These figures demonstrate the relative strength of the various parties in the city and county of San Francisco at this election, and to my mind clearly establish to an extent that leaves the matter beyond the range of dispute the fact that the Democratic party did not cast more than 6,500 votes of the votes received by Mr. Bell for Governor, and therefore that the Independence League did cast the second highest vote for Governor.

The language of the charter, as quoted in the former opinion, shows that the ultimate purpose to be accomplished in regard to the selection of election commissioners from dif-

ferent parties is that there shall be "equal representation at all times of the two political parties casting the highest vote at the general election last preceding the appointment in question." The preceding provision, that the appointment must be made with reference to the vote cast for Governor, is merely the means provided by the section for the determination of the real question: Which of the two political parties has the greatest number of members? It was necessary for the mayor to ascertain which party was entitled to the appointment of election commissioners by reason of its being the party casting the second highest vote for Governor. Cases can be imagined in which this question of fact would be very difficult of solution. The vote might be of such a nature, especially in the case of a nearly equal vote, as to leave it extremely uncertain which party did in fact cast the second highest vote for Governor, and in such a case it may be that relief by mandamus would have to be denied, on the ground that the petitioner had not clearly and indisputably shown his right to the performance of the act sought. In this case, however, as we have shown, no such difficulty exists. The fact from which the mayor was required to act by appointing members of the Independence League was easily and satisfactorily ascertainable from a mere inspection of the official records contained in the office of the Secretary of State.

We concur: SHAW, J.; SLOSS, J.

155 Cal. 287

WARD v. SHERMAN. (L. A. 2,016.)

(Supreme Court of California. March 6, 1909.)

1. APPEAL AND ERROR (§ 1208*)—REVERSAL—RESTITUTION.

Where a judgment is reversed on appeal, a party is in general entitled to restitution of all things lost through the judgment below, and courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously; restitution being properly directed in the original action itself under the express terms of Code Civ. Proc. § 957, or in a separate action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4705, 4706; Dec. Dig. § 1208.*]

2. APPEAL AND ERROR (§ 1208*)—REVERSAL—RESTITUTION.

In an action for restitution of things lost by a judgment for defendant afterwards reversed, defendant must account for the property received under such judgment; the rule governing his liability being that applicable to trustees.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4701, 4704; Dec. Dig. § 1208.*]

3. APPEAL AND ERROR (§ 1208*)—REVERSAL—RESTITUTION.

Though judgment awarding a ranch and personalty thereon to defendant was reversed, he is not liable to plaintiff if he and those holding under him conducted the business diligently, excepting a useless expenditure of \$1,000, if the expense incurred exceeded more than \$1,000 the

amount received as proceeds, and if all the property, excepting that properly used or lost without defendant's fault, has been returned to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4701, 4704; Dec. Dig. § 1208.*]

4. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS—CONCLUSIVENESS.

The Supreme Court will not disturb a trial court's findings on a substantial conflict of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

5. APPEAL AND ERROR (§ 209*)—PRESENTATION OF OBJECTIONS IN LOWER COURT—INDEFINITE EVIDENCE—CROSS-EXAMINATION OF WITNESSES.

If plaintiff, on issues respecting receipts and expenditures by defendant, desired more specific information than was given by defendant's witnesses, he should have obtained it by cross-examination, and, failing to do so, he cannot complain on appeal that the evidence was indefinite.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1290; Dec. Dig. § 209.*]

6. APPEAL AND ERROR (§ 1208*)—REVERSAL—RESTITUTION.

On a sale by defendant of property received under a judgment afterwards reversed, plaintiff could pursue the property, or claim the proceeds, but could not demand both.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4704-4706; Dec. Dig. 1208.*]

7. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS.

On an accounting, error in failing to find on an issue of the normal increase of live stock during defendant's possession was harmless, where the court found that plaintiff received all the cattle not disposed of in properly managing the business or without defendant's fault.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4239; Dec. Dig. § 1071.*]

8. TRIAL (§ 396*) — FINDINGS — ISSUES NOT RAISED BY PLEADINGS.

There need be no finding on an issue not raised by the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 935; Dec. Dig. § 396.*]

9. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—EXCLUSION OF TESTIMONY.

Any error in excluding testimony was harmless, where the testimony was subsequently received.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4200; Dec. Dig. § 1058.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas Monroe, Judge.

Action by John M. Ward against Moses H. Sherman. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

Variel & Hannon, for appellant. John D. Pope, for respondent.

SLOSS, J. In December, 1899, the district court of Maricopa county, territory of Arizona, in an action brought by John M. Ward, plaintiff herein, against Moses H. Sherman and one Hardenberg, entered its decree adjudging that Moses H. Sherman, one of the defendants in that action and the defend-

ant herein, was the owner and entitled to the possession of the "Sun Flower cattle range," together with the cattle, horses, mules, wagons, harness, farm tools, and machinery thereon. On January 10, 1900, the plaintiff, in accordance with said judgment and by reason thereof, surrendered to Sherman the possession of all the property described in said judgment, consisting of about 2,400 head of horned cattle (the exact number not being susceptible of ascertainment), 54 head of horses and mules, and certain other personal property, together with the range upon which the cattle and horses were grazing comprising 462 acres of patented land owned by plaintiff and the surrounding public domain to an extent of 10 or 15 miles. Plaintiff appealed from said judgment to the Supreme Court of the territory of Arizona, which affirmed the judgment, whereupon plaintiff prosecuted an appeal from the judgment of the latter court to the Supreme Court of the United States, which court in January, 1904, made its judgment reversing the judgment of the Supreme Court of Arizona, and remanded the cause to that court with directions that it should reverse the judgment of the district court of Maricopa county and remand the cause thereto for further proceedings. The present action is brought to recover the cattle and horses and their natural increase, alleged to be 20 per cent. per annum, and the other personal property, or the value thereof, less the reasonable cost of managing the range and caring for the property, and for an accounting. Of the answer filed by the defendant, it will be sufficient, for the purposes of this appeal, to say that defendant alleged that, while he was in possession of the range, he managed it with care and economy, and that he necessarily expended in caring for said range and in capturing, caring for, and marketing said cattle more than all the money he did or could receive for them. The court found that the defendant took possession of the property after the entry of the judgment in the district court of Maricopa county, and retained possession until some time in the year 1902, when he transferred it to one Gunn, who afterward transferred the same to one Smith. After the reversal of the judgment in the Supreme Court of the United States, to wit, some time in the year 1904, Smith surrendered said ranch and the property thereon to plaintiff, and plaintiff resumed possession of the same. It is found: That during the time that Sherman and Gunn and Smith were in possession of the ranch they cared for the cattle, horses, mules, and other property thereon and conducted the business of the ranch in the usual and customary way and with ordinary care and diligence, except that in the year 1900 Sherman paid for removing 616 cattle from the range \$1,000 more than it was reasonably worth to remove the same; that during the time Sherman, Gunn, and Smith were in possession of the ranch

they used a portion of the cattle and the proceeds thereof in conducting and defraying the necessary expenses of the business, but they did not use sufficient to defray all of said expenses, and after deducting \$1,000 overpayment for removing cattle, as above specified, there is still a deficiency in the cattle used and the proceeds of cattle sold to meet the necessary expenses of conducting the business of said range. There is a further finding to the effect that during the year 1900 the feed for the cattle on said range was insufficient by reason of drought and the inroads of large numbers of sheep which ate up the grass and feed, and in the use of ordinary care and judgment defendant removed and sold from said range from 600 to 800 head of cattle which it would not have been necessary to remove and sell except for the insufficiency of feed on the range during said year 1900, but in removing said cattle and selling the same defendant was not guilty of carelessness, negligence, or mismanagement, but acted with reasonable care, judgment, and discretion. Finally, it is found that "by reason of the inroads of sheep and drought the cattle on said range did not increase between the time when defendant took possession of said range and the time when the same was surrendered to plaintiff, and all the cattle, horses, and other property that were on said range, except such as had died or disappeared without fault of defendant or said Gunn or said Smith, were surrendered to plaintiff with said range during the year 1905." Upon these findings the court concluded that plaintiff was not entitled to recover from the defendant, and that the defendant should have judgment against the plaintiff for his costs. Judgment was entered accordingly, and the plaintiff now appeals from that judgment and from the order denying his motion for a new trial.

There is no dispute between the parties as to the rules of law governing an action of this kind. Where a judgment or decree of an inferior court is reversed by a final judgment on appeal, a party is in general entitled to restitution of all the things lost by reason of the judgment in the lower court; and, accordingly, the courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously. *Cowdery v. London, etc.*, Bank, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115; *Freeman on Judgments*, § 482. The restitution may be directed and provided for in the original action itself (Code Civ. Proc. § 957), or may, as here, be sought in a separate action instituted for that purpose (*Cowdery v. London, etc.*, Bank, *supra*, and cases cited). In such action the defendant must account for the property received under the judgment which has been reversed, and the rule governing the extent of his liability is that applicable to a trustee, which, in 28 Am. & Eng. Ency. of Law (2d Ed.) p. 1059, is stated as follows: "The general doctrine being that trustees

ought to conduct the business of the trust in the same manner as an ordinarily prudent man of business would conduct his own, they will not be chargeable with more than they have received nor held responsible for losses that may arise, when they have acted in good faith and with common skill, prudence and diligence." Under these rules it seems perfectly clear that, if the findings of the court are sustained by the evidence, the necessary conclusion is that drawn by the trial court, namely, that the defendant was entitled to judgment in his favor. These findings are to the effect that the defendant and those who held the ranch and the personal property under him conducted the business of the ranch with care and diligence, with the exception of one item, in which they made an expenditure of \$1,000 more than should have been made, but that the expense properly incurred by them in conducting said business was more than \$1,000 in excess of the amount received by them as the proceeds of the ranch and of the cattle, and that all of the property, except so much thereof as had been properly used or lost by reason of circumstances for which the defendant and Gunn and Smith were not responsible, had been returned and surrendered to plaintiff.

It is strenuously insisted that the findings are not supported by the evidence, and in this connection the appellant points to the testimony of numerous witnesses to the effect that the rate of increase of cattle upon a range of this character amounts to about 20 per cent. per annum, and that, if this rate of increase had been maintained for the four years during which plaintiff was out of possession, the cattle returned to him would have exceeded by many hundreds the number actually surrendered. But, as against this, there is ample testimony to support the finding of the court that, during the years 1900 to 1904, drought and the inroads of sheep produced conditions so differing from those which had prevailed in preceding years that the range did not furnish sufficient food or water to support the number of cattle ranging thereon. This had a twofold result: The normal rate of increase was greatly diminished, and, in addition, it became necessary to reduce the number of cattle on the range in order that those remaining might subsist. There is no occasion to review the testimony of the different witnesses with reference to these points. It is enough to say that the record presents merely the familiar situation of a substantial conflict of evidence, and that in the face of such conflict this court cannot review the findings of the trial court.

Regarding the finding that the proceeds of sales of cattle by the defendant and Gunn and Smith were not sufficient to defray the necessary expenses of the business, it is true that the evidence was not as complete and detailed as it might have been. Witnesses did, however, testify to the aggregate amounts of the receipts and expenditures, and, if plain-

tiff had desired more specific information on these points, he could readily have obtained it by cross-examination. *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848; *Cassin v. Cole*, 153 Cal. 677, 96 Pac. 277.

The point is made that the defendant should have been charged with the sum of \$5,000 received by him from Gunn when he turned over the range to the latter. The testimony in this connection was that Gunn paid Sherman \$5,000 for the range, taking a quitclaim deed from him. This was no part of the proceeds for which Sherman was bound to account to plaintiff. Upon a sale by Sherman of the property received under the judgment which was afterwards reversed, the plaintiff might have had the right to pursue the property which was sold or to claim the proceeds of the sale, but obviously he could not demand both. Here the cattle sold to Gunn remained on the range, and such of them as were still there after the final reversal of the Arizona judgment were returned to plaintiff. The trial throughout seems to have proceeded on the theory that Gunn and Smith were claiming under Sherman, and that an accounting was to be made of their dealings with the cattle in precisely the same manner as of Sherman's dealings prior to the sale to Gunn. In this state of the case, the \$5,000 received by Sherman cannot be treated as a substitute for the cattle themselves, but must be regarded as the purchase price of Sherman's own interest in the litigation. In quitclaiming the range and the cattle to Gunn, he was in effect selling to the latter his chance of ultimately winning the litigation. If the judgment had been affirmed, Gunn would have held a good title; if reversed (as in fact it was), he would have paid \$5,000 for property which did not belong to his vendor. In either event the plaintiff herein, pursuing the property itself and getting it, was in no way interested in this \$5,000.

It is further claimed that the court erred in failing to find upon the issue of the normal ratio of increase of stock during the years defendant had possession. A finding upon this issue could not have affected the result in view of the further findings of the court that, while defendant was out of possession, the cattle did not increase, and that plaintiff received all of them except such as were disposed of in the proper management of the business or without the fault of the defendant.

The claim that the court should have found the reasonable cost of management, as well as the gross proceeds derived from the property by Sherman, during the years he had possession, is answered by the statement that no such issue was presented by the pleadings.

It is urged that the court erred in sustaining an objection to a question asked the witness H. C. Ward as to what should be the natural annual increase of the cattle on the

Sun Flower range. If the ruling was erroneous, any harmful effect which might have been produced thereby was obviated by the testimony of the witness, subsequently given, that no reason existed why with proper management of the range the rate of increase testified to (i. e., 20 per cent.) should not have obtained during the seasons 1900, 1901, 1902, and 1903.

The judgment and order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

155 Cal. 318

VARNEY & GREEN v. WILLIAMS, Town Marshal, et al. (S. F. 4,920.)

(Supreme Court of California. March 8, 1909.)

1. INJUNCTION (§ 85*)—ENFORCEMENT OF ORDINANCE—PUBLIC NUISANCE—INJUNCTION.

Where billboards constitute a public nuisance, equity will refuse any writ perpetuating their maintenance, regardless of the validity of an ordinance prohibiting billboards, under which defendant assumes to proceed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

2. EMINENT DOMAIN (§ 2*) — ORDINANCES — PROHIBITION OF BILLBOARDS—VALIDITY.

An ordinance absolutely prohibiting billboards displaying any advertisement, but permitting any person having a fixed place of business to maintain signs advertising his own goods, is invalid, as depriving one of his property without compensation in violation of Const. art. 1, § 14, though an ordinance prohibiting advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the person or property of the public, is within the police power.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 3; Dec. Dig. § 2.*]

Department 1. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Varney & Green against Amos O. Williams, town marshal of the town of East San Jose, and others. From a judgment for defendants, plaintiff appeals. Reversed.

Heller, Powers & Ehrman, for appellant. Jackson Hatch, for respondents.

SLOSS, J. The plaintiff, a corporation engaged in the business of posting bills, painting advertising signs, and conducting a general advertising business, brought this action to enjoin the municipal authorities of the town of East San Jose from tearing down certain billboards maintained by plaintiff in said town. The defendants based their contemplated action upon the provisions of an ordinance passed by the town trustees. Section 1 of this ordinance provides: "That every person who, within the corporate limits of the town of East San Jose, shall erect or maintain or cause to be erected or maintained, any billboard, signboard or other

structure for the purpose of painting or otherwise delineating or picturing or displaying thereon or thereby any advertisement of any goods, wares or merchandise whatsoever shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding two hundred dollars, or by imprisonment not exceeding two months or by both such fine and imprisonment." Section 2 makes it the duty of the marshal in the event of the erection or maintenance of a billboard in violation of section 1 to remove such board after notice to the offender. By section 3 the preceding sections are not to apply to any person having a fixed place of business in the town of East San Jose "who shall erect or maintain any advertisement sign on the premises where his said business is carried on * * * provided that such advertisement sign shall advertise only goods, wares and merchandise for sale by him at his said place of business." The court finds that plaintiff is maintaining within the corporate limits of East San Jose three billboards for advertising. These boards were constructed and are maintained with the consent of the owners of the property on which they are located. They are substantially constructed, and not liable to be blown down except in case of extraordinarily high winds. It is found that each of said boards is "offensive to the senses and an obstruction to the free use of property," and that "since their construction, and during their maintenance, they have been, and they are still, a public nuisance." Judgment was entered in favor of defendants. Plaintiff appeals from the judgment, and from an order denying its motion for a new trial.

If the billboards constituted a public nuisance, a court of equity would refuse any writ designed to perpetuate their maintenance, regardless of the validity of the ordinance under which defendants assume to proceed. *McQueen v. Phelan*, 4 Cal. App. 695, 88 Pac. 1099. But the finding that the boards did constitute a nuisance is attacked as contrary to the evidence. It is not contended by respondents that any nuisance in fact existed, unless it resulted from the mere circumstance that structures were maintained contrary to the terms of the ordinance. The single question for decision, therefore, is whether the enactment of this ordinance was within the legislative power of the town of East San Jose. Except for the limited exemption conferred by section 3, the effect of the ordinance is to absolutely prohibit the erection or maintenance of billboards for advertising purposes. There is no attempt to restrict the operation of the enactment to billboards that may be insecure or otherwise dangerous, or to advertising that may be indecent. The town trustees have undertaken to make criminal the maintenance of any billboard, however securely it may be built, and however un-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

objectionable may be the advertising matter displayed upon it. Such prohibition, involving a very substantial interference with the rights of property, can be justified, if at all, only to the extent that the subject-matter of the legislation is embraced within the police power of the state. Bearing in mind that the ordinance does not purport to have any relation to the protection of passers-by from injury by reason of unsafe structures, to the diminution of hazard of fire, or to the prevention of immoral displays, we find that the one ground upon which the town council may be thought to have acted is that the appearance of billboards is, or may be, offensive to the sight of persons of refined taste. That the promotion of æsthetic or artistic considerations is a proper object of governmental care will probably not be disputed. But, so far as we are advised, it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way. Such restriction is, if not a taking, pro tanto of the property, a damaging thereof, for which, under article 1, § 14, Const., the owner is entitled to compensation. To this extent the authorities are all in accord. "No case has been cited," says the Court of Errors and Appeals of New Jersey in *City of Passaic v. Paterson, etc., Co.*, 72 N. J. Law, 285, 62 Atl. 267, 111 Am. St. Rep. 676, "nor are we aware of any case, which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation." In *Commonwealth v. Boston Advertising Company*, 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494, an enactment forbidding the maintenance of business signs so near a parkway as to be plainly visible to the naked eye of persons in the parkway, was held to be invalid as amounting to a taking of property for a public use without compensation. To the same effect are *Bryan v. City of Chester*, 212 Pa. 259, 61 Atl. 894, 108 Am. St. Rep. 870, and *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460. Analogous in principle is the case of *City of St. Louis v. Hill*, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226, in which the court declared invalid a statute authorizing cities to establish along boulevards a building line to which all structures must conform. See, also, *City of Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230. In most or all of the cases dealing with prohibitions of the right to erect or maintain billboards, it is recognized that the Legislature may under the police power prohibit advertisements of indecent or immoral tenden-

cies or signs dangerous to the physical safety of the persons or property of the public. Ordinances limiting the height of billboards have been sustained as having a tendency to protect passers-by from physical injury. *City of Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659; *Gunning System v. City of Buffalo*, 75 App. Div. 31, 77 N. Y. Supp. 987; *Whitmier, etc., Co. v. City of Buffalo (C. C.)* 118 Fed. 773; *In re Wilshire (C. C.)* 103 Fed. 620. On the other hand, ordinances requiring every billboard to be constructed not less than 10 feet from the street line (*City of Passaic v. Paterson, etc., Co.*, supra), or at a distance from the street exceeding by at least five feet the height of the billboard (*Crawford v. City of Topeka*, 51 Kan. 756, 33 Pac. 476, 20 L. R. A. 692, 37 Am. St. Rep. 323), have been held to be unreasonable restrictions upon individual rights, and invalid. We are not here, however, concerned with the extent to which the legislative power may, in the effort to protect the public safety or morals, regulate the manner of erecting or using billboards. The ordinance in question does not attempt such regulation, but undertakes to absolutely forbid the erection or maintenance of any billboard for advertising purposes. We have no doubt that this sweeping prohibition was beyond the power of the town trustees.

The judgment and the order appealed from are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

155 Cal. 303

CUZNER v. CALIFORNIA CLUB. (L. A. 2,353.)

(Supreme Court of California. March 6, 1909.)

1. INTOXICATING LIQUORS (§ 10*)—MUNICIPAL CORPORATIONS—POWER.

A city empowered to regulate traffic in intoxicating liquors may enact prohibitory or license tax laws applicable, not only to the business of selling to the public, but also to sales of liquors by a social club to its members and guests.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 9-11; Dec. Dig. § 10.*]

2. INTOXICATING LIQUORS (§ 10*)—CLUBS—MUNICIPAL CORPORATIONS—POWER.

Under power to impose a license tax on any business, etc., a city may treat the sale of intoxicating liquors by a social club to its members as the carrying on of business.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 11; Dec. Dig. § 10.*]

3. INTOXICATING LIQUORS (§ 50*)—CLUBS—APPLICABILITY OF ORDINANCE.

Los Angeles ordinance, adopted January 27, 1908, imposing a license tax on corporations, etc., conducting, managing, or carrying on the business of a retail liquor dealer, does not apply to a bona fide social club, which sells liquor to its members and guests, especially in view of the administrative construction given by the city's failure to require the club to obtain a license; the ordinance applying only to persons, etc., engaged in the business of selling

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

liquor in the sense in which the term "business" is ordinarily used in that connection.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 51; Dec. Dig. § 50.*]

4. LICENSES (§ 11*)—"BUSINESS."

The term "business" as used in a law imposing a license tax on businesses, trades, etc., ordinarily means business in the trade or commercial sense, only carried on with a view to profit or livelihood.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 18; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 915-923; vol. 8, pp. 7593, 7594.]

In Bank. Appeal from Superior Court, Los Angeles County; Felix W. Ewing, Judge.

Action by James Cuzner against the California Club. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Gibson, Trask, Dunn & Crutcher (Edward E. Bacon, of counsel), for appellant. Anderson & Anderson, for respondent. Leslie R. Hewitt, City Atty., and Lewis R. Works, Asst. City Atty., amici curiæ.

ANGELLOTTI, J. This action was brought by a member of the California Club, a bona fide social organization existing in the city of Los Angeles, to enjoin the selling or serving of liquors by the club to its members and their guests, upon the ground that by making such sales the club is violating the provisions of an ordinance of the city of Los Angeles requiring the payment of a license fee by all persons engaged in the business of retail liquor dealers. The complaint charges that the defendant maintains a bar, at which its members and their guests are served with liquors at retail, and intoxicating liquors are also served to either members or guests at other places in the club, and it is contended by the plaintiff that in so doing the defendant is conducting a place for the sale of liquors within the meaning of said ordinance, and thereby lays itself liable to heavy fines, and also to a forfeiture of its charter if it persists in this conduct. A general demurrer to the complaint for want of facts sufficient to constitute a cause of action was overruled, and defendant declined to answer. Judgment was thereupon entered for plaintiff, and defendant appeals.

It is assumed by the parties that such an action will lie on behalf of a member of the club. See *Klein v. Livingston Club*, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. Rep. 717. The only question presented by the appeal is whether the provision of an ordinance of the city of Los Angeles, "providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations, carried on within the limits of the city of Los Angeles," adopted January 27, 1908, that imposes a license tax of \$100 per month upon "every person, firm or corporation conducting, managing or carrying on the

business of a retail liquor dealer," is applicable to the defendant. The defendant is a bona fide social club, incorporated in December, 1888, under the laws of the state of California, solely "with a view to promote social intercourse among its members," and not for profit, and is without any capital stock. Its principal place of business, as stated in its articles of incorporation, is the city of Los Angeles, wherein it maintains a clubhouse for the use of its members and their guests. In this clubhouse are maintained all those conveniences for the use of such members and their guests as are ordinarily to be found in a social clubhouse, such as a library, parlors, and reception rooms adequately furnished, dining rooms where meals are furnished, billiard rooms and sleeping apartments. It owns its clubhouse building, and the furniture therein, and the land on which the building stands, the aggregate value thereof being in excess of \$500,000. During the whole period of its existence it has kept therein a stock of vinous, spirituous, and malt intoxicating liquors in sufficient quantities to supply the wants of its members and their guests, and, "without any license whatever of any kind from the city of Los Angeles so to do," has furnished such members and guests with such quantities thereof as they ordered, receiving therefor from the parties taking the same more than the cost price thereof. The moneys so received by the club are, like the money received for dues, meals, etc., used solely for the maintenance of the club. The permanent membership of the club is limited in number to 850. No person who is a resident of Los Angeles, not a member of the club, is entitled to any of its privileges, except that he may be introduced once by a member, but when so introduced cannot purchase anything therefrom, and cannot remain in the clubhouse after the departure therefrom of the member introducing him. Persons not residing within 50 miles of Los Angeles may be introduced to said club by any member, and receive a card entitling them to the privileges thereof for a period of not more than 30 days in any period of 12 months. Such persons constitute the guests of whom we have spoken. The member introducing such a visitor is responsible for his conduct, and for any indebtedness which he may incur. The whole object of the club is to furnish to its members the conveniences and privileges of a social club, and everything that is done by it in the way of furnishing meals, lodgings, and liquors is merely incidental to this object, just as the furnishing of a library, parlors, and reception rooms, of the advantages of which all members may partake without charge, is incidental to that object. Whatever profit may be derived by the club from any of the transactions is used, and to be used, solely for the main object above

stated. In the way above stated only does the club engage in any business other than the conduct of a bona fide social club.

It must be conceded at the outset that the municipality of Los Angeles, in the exercise of the power to regulate traffic in intoxicating liquors that is a part of the police power conferred upon it by the Constitution, may enact prohibitory laws applicable, not only to those engaged in the business of selling intoxicating liquors to the public, but also to such transactions in regard thereto as we have described above, and that they may regulate, by license tax or otherwise, any and all kinds of dealings with relation to such liquors, including such dealings as are had by the defendant with its members. It may also be conceded that the transactions above detailed are of such a nature that, in the exercise of the power to impose a license tax for revenue on any business, etc., the municipality may treat them as the carrying on of a business that may be taxed for revenue, and impose a license tax thereon for that purpose. This is apparently not disputed by learned counsel for defendant. The sole question then is whether it was the intention of the framers of the law or ordinance to include such clubs.

The ordinance of January 27, 1908, is, in all respects material here, a re-enactment of an ordinance adopted February 28, 1903, with a substantially similar title, viz., "An ordinance providing for licensing and regulating the carrying on of certain professions, trades, callings and occupations, carried on within the limits of the city of Los Angeles." It makes it unlawful for any person to carry on "any trade, calling, profession or occupation" specified in the ordinance without having procured the license to do so. It imposes a license tax on a great variety of businesses and callings, over 80 in number, generally in terms providing that the tax is imposed on any one "carrying on the business" named. The provisions in regard to the liquor business are as follows:

"Sec. 49. For every person, firm or corporation conducting, managing or carrying on the business of a retail liquor dealer, \$100.00 per month.

"For every person, firm or corporation conducting, managing or carrying on the business of a wholesale liquor dealer, \$75.00 per month.

"For every person, firm or corporation carrying on the business of a restaurant or eating place where spirituous, vinous, malt or mixed intoxicating liquors are sold, served or given away in original packages containing not less than one pint, to be consumed on the premises with bona fide meals, \$75.00 per month in addition to the regular restaurant license required by the ordinances of the city of Los Angeles.

"For the purpose of this ordinance a retail liquor establishment is defined to be any place where spirituous, vinous, malt or mixed

intoxicating liquors are sold, served or given away, in quantities of less than five gallons, to be drunk either upon the premises or elsewhere.

"Any person, firm or corporation who, either as owner, agent, lessee or otherwise conducts or carries on a retail liquor establishment, as herein defined, is for the purpose of this ordinance declared to be a retail liquor dealer; provided, however, that none of the definitions herein given shall apply to the sale, serving or giving away in a restaurant or eating place of spirituous, vinous, malt or mixed intoxicating liquors, in original packages, containing not less than one pint, to be consumed on the premises with bona fide meals.

"For the purpose of this ordinance, a wholesale liquor establishment is defined to be any place where spirituous, vinous, malt or mixed intoxicating liquors are sold, served or given away in quantities of not less than one-fifth of a gallon, and not to be drunk upon the premises where so sold, served or given away; and any person, firm or corporation who, as owner, agent, lessee or otherwise, conducts or carries on a wholesale liquor establishment, as herein defined, is for the purpose of this ordinance declared to be a wholesale liquor dealer.

"For the purposes of this ordinance a restaurant is defined to be a place fully equipped with modern conveniences for cooking and preparing victuals, and where hot meals are actually served at least three times a day, and at least six days in the week; and a bona fide meal is defined to be a meal consisting of such quantity and quality of food as is ordinarily served for a meal in hotels or restaurants. Merely sandwiches, or lunches, or crackers, or cheese, shall not be held nor considered to be a bona fide meal within the provisions of this ordinance."

Reasonably construed, these provisions regarding liquor dealers must be held to have been intended to apply only to such persons, etc., as are engaged in the "business of selling liquor" in the sense in which the term "business" is ordinarily used in that connection. We concede that it was entirely within the power of the city council to define in the ordinance what it meant by the term "business of a retail liquor dealer," upon the "managing or carrying on" of which it imposed the license tax by the first paragraph of section 49, and to define it in such a way as to include transactions of the character that we have detailed. But we see, in the definitions contained in the succeeding paragraphs, no intention to depart from the manifest policy of the whole ordinance, which was to impose a license tax upon the doing of various kinds of business, or, as put in the title, "upon the carrying on of certain professions, trades, callings and occupations." The object of the definitions was to distinguish between the different classes of persons engaged in the business of selling

liquor, retail liquor dealers, wholesale liquor dealers, and restaurant keepers, as to whom different rates of license tax were fixed, so as to make it clear and definite in which class any such person falls, and also to guard against evasions by persons really engaged in the business of liquor dealers who might attempt to cloak their transactions as gifts, as for instance by selling a cracker and giving a drink, a device not unknown in the past, or to obtain the reduced rate of a restaurant keeper under the cloak of a sham restaurant. We think the ordinance clearly shows that these were the sole objects of the definitions, and that the idea of including acts that would not ordinarily be held to be included within the term "managing or carrying on a business" was not present. Taking the provision defining a "retail liquor establishment" by itself, and construing it literally and technically, it would include a man's home, if a man served or gave spirituous, vinous, malt, or mixed intoxicating liquors to his guests therein, for such home would then be a place where such liquors were served or given away in quantities of less than five gallons. Admittedly this provision must be read in connection with the next following provision, which defines a "retail liquor dealer" as one who "conducts or carries on" such a place. These words in the connection in which they are used clearly imply a conducting or carrying on of a place as a business, the conducting or carrying on of a place "where liquors are vended as a business." Ex parte Mansfield, 106 Cal. 405, 39 Pac. 775. As learned counsel for plaintiff suggests in reply to the claim that any other construction would include a host serving liquors in his own house, the words indicate "a dealing or trafficking in liquors." As we read the various provisions, so far as retail liquor dealers are concerned, they simply impose the tax on the business of selling and disposing of, at a fixed place of business, spirituous, vinous, malt, or mixed intoxicating liquors, in less quantities than five gallons, and the words "sold, served or given away" include only such disposition of liquors as may properly be held to be made in the conducting of a business. This we think to be the fair and reasonable construction of the language used, especially when the whole ordinance is considered together, and we see nothing in the charter provisions, or other ordinances of the city that are before us under stipulation of the parties, to indicate otherwise. See Ex parte Seube, 115 Cal. 629, 632, 47 Pac. 596; Ex parte Mansfield, 106 Cal. 404, 39 Pac. 775.

The question, then, as it appears to us, is whether a bona fide social club, engaged in transactions of the character hereinbefore detailed, with the sole object, as we look at it, of distributing articles provided for the use of the members in such a way "that there shall not be unequal contributions to

the treasury which purchases them" (Klein v. Livingston Club, 177 Pa. 231, 35 Atl. 608, 34 L. R. A. 94, 55 Am. Rep. 717), is to be held to be within the purview of a law or ordinance which simply imposes a license tax upon the business of selling liquors, and does not contain other provisions that show a clear intent to include them. Upon this question, we are satisfied that the great weight of authority is in favor of the proposition that they are not so included. The matter is exhaustively discussed by Mr. Black in his valuable work on Intoxicating Liquors, and he sums up as follows: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink when they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But, on the other hand, if the club is organized and conducted in good faith, with a limited and selected membership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way, and to the same extent, that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law." Black on Intoxicating Liquors, § 152.

The term "business," as used in a law imposing a license tax on businesses, trades, professions, and callings, ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood. A bona fide social club, if permitted by its articles of incorporation or association, may, of course, so engage in business, either by transactions with its members, or members of the public, as, for instance, by letting for a consideration rooms not used for the ordinary purposes of the clubhouse, or by engaging in some outside enterprise for the purpose of realizing profits to be devoted to club purposes; and, so far as it does such things, even incidentally for the purpose of realizing profit to be devoted solely to club purposes, it would be engaged in business in the commercial sense as fully as any person could be. But in its transactions with its members in the carrying on of the clubhouse looking simply to the giving to them such privileges in the property devoted to bona fide club purposes as they are all, in common, entitled to under the constitution and rules of the club, it is not engaged in business at all in the commercial or trade sense, as ordinarily understood. Such property is beneficially owned in common by the members in equal

shares, and is devoted to their common use. So far as such property can be actually used equally by all the members, as in the case of reading rooms, sitting rooms, etc., no special charge is made against any member for such use. All may actually use such things in common. But when, in the exercise of the common privilege, one member appropriates to his exclusive use food or drink, or a room for sleeping purposes, things that cannot be actually used in common by all the members, he pays therefor simply because it is the only fair and equitable way of apportioning the expense of the club among the members. As stated in *Klein v. Livingston Club*, supra: "The purpose of the whole system is to distribute the advantages, comforts and luxuries of the club among the members, so that there shall not be unequal contributions to the treasury which purchases them."

The following cases fully support the doctrine that transactions of the character here detailed do not bring a bona fide social club within the purview of a law or ordinance simply imposing a license tax upon the business of liquor selling: *Manassas Club v. City of Mobile*, 121 Ala. 561, 25 South. 628; *State v. Austin Club*, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; *Koenig v. State*, 33 Tex. Cr. R. 367, 26 S. W. 835, 47 Am. St. Rep. 35; *Tennessee Club v. Dwyer*, 11 Lea (Tenn.) 452, 47 Am. Rep. 298; *Piedmont Club v. Com.*, 87 Va. 540, 12 S. E. 963; *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27; *People v. Adelphi Club*, 149 N. Y. 5, 15, 43 N. E. 410, 31 L. R. A. 510, 52 Am. St. Rep. 700; *Klein v. Livingston Club*, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. Rep. 717; *State v. Boston Club*, 45 La. Ann. 585, 12 South. 895, 20 L. R. A. 185; *Com. v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 340; *State v. St. Louis Club*, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826; *Graff v. Evans*, L. R. S. Q. B. 373, involving the Grosvenor Club; *Davies v. Burnett* (1902) 1 K. B. 666, involving the North Wolverhampton Workingmen's Club. It is perhaps true, as claimed by learned counsel for plaintiff, that some of these cases proceed upon the theory that such a transaction in no sense constitutes a sale, which theory we are inclined to believe is not entirely correct. But as we read most of the cases which it is said approve the doctrine of no sale, the real point decided is that, while such transactions may technically constitute sales, they do not constitute sales within the meaning of the act under consideration—are not sales of the commercial character contemplated by such act. If we were of the opinion that the ordinance before us should be construed as imposing a tax upon any and all sales as distinguished from such sales as are made in the carrying on of the business of selling liquor in the ordinary sense, it is doubtful whether we could assent to the doctrine of some of the cases

that it was not intended to include transactions of the character under consideration. But, as we have said, we do not think that the ordinance before us means this, under any fair and reasonable construction. In some of these cases cited, as in *People v. Adelphi Club*, supra, a case where the law apparently imposed a tax on the sale, it is true the court in part based its conclusion upon another provision, or provisions, which it thought indicated that sales of this character were not contemplated, but we think that such provisions no more clearly indicated such intent than does the ordinance before us. In *State v. Boston Club*, supra, which holds that it is not the intention of such an ordinance to require a license of a social club as being in business or in trade, it was also held that by reason of special provisions as to liquor dealing, in some respects analogous to those in the ordinance before us, viewed in the light of the history of legislation in that state upon the subject, such transactions were intended to be included. The same conclusion has been reached by some other courts, in cases cited by learned counsel for plaintiff, upon special provisions as to liquor selling, which it was held showed such intention. We shall not attempt to analyze or distinguish these cases. The question is one which must be determined upon a construction of the ordinances and laws applicable to Los Angeles, in the light of the history of our own legislation on the subject.

Many of the cases relied on by learned counsel for plaintiff are cases involving the proper construction of prohibitory or local option laws, as applied to transactions of the character under discussion. As said by counsel for defendant, "such laws are not confined, either in terms or in purpose, to the business of selling liquors, but extend generally to all dealing therein," and they must be construed from a very different standpoint. Some of the other cases so cited are those where the alleged club is a mere form, adopted for the purpose of cloaking the operations of what was really a retail liquor business. In such cases the mere form will, of course, be disregarded, and the law held applicable. In other cases, such as *Army & Navy Club v. District of Columbia*, 8 App. D. C. 544, and *Kentucky Club v. Louisville*, 92 Ky. 309, 17 S. W. 743, there were special provisions in terms as to "clubs," "clubhouses," and "club-rooms" which it was thought specially showed the intent to include them. Eliminating these cases, it is true that there still remain cases that are in conflict with our conclusion upon the general proposition involved. Of these *People v. Soule*, 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494, a practically analogous and well-considered case, is probably the most conspicuous example. It appears to us that the opinion in that case lays too much stress upon the fact that such transactions possess all the elements of legal sales, and apparently regards that fact as determinative of the con-

troversy. We have already referred to *State v. Boston Club*, 45 La. Ann. 585, 12 South. 895, 20 L. R. A. 185. The cases of *South Shore Country Club v. People*, 228 Ill. 75, 81 N. E. 805, 12 L. R. A. (N. S.) 519, 119 Am. St. Rep. 417, and *State v. Essex Club*, 53 N. J. Law, 99, 20 Atl. 769, were cases where the tax was apparently imposed upon the sales, but the reasoning of the opinions probably places the cases among those opposed to the view heretofore quoted from *Black on Intoxicating Liquors*. The same is true of *State v. Shumate*, 44 W. Va. 490, 29 S. E. 1001. The decisions of the federal courts (*U. S. v. Wittig*, 2 Low. 466, Fed. Cas. No. 16,748; *U. S. v. Alexis Club* [D. C.] 98 Fed. 725) are based upon a construction of the provisions of the internal revenue law, which, for the purposes of that act, must probably now be considered as settled for all time, that renders all persons selling liquor liable, whether or not they can properly be regarded as being engaged in the business of selling. It was expressly recognized in both the cases cited that there would be great doubt if the question was merely whether the club was "dealing" in liquors, or "engaged in the business of selling" within the common meaning of those words. The statute there provided: "Special taxes are imposed as follows: * * * Fourth. Retail dealers in liquors shall pay twenty-five dollars. Every person who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than five gallons at the same time shall be regarded as a retail dealer in liquors." Section 3244, Rev. St. (U. S. Comp. St. 1901, p. 2096). Section 3242 (U. S. Comp. St. 1901, p. 2094) provided that "every person who carries on the business of a * * * retail liquor dealer * * * without having paid the special tax as required by law," shall be fined and imprisoned, etc. It will be observed, as stated by counsel for defendant, that while in the ordinance before us the limitation to persons "carrying on the business" is an integral part of the very provision which imposes the tax in the United States statute, the tax was imposed upon "retail dealers in liquor," and these were in terms defined in such a way, the courts held, as to exclude the idea of carrying on business. The construction given that it included all sales, without regard to whether the person was engaged in the business of selling in the ordinary sense, is based in part upon the rule declared in the *Wittig Case*, as follows: "This is a revenue law, and the decisions of the Supreme Court require us to construe it liberally in favor of revenue, to prevent evasions." But, as said before, we shall not attempt to reconcile the cases. A full examination but demonstrates that there is a conflict in the views of the courts upon both the propositions we have discussed, viz., the proper construction of such an ordinance as the one before us, and, assuming the correctness of our construction, the question whether such transactions as

we have detailed bring defendant within its operation. We believe our construction of the ordinance to be the only fair and reasonable construction of its various provisions; and, upon the proposition that a bona fide social club, engaged in transactions of the kind above set forth, is not engaged in the business of selling liquors, within the meaning of an ordinance simply imposing a tax upon such business, we are satisfied that the great weight of authority is in accord with our conclusion.

Upon the question of the proper construction of the ordinance, it may be added that it appears to us to be a material fact, in determining the intent of the council in adopting the ordinance of January, 1908, that although substantially similar ordinances have been in force during all of defendant's existence as a club, defendant has never been required to have a license from the city. The brief of *amici curiæ* in support of plaintiff's position in fact states that the license ordinances have never been enforced against clubs of this kind, but the record available to us contains no information on this subject except as to defendant. But this fact as to defendant is alleged. As to defendant we have an administrative construction of many years of similar ordinances, in accord with views announced by many courts, upon a question which all must concede was at least debatable, a construction as to which the city council could not be deemed ignorant when it enacted the ordinance before us. If it had been intended by that body in enacting the ordinance of January, 1908, that a license tax should be imposed on a bona fide social club so engaged, it is reasonable to assume that it would have made some change in the law as it previously existed to clearly and unmistakably show that it was intended to include them. See *People v. Adelphi Club*, supra; *Klein v. Livingston Club*, supra. If it be deemed proper by the city of Los Angeles that bona fide social clubs, engaged in the transactions of the kind here involved, should pay a license tax, or be in any way subjected to the operation of reasonable regulations relative to the sale or disposition of intoxicating liquor, it will be a very simple matter for it to so provide by the use of language that would clearly show such an intent. While the question is not entirely free from doubt, we do not believe that any such intent is shown by the existing laws of the city.

The judgment is reversed, and the cause remanded, with directions to the lower court to sustain the demurrer of defendant, with leave to plaintiff to amend his complaint if he so desires.

We concur: SLOSS, J.; MELVIN, J.; HENSHAW, J.

SHAW, J., by reason of being a member of the defendant club, deeming himself disquali-

fied, does not participate herein. LORIGAN, J., by reason of sickness, does not participate herein.

BEATTY, C. J. (concurring). I concur in the judgment, but not with that assured conviction of the validity of my conclusion which, in a matter so important, I should wish to feel. If the cause were to be decided with sole reference to the terms of the ordinance, unaffected by any extrinsic circumstance, it would be impossible for me to say, in view of the admitted facts, that the defendant is not carrying on the business of a retail liquor dealer. The numerous decisions cited by its counsel in support of the opposite view are either distinguishable on what appear to me substantial grounds, or, where strictly in point, rest upon reasoning which, to my mind, is not satisfactory. If we had been called upon, shortly after its adoption, to give a construction to the ordinance of 1903 (of which the existing ordinance is in every material particular a mere re-enactment), I should not have entertained a doubt that the California Club was clearly within its terms.

But it is conceded that, during the whole period of five years between the adoption of the ordinance of 1903 and its re-enactment in 1908, no demand was ever made upon the club for the payment of a license tax, and it seems to be an unavoidable inference from this circumstance that it was the common understanding of the municipal authorities that the course of dealing between the club and its members and guests was not the carrying on of the business of retailing liquors. It was, in other words, a contemporaneous construction of the ordinance by those who enacted it, and the fact that it was re-enacted in the same terms seems to justify the conclusion that the intention of its framers was that it should have no wider operation than that to which it had been so long restricted.

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ARROYO DITCH & WATER CO. v. BALDWIN et al. (CURTIN et al., Interveners). (L. A. 2,039.)

(Supreme Court of California. March 5, 1909.)

1. APPEAL AND ERROR (§ 867*)—SCOPE OF REVIEW—ORDER DENYING NEW TRIAL.

On appeal from an order denying a motion for a new trial, whether the complaint is sufficient to support the judgment, whether the court erred in overruling the demurrer to the complaint, and whether the judgment is supported by the findings will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476, 3478; Dec. Dig. § 867.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—CONFLICTING EVIDENCE.

A finding by the court on conflicting evidence will not be disturbed on review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

3. WATERS AND WATER COURSES (§ 107*)—SUBTERRANEAN CHANNELS—BURDEN OF PROOF.

Subterranean water is presumed to be percolating, and one who claims rights in such water as a flowing stream has the burden of showing its existence as a stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 116; Dec. Dig. § 107.*]

4. WATERS AND WATER COURSES (§ 107*)—SUBTERRANEAN CHANNEL—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to support a finding that the old San Gabriel river has no well-defined subterranean channel.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 116; Dec. Dig. § 107.*]

5. WATERS AND WATER COURSES (§ 247*)—IRRIGATION—NATURE OF RIGHT TO USE.

In an action by an irrigation company to quiet title to water in a stream, it is immaterial whether the company owned the water right in question, or merely distributes the water for the stockholders, who were owners thereof before the company was organized.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. § 247.*]

6. WATERS AND WATER COURSES (§ 132*)—IRRIGATION RIGHTS—PRESCRIPTION.

The right to take water from a stream for irrigation purposes as against riparian owners may be acquired by prescription.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 132.*]

7. WATERS AND WATER COURSES (§ 247*)—IRRIGATION RIGHTS—QUIETING TITLE—RIGHT TO MAINTAIN ACTION.

An irrigation company whose incorporators and stockholders were owners of the water for irrigation, acquired either by prescription or as riparian owners, may maintain an action to quiet title to such water as against an upper riparian owner.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. § 247.*]

8. WATERS AND WATER COURSES (§ 78*)—DIVERSION—RIGHTS OF UPPER LANDOWNER.

An upper riparian landowner cannot object to the diversion of water after it has passed his premises.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 69, 74; Dec. Dig. § 78.*]

9. WATERS AND WATER COURSES (§ 160*)—DIVERSION—USE OF DAM.

A riparian owner having a right to a part of the water of a stream may change the flow by a dam on his own property, if he does not thus divert more water than he is entitled to.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 193; Dec. Dig. § 160.*]

In Bank. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the Arroyo Ditch & Water Company, a corporation, against E. J. Baldwin and others. Andrew Curtin and another intervene. Judgment for plaintiff. From an order denying a new trial, defendant Baldwin appeals. Affirmed.

Works, Lee & Works, for appellant. Kendrick & Knott, for respondent water com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pany. J. S. Chapman, Chapman & Chapman, J. L. Fleming, and A. J. King, for respondents ditch company and others. Anderson & Anderson and Burrel D. Neighbours, for respondents Curtin and Neighbours.

MELVIN, J. This case comes up on an appeal from the order denying defendant Baldwin's motion for a new trial; the appeal from the judgment having been heretofore dismissed. The action was brought by the Arroyo Ditch & Water Company (a corporation) to quiet in itself and in the defendants other than E. J. Baldwin, as against said Baldwin, the title to the waters of the Old San Gabriel river and to all the water which in its natural course flows in said river above the point known as the Arroyo ditch dam, except a certain proportion of said water which was conceded to belong to Baldwin. Plaintiff also prayed that the said Baldwin be enjoined from using more than his alleged share of said water. Certain interveners appeared, and judgment was finally rendered substantially as prayed for in the amended complaint of the Arroyo Ditch & Water Company. This appeal being only from the order denying the motion for a new trial and not from the judgment, the questions whether the complaint is sufficient to support the judgment or whether the court erred in overruling the demurrer to the complaint cannot be considered. *Holmes v. Warren*, 145 Cal. 459, 78 Pac. 954; *Coburn v. California Portland Cement Co.*, 144 Cal. 81, 77 Pac. 771. Neither can we pass upon the question whether or not the judgment is supported by the findings. *Simon Newman Co. v. Lassing*, 141 Cal. 175, 74 Pac. 761.

The superior court finds, among other things, that the Old San Gabriel river (sometimes called for a part of its course Rio Hondo) rises in the Rancho Potrero Grande, south of and near the north line of said rancho; that plaintiff and defendants other than E. J. Baldwin obtained water from the stream by joint diversion at the Arroyo ditch dam; that below said dam are 47,320 acres of land within the ranchos Paso de Bartolo, Santa Gertrudes, Los Cerritos, San Antonio, and San Pedro which require for irrigation all the water naturally flowing in the old San Gabriel river at the point designated as the Arroyo ditch dam; that said acreage requires 6,760 inches of water under a 4-inch pressure for its successful irrigation; that appellant is the owner of 5,835.80 acres of land bordering on and within the water-shed of said river included within the ranchos of Potrero Grande and La Merced; that he also owns an undivided five-sixths interest in the Potrero Chico rancho, containing 150 acres and riparian to the river. It is also found that only a part of Baldwin's land is susceptible of irrigation; that some of it is damp and moist land requiring no irrigation; that some needs but slight irrigation; that wells upon Baldwin's land supply water in abundance

for domestic use; and that 289 inches of water under 4-inch pressure is essential for irrigation for the successful cultivation and production of crops on all the said land of the appellant which is susceptible of and requires irrigation.

Appellant's counsel vigorously assert that the court erred in finding that the Old San Gabriel river rises in the county of Los Angeles south of and near the boundary line of the Rancho Potrero Grande. They stoutly maintain that the evidence shows the river's source to be in the San Bernardino Mountains, and that it flows partly on the surface and partly by underground channel to the Pacific Ocean. In this behalf they cite *Vine-land Irrigation Dist. v. Azusa Irrigation Co.*, 126 Cal. 486, 58 Pac. 1057, 46 L. R. A. 820, a case referring to the same river above appellant's lands, and holding that, where there is a well-defined subsurface flow within the bed and banks of a stream, the subterranean waters are to be regarded as but a valuable portion of the surface stream so far as riparian rights and privileges of appropriation are concerned. There is, it is true, a conflict of evidence with respect to the nature of the subterranean waters above the point at which, according to the findings, the river rises. Some of the witnesses were of the opinion that the water which came to the surface near the north boundary line of the Rancho Potrero Grande was but the reappearance of a well-defined stream that had flowed from the mountains partly upon the surface and partly underground. Others testified that there was no flow of water above the Rancho Potrero Grande except in times of great flood when the San Gabriel river would break over its banks, spreading over the country, and would come down through the Lexington wash. For example, witness Lanterman testified that the water which rises to the surface in the Rancho Potrero Grande comes from the water-shed and "percolates through the soil down to the place where the water rises in the Rio Hondo." Witness George Brown, a well driller, who had put down 52 wells in that vicinity in territory measuring about 1¼ miles from east to west, testified that he did not strike bed rock in sinking any of these wells, and that from the time he found water the soil was saturated with it all the way down except in the strata of clay. Under the rule that this court will not disturb a finding based upon some evidence where there is a conflict of testimony, we must hold that the court below did not err in the determination that no well-defined subterranean channel existed. This position is strengthened when we consider the rule stated by Farnham: "Subterranean water is presumed to be percolating, and therefore one who claims rights in a flowing stream has the burden of showing its existence." *Farnham on Water and Water Rights*, § 947.

The articles of incorporation of the Arroyo Ditch & Water Company, which were in evidence, give the purposes for which it was formed in part as follows: "To take, appropriate and divert water from the Old San Gabriel river and other sources in Los Angeles county, state of California for irrigation and domestic purposes. * * * To sell and lease water rights acquired by this corporation, to distribute water to its members and other persons in Los Angeles county for irrigation and domestic purposes, to acquire, buy, sell, and dispose of water rights, privileges, and interests in water rights, flumes, ditches, and canals for domestic and irrigation purposes; and generally to do any and all things that may be necessary to procure, have, and furnish water to the inhabitants of Los Nietos and the adjoining townships in Los Angeles county, state of California, with water for domestic and irrigation purposes." Appellant contends, however, that the real purpose of the corporation was merely the distribution to its stockholders of the water to which each was entitled before the formation of said corporation, and that this is shown by the contract between the landowners existing before the articles of incorporation were filed, whereby the stock was to be issued to each owner in the proportion of one share for each acre of his land theretofore irrigated from said ditch. But whether the company owned the water in question or merely acted for the stockholders is immaterial. It was stipulated that the persons whose names appeared upon a certain map were owners of the various tracts of land marked with their respective names, and that for more than 10 years prior to January 1, 1885, they and their predecessors in interest had diverted and used all the surface flow of the stream continuously and uninterruptedly and under claim of title as against all owners of the land below the point designated as the Arroyo ditch dam. Appellant's counsel contend that such stipulation does not necessarily imply an adverse use. But when we consider the proof adduced elsewhere, that the Arroyo ditch carried practically all of the water from the stream at the point where the dam was located, this contention fails. It is the settled law of this state that the right to take water from a stream, as against riparian owners may be acquired by prescription. *Gallaher v. Montecito Valley Water Co.*, 101 Cal. 245, 35 Pac. 770; *Bathgate v. Irvine*, 126 Cal. 144, 58 Pac. 442, 77 Am. St. Rep. 158. Plaintiff's incorporators having thus acquired such right or having riparian rights themselves, it is immaterial to the defendant Baldwin, an upper riparian owner, whether the right was enforced by them separately or through a corporation representing them, either as their agent and trustee or as possessor of their former titles. The right of the plaintiff to sue was very clearly stated in the opinion of

the learned judge of the trial court, quoted in appellant's brief, as follows: "The question as to whether or not the plaintiff has sufficient interest in the water distributed by it to its stockholders to represent them in this litigation affecting the title to water is not free from difficulty. Defendant contends that title to water is in the owners of the soil, the actual users of the water, and that therefore these parties are the ones who have the right to maintain the action and to have their title to the water quieted, and that the plaintiff has no standing in court, and the case should be dismissed. The same question was involved in suit No. 31,395, entitled, 'Arroyo Ditch & Water Company v. Dorman et al.' Judge Trask there held that plaintiff could maintain the action to quiet title against the other co-tenants, and in that action the rights of the Arroyo Ditch & Water Company and the defendants therein were adjudicated. This case was subsequently appealed to the Supreme Court, and a decision rendered therein sustaining the judgment of the lower court, with certain exceptions which are not material to the point involved. 137 Cal. 611, 70 Pac. 737. The Supreme Court refused to pass upon the question as to whether or not the plaintiff was the owner of the water, but held that the plaintiff had sufficient interest to maintain the suit to quiet title. This decision is binding on all the parties to this suit except the defendants Baldwin and the interveners Curtin and Neighbours, who were not parties to that action, but as to them it is nevertheless an authority directly in point as to the right of this plaintiff to maintain this suit. Upon the authority of that case it will therefore be held that plaintiff, as against the defendant Baldwin, is the owner of the water in question, and entitled to maintain this action." It is immaterial to this discussion whether or not some of the water taken from the stream by respondent is carried beyond the water-shed. Appellant is limited in his right to the use of water upon his riparian land within the water-shed of the stream. He may take his proper proportion of the water. The surplus must be returned to the channel of the river at the lower boundary line of his land. After he has thus used his legitimate part of the water, he cannot object to its diversion to any beneficial use by the lower riparian owners and appropriators or their successors in interest. The finding that appellant's lands are abundantly supplied with water for domestic use from wells is sustained by evidence. The testimony of witnesses Elliott and Unruh, though not as full upon this subject as could be desired, is sufficient to justify the finding. There was also evidence upon which the court's calculations with reference to the proportion of the water belonging to the different litigants were properly based.

Objection is made to the finding that defendant Baldwin has "without any right to

do so constructed a dam across a part of said Old San Gabriel river on the said lands of said Baldwin." Obviously appellant, being entitled to part of the water from the Old San Gabriel river, has the right to change its flow by means of a dam on his own property, but a reading of the entire finding makes its meaning plain. Added to and immediately following the words just quoted appear the following: "And has thereby diverted and converted to his use large quantities of the waters of said river which then belonged and now belong to the plaintiff," etc. Plainly the intention was to characterize the dam not as an improper structure in itself, but as a means whereby defendant Baldwin procured an excessive quantity of water. There was no error in permitting witness Tweedy to testify that if the 300 inches of water had not been diverted by Mr. Baldwin, and had come down to the plaintiff's dam, the latter could have made a beneficial use of it.

In view of our conclusions, there is no necessity for an examination of respondent's theory that the order of the lower court should be arbitrarily affirmed because of appellant's failure to serve the San Antonio Irrigating Ditch Company, a defaulting defendant, with notice of intention to move for a new trial.

It follows from the foregoing that the order denying the motion for a new trial should be sustained, and it is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; and LORIGAN, J.

9 Cal. App. 718

ANTONIAN v. SOUTHERN PAC. CO.
(Civ. 520.)

(Court of Appeal, Third District, California.
Jan. 27, 1909. Rehearing Denied by Supreme Court March 25, 1909.)

1. RAILROADS (§ 324*)—HIGHWAY CROSSINGS—CARE OF PERSON APPROACHING SAME.

A person approaching a railroad crossing on a public highway need only use ordinary care to avoid injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1022; Dec. Dig. § 324.*]

2. NEGLIGENCE (§ 4*)—DEFINITION OF "ORDINARY CARE."

"Ordinary care" is such care as a reasonable and prudent man would use under the same or similar circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740.]

3. RAILROADS (§ 346*)—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK AND LISTEN—PRESUMPTIONS.

Ordinary care by one about to pass over a railroad crossing requires him to look and listen attentively both ways, from a point where he can do so effectively; and, if by so doing he could see or hear a train approaching in time to avoid a collision, which occurs, it is presumed

that he either failed to look and listen, or was heedless of what he saw and heard, in either of which events he is guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1122; Dec. Dig. § 346.*]

4. RAILROADS (§ 327*)—TRAVELER AT CROSSING—DUTY TO LOOK AND LISTEN.

It is not ordinarily possible to affirm as a matter of law the precise distance from the crossing at which a traveler must look and listen; the test being whether he exercised ordinary care in selecting the place where he could do so effectively.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1051; Dec. Dig. § 327.*]

5. RAILROADS (§ 327*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—DUTY OF TRAVELER TO STOP.

A traveler need not, as a rule, stop, as well as look and listen at a railroad crossing, though the circumstances of a particular case might require it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1046; Dec. Dig. § 327.*]

6. RAILROADS (§ 350*)—DUTY OF TRAVELER TO STOP AT CROSSING—QUESTION FOR JURY.

It is for the jury to say from the facts of the particular case whether a traveler should have stopped at a railroad crossing where he was injured.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1172; Dec. Dig. § 350.*]

7. RAILROADS (§ 330*)—CROSSING ACCIDENTS—RELIANCE ON PRESUMPTION OF DUE CARE.

The rule that a traveler at a railroad crossing may not rely on the presumption that the railroad company will not be guilty of negligence does not relieve the company of all consequences of negligence, but means only that its negligence will not absolve the traveler from the duty to exercise the ordinary precautions required of one about to cross.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1071; Dec. Dig. § 330.*]

8. RAILROADS (§ 350*)—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence as to contributory negligence, in an action for injuries to a bicycle rider caused by a collision in crossing railroad tracks, held to present a question for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. § 350.*]

9. RAILROADS (§ 352*)—SPECIAL FINDINGS—RESPONSIVENESS.

An instruction, addressed to the conduct of the person who sees a train approaching while he is in a position to avoid injury, is not inconsistent with a verdict which found that plaintiff, suing for injuries caused by a collision, at no time saw the train in time to have avoided the injury by stopping instantly.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 352.*]

10. TRIAL (§ 242*)—INSTRUCTIONS—DOUBTFUL MEANING—CONSTRUCTION.

Where an instruction is not clear as to its meaning, the jury have the right to attach a meaning thereto, such as will harmonize with the evidence, and will not be inconsistent, either with their general verdict, or their findings on special issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 570; Dec. Dig. § 242.*]

11. RAILROADS (§ 352*)—SPECIAL FINDINGS—RESPONSIVENESS.

In an action for injuries to a bicycle rider in a collision with a car in crossing railroad

tracks, the jury were instructed that one intending to cross a railroad track must look and listen for approaching trains, and that what he must do in such a case must depend on circumstances, that if the view be obstructed, he must take greater pains to listen for approaching trains, and that if, taking these precautions, he would have seen or heard the approaching train, the very fact of injury would raise the presumption that he did not take the required precaution, and that if plaintiff, by stopping instantly at any time when the train was "in view of him," could have avoided the accident, then it occurred through his contributory negligence, and verdict should be for defendant. *Held* that, as plaintiff did not see the train approaching till his front wheel was on the track, and to have then stopped instantly would have meant certain injury, if not death, the instruction must be held to mean by the term "in view of him" that the train was actually in sight of plaintiff, and not that he might have seen the approaching car, and that thus construed there was no inconsistency between it and the verdict, which found that he at no time saw it in time to avoid the injury by stopping instantly.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 352.*]

12. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

Where the jury, in an action for injuries at a railroad crossing with a car, found as a fact that plaintiff did not see the train in time to avoid the accident, and that in approaching the train he acted with ordinary care, they were not required to find for defendant, under an instruction that, if plaintiff could have seen the cars in time to avoid the accident by stopping instantly, it was his duty to do so, as this was but saying that it would be negligence if he failed to do so, and other instructions declared that negligence is always relative; that it is an omission to do or omit something which a reasonable man, guided on those considerations which ordinarily regulate the conduct of human affairs, would do or omit, that it must always be determined with reference to the situation and knowledge of the parties; and that to absolve plaintiff from contributory negligence they need only believe he exercised ordinary care.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 295.*]

13. WORDS AND PHRASES—"WARNING."

"Warning" is defined to mean previous notice, caution against danger.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7392.]

14. RAILROADS (§ 350*)—ACTION FOR INJURY CAUSED BY COLLISION—SPECIAL VERDICT—SPECIAL ISSUE AS TO NOTICE OF DANGER—QUESTION FOR JURY.

Where, in an action for injury to a bicycle rider in a collision at a railroad crossing at night, the only evidence indicating that a warning was given him was a shout heard 100 feet away in the opposite direction from any danger, it was for the jury to say, in answering a special issue as to whether he was warned by any one before he crossed the track, whether this outcry by some one unknown to him was, or ought to have been, understood as a warning, in the sense the jury had a right to apply the term as "previous notice" or "caution against danger."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1152; Dec. Dig. § 350.*]

15. WORDS AND PHRASES—"INSTANTLY."

"Instantly" implies without any intervention of time, allows not a particle of delay, and makes an interval too small to be appreciated.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3660.]

16. RAILROADS (§ 352*)—SPECIAL FINDINGS—CONSISTENCY WITH GENERAL VERDICT.

In an action for injuries in a collision at a railroad crossing the jury, in answer to special issues, stated that the accident could have been prevented if plaintiff had stopped instantly when he first reached a point at the crossing where he could have seen the approaching cars; that no warning was given to him by any one before he crossed the tracks; that he was about seven feet from the track on which the accident occurred when he first could have seen the approaching cars; and that he did not approach the track in such a manner that he could have stopped instantly. *Held*, that there was no conflict between such special findings and the general verdict for plaintiff, which found, in effect, that he did not see the approaching cars, and that, if he had seen them, he could not have stopped instantly, and that he was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 857; Dec. Dig. § 352.*]

17. RAILROADS (§ 351*)—ACTION FOR INJURIES AT CROSSING—EVIDENCE WARRANTING INSTRUCTION.

In an action for injuries to a bicycle rider in a collision at a railroad crossing, evidence held to warrant an instruction that plaintiff's recovery was not precluded by the fact that he may have contributed to his injury, if he was not in fault in so doing, and that, if plaintiff was suddenly put in peril by defendant's negligence without sufficient time to consider all the circumstances, he was excusable for omitting some precautions or making an unwise choice, if otherwise innocent of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1204; Dec. Dig. § 351.*]

18. RAILROADS (§ 351*)—ACTION FOR INJURIES AT CROSSINGS—INSTRUCTION.

As against an objection that there was no warrant in law for such instruction, it must be held that there was no error therein, and that it was not misleading.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1204; Dec. Dig. § 351.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Paul Antonian against the Southern Pacific Company. From a verdict for plaintiff, and from orders denying a new trial, and a motion to set aside the judgment and enter judgment for defendant, the latter appeals. Affirmed.

L. L. Cory, for appellant. Southerland & Barbour, for respondent.

CHIPMAN, P. J. This is an action to recover damages for an injury to the person of plaintiff alleged to have resulted from defendant's negligence. The cause was tried by a jury, and a general verdict found in favor of plaintiff. Certain special issues were submitted to the jury, and answered as follows: "(1) Could the accident to the plaintiff have been prevented if the plaintiff had stopped instantly when he first reached a point at the crossing where he could have seen the approaching cars? A. Yes. (2) Was a warning given by any one to the plaintiff before he crossed the track? A. No. (3) If he had stopped instantly when the warning was given, could the plaintiff have prevented the

accident? A. ———. (4) How near was the plaintiff to the track upon which the accident occurred when he was first in a place where he could have seen the approaching cars? A. About 7 feet. (5) Did the plaintiff approach the track upon which the accident occurred in such a manner that he could have stopped instantly? A. No.” Judgment passed for plaintiff on the verdict, from which, and from the order denying its motion for a new trial, defendant appeals, and also from an order denying defendant’s motion, made after judgment, directing the clerk to set aside the judgment entered upon the general verdict, and to enter judgment in favor of defendant upon the special issues and findings of the jury.

Plaintiff resided in that portion of the city of Fresno situated west of the defendant’s railroad tracks. About half past 10 o’clock on the night of August 17, 1905, he was returning to his home, riding a bicycle, from the principal part of the city, situated on the east side of defendant’s tracks. He was traveling along the north side of Tulare street where it crosses the tracks, and along what was spoken of and used as a bicycle path, about where the sidewalk would have been located had it been extended across the tracks, on the north side of that street. At this crossing there are eight tracks running north and south. Going west from the east side, the first is a short track, designated sometimes as the “Sanger Line.” The second track is the main line from San Francisco to points south. The third, fourth, and others are used for switching purposes. The accident occurred on track 4. Plaintiff testified: “I was riding on the bicycle path. As I turned into Tulare street, going to the railroad crossing, I noticed the electric light above the crossing was out, and it was very dark. I was riding about as fast as a man usually walks. When I came to the railroad crossing, I looked in both directions and listened, but I couldn’t see or hear anything. My wheel was not making noise. On the third track, and north of the crossing, two or three feet from the path, a box car was standing near the street. Just as I crossed the track where the box car was standing, I heard some one holla in the darkness. It frightened me so much before I knew anything more I saw a flat car was coming towards me, just the next track where the box car was standing, and it was only about 8 feet from me, maybe it was less than 8 feet. When I first saw this flat car, my front wheel was across this first track, across the first rail of the first track west of where the box car was standing. That is the track where the accident happened. When I saw the flat car was coming towards me, I just pressed my pedal hard to get across there, to save myself from being killed, and the flat car struck my back wheel, and threw me on the ground with my legs on the track. As quickly as I could, I pulled my both legs out of

the way, but before I did it, it caught my right foot and crushed it. * * * I had been riding a bicycle for about four years. That night I came towards the crossing on my wheel, there was no flagman at the crossing, and no light at all. It was very dark, too, as I got by that box car, and when I first saw the flat car, I didn’t see any light. I did not hear the sound of those flat cars, and did not hear any bell ringing nor any whistle blow. I am a house painter by trade.” On cross-examination he testified: “My eyesight is good, and so is my hearing. * * * I was listening and didn’t hear anything and didn’t see anything. * * * When I was crossing, I was looking and watching out for anything I could see, and I was within 8 or 9 feet of the box car before I saw it, it was so very dark. I did not see any switchmen or light at the crossing at all, and nobody else. When I passed this box car, then I could see up or down the track, there was nothing to prevent it. Just as I passed this track 3 I could look up and down track 4, but some one halloed in the darkness just as I crossed by the box car. At the same time I saw the flat car coming behind me from the next track. Just as I got past that box car somebody yelled, halloed. Then at the same time when my front wheel was across the first rail, I saw the flat car coming. When I just crossed this track, the box car, when some one halloed in the darkness, I was so frightened, and my front wheel was across the rail when I saw the flat car was coming there. When I passed the box car on track 3, I looked up and down the track and saw nothing. I couldn’t see the cars coming at all. I heard some one hollow, that is all. My head was not down. I could see plainly. I couldn’t see the person that halloed. I couldn’t see where the voice came from. I didn’t see anybody at all. As I said, I was on the first rail when I saw the flat car. When the men halloed in the darkness, the front wheel of my bicycle was on the rail of track 4, and at that second I saw the flat car coming towards me. I did not stop, but worked my pedal hard, tried to get across. I did not turn my wheel to the right or left, but went straight ahead. * * * I am very familiar with this crossing, having crossed it many times, both at night and day.” Witness Holderman and witness York were crossing the tracks on bicycles on the south side of Tulare street at this same moment. They both testified to the darkness of the night; that they looked and listened, but saw no one at the crossing with or without a lantern, and saw no cars and heard no cars approaching Tulare street until about the instant plaintiff was struck, and heard no whistle or bell; that they heard some one a short distance south of the street call out about the instant that plaintiff had passed the box car. York testified: “I looked up and down, and did not see any cars moving, and I did not hear any

cars. There was no light on any moving cars, and I did not hear any bell or whistle. I heard this man south of Tulare street yell 'Look out,' then I looked where the yell came from. It was so dark I could hardly see whether there was a man there or not. * * * After the yell Antonian was struck in about a second, probably not that long, because it was as soon almost as I could turn my head the two ways. * * * There was no light on the end of these cars. Those cars were not making any noise that I could hear. The first thing I heard was the crushing and grinding when they came together."

It appeared that the servants of defendant were engaged in switching a train of about 20 cars, so as to distribute them to different tracks, crossing Tulare street, back and forth, in the operation. A number of cars had thus been shunted out of the train, and with the remaining 10 or 12 cars it had moved north of the street, and stopped with the rear flat car a short distance from the street, the engine at the other end of the train, as testified by Hamilton, one of the switchmen. This witness, Hamilton does not make clear where he stood when the train backed onto Tulare street. The testimony of the witness above noted was that no one was at the crossing with a lantern, or at all. If Hamilton had been there at some time, which is probable, the jury must have found that he had left the crossing before these wheelmen came near enough to see him, for they did not see or hear him. Hamilton's testimony was that plaintiff was moving twice as fast as the train, and both had the same distance to travel to reach the bicycle path, crossing track 4. Accordingly plaintiff would easily have cleared the cars with distance to spare. However, there was testimony, and the jury were justified in finding, that no one was at the crossing with or without a lantern when plaintiff came near to it, and Hamilton testified that there was no light and no person on the rear flat car. It was testified by the trainmen that, besides the box car standing on track 3 near the bicycle path, "there were box cars attached to it; it was on the rear of a string of cars," as testified by Tracy—and, as testified by Hamilton, "there were possibly 7 or 8 cars standing on track 3." It should also be stated that the distance between the west rail of track 3 and the east rail of track 4 was 8 feet and 2½ inches, and from the projection of the woodwork of the box car on track 3 was not more than 7 feet, as may be inferred from the finding of the jury. Traveling at the rate of three miles an hour, plaintiff was moving at the rate of 4.6 feet per second, so that in about 1½ seconds of time he would pass from the box car to the east rail of the track where he testified that he first saw the cars coming towards him, and but a few feet from him—"8 feet or less," as he testified.

As to the degree of darkness that night,

we have the statements of witnesses against which an almanac was introduced by defendant which showed that the moon rose at 8:25 p. m. But it did not appear whether the night was cloudless and free from fog, nor how far above the horizon the moon would be at 10:30 p. m. We may assume, I think, at its then position in the sky, that its slanting rays of light would tend rather to intensify the darkness immediately west of the box cars on track 3 by casting their shadow, and tend to obscure the view of the flat cars on track 4 rather than illuminate them. Aside from the testimony of the three wheelmen there was also evidence warranting the jury in finding that, when plaintiff listened on his approach to the crossing, he heard nothing, in the fact that the cars had stopped, and that no cars were seen on track 4, when plaintiff was looking, for his attention would be attracted only by moving cars, and there were none moving, and, besides, his view was obstructed by "the string of box cars" on track 3.

Upon the facts presented to the jury, as we have endeavored to state them, we are to determine the relative rights and duties of the parties to the controversy, guided by such settled rules of law as are applicable to this class of cases.

Appellant contends: (1) That "the special findings of the jury are inconsistent with the general verdict, and upon the special findings, under the instructions of the court, the defendant was entitled to judgment"; (2) "upon the merits the defendant was entitled to judgment, as the accident to plaintiff was the result of his own contributory negligence and want of care;" (3) that the court erred in giving a certain instruction at plaintiff's request. The law requires no more of a person approaching a railroad crossing upon a public highway than that he use ordinary care to avoid injury, and ordinary care is such care as a reasonable and prudent man would use under the same or similar circumstances. It is a requisite to the exercise of ordinary care by one about to pass over a railroad crossing that he look and listen attentively both ways, and that if by so doing he could have seen or heard a train approaching in time to have avoided collision with it, and a collision occurs, a presumption arises that he either failed to look and listen, or was heedless of what he saw and heard, in either of which events he is guilty of contributory negligence. The law also requires that in the exercise of ordinary care he must look and listen from a point where he can do so effectively. It is not ordinarily possible, however, to affirm, as matter of law, the precise number of feet from the crossing at which the traveler must look and listen, the underlying test being, Did the traveler exercise ordinary care in selecting the place?

The foregoing rules were clearly stated in *Baltimore & Ohio S. W. R. Co. v. Rosborough*, 40 Ind. App. 14, 80 N. E. 869—a case having

much analogy in its facts to the facts here—and we believe these rules to be a correct statement of the law, and as held also in this state. It has been held that the traveler must stop and look and listen, and defendant insists that this is what plaintiff should have done. So far as I have been able to discover, the first of the last above requisites is not a rule of law except, possibly, in the Pennsylvania courts. It has never been so held by the courts of this state. Circumstances may appear from which the duty would be cast upon the traveler, as a man of ordinary prudence in the exercise of ordinary care, to stop before attempting to cross the track of a railroad, but it is with the jury to say from the facts of the particular case whether the traveler should have stopped. See *White v. S. P. Co.*, 122 Cal. 307, 54 Pac. 956; *Bilton v. S. P. Co.*, 148 Cal. 450, 83 Pac. 440. The question was quite fully discussed in *Judson v. Central Vermont R. Co.*, 158 N. Y. 597, 53 N. E. 516. We think the rule is there correctly stated. It was held that it is not, as matter of law, negligence for a person approaching a railroad in a carriage upon a highway to fail to stop, but that his omission to do so is a fact to be submitted to the jury. Referring to the case of *Kellogg v. Railway Co.*, 79 N. Y. 72, the court said: "The duties which rest upon a traveler attempting to cross a railroad are there stated, and it was, in effect, said that he was not bound to exercise the greatest diligence, but only such as a prudent man approaching such a place would ordinarily exercise, and that, even where he could probably have avoided the accident by stopping, he is not, as matter of law, required to do so, and that the courts of this state have so held; but, if he ought to stop, and he omits to do it, it is a fact to be submitted to the jury, with the other facts in the case bearing upon the question." To same effect is *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426; *Beanstrom v. N. P. R. R. Co.*, 46 Minn. 193, 48 N. W. 778; *H. & T. C. Ry. Co. v. Wilson*, 60 Tex. 142; *Alexander v. Richmond & D. R. R. Co.*, 112 N. C. 720, 16 S. E. 896; *Bunting v. C. P. R. R. Co.*, 14 Nev. 358. Where the facts disclose no circumstances making it apparently unsafe or hazardous to attempt to cross a railroad track on the public highway without stopping (and this is true of most of the cases of this class), obviously a rule which would impute negligence, as matter of law, for not stopping in such a case would be without reason. The court in the Kansas case, *supra*, very properly remarked: "The traveler on the highway is no more bound to stop when he approaches a railroad than the managers of a train are bound to stop when they approach a highway. It may be the imperative duty of either to stop when the conditions require it." It was there held error to instruct the jury that it was the duty of the driver of a carriage in which plaintiff was riding "to stop and look up and

down the track to see if there was a train approaching."

The plaintiff was clearly within his rights in passing along Tulare street on his wheel, and in crossing defendant's tracks to return to his home. He was traveling no faster than a man would walk. He looked and listened as he approached the tracks, saw no obstruction, and heard no noise of a moving train; heard neither bell nor whistle. He crossed the main through track, also another track leading away from Fresno, crossed a switch, track 3, on which was a string of box cars obstructing his vision northward, and was within 7 feet of track 4, on which he received the injury, all the time looking and listening, and hearing; nothing and seeing nothing to indicate approaching cars. Two other wheelmen had reached like proximity to track 4, who, though they looked and listened, saw no moving cars, and heard none moving, nor saw any light and heard neither bell nor whistle. Plaintiff neither saw nor heard the cars moving, nor any light to indicate the presence of moving cars, and no servant of the company was at the crossing. A single revolution of his wheel, the lapse of a second and a half of time, brought him to the point where he first discovered the threatening danger. He had no more reason to suppose that there was a moving train on switch 4 than on any other track he had passed. In fact, there had been none moving on track 4 from the time he approached the tracks until about the instant he was passing the box car on track 3. If he had stopped and looked and listened at track 3, he would probably have seen or heard the cars, but it cannot be said, as matter of law, that this was his duty. He did look and listen, and if he looked south first, as did Holderman and York, when he and they heard the switchman halloo from that direction, as was the natural thing to do, he would have reached, as in fact he did reach, the east rail of track 4 in that fatal second of time, and before he could turn his head and look north, whence the real danger approached. Finding himself on the track and the danger imminent, he resorted to the only means which seemed to him available to avoid injury.

It is true that our Supreme Court has held that the plaintiff may not rely upon the presumption that the railroad company will not be guilty of negligence. The rule is very strongly stated in *Hutson v. Ry. Co.*, 150 Cal. 701, 89 Pac. 1093. But we do not understand that the rule relieves the railroad company from all consequences of its negligence. It means that the negligence of defendant will not absolve plaintiff from the duty to exercise the usual and ordinary precautions required of a person about to cross a railroad track. I think that all the circumstances may be considered by the jury, including those which point to defendant's negligence, not as excusing contributory negligence on

plaintiff's part, but as tending to explain his conduct, of which the jury are to determine whether or not it, in fact, constituted contributory negligence. It is possible that, had plaintiff clearly comprehended the meaning of the shout he heard after passing the box cars on track 3, and had, in that fleeting second of time, seen or heard the cars approaching on track 4 at the instant he passed the box cars, he might have thrown himself to the ground, or vaulted from his wheel, and thus have averted the threatened danger, but he is not to be held to the exercise of unerring judgment under every stress of circumstance. We think, as was said in *Bilton v. S. P. Co.*, supra: "He was only required to do what was reasonable under existing circumstances. * * * The case was undoubtedly one where the reasonableness of the effort to escape injury after the discovery of the danger was a question for the jury, to be determined by them in view of all the circumstances shown by the evidence." The court said, in *Schneider v. Market St. Ry. Co.*, 134 Cal. 490, 66 Pac. 738: "If the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice under this disturbing influence, although if his mind had been clear, he ought to have done otherwise. This is especially true if the peril is caused by the defendant's fault; and of such case it is said: 'Even if, in bewilderment, he runs directly into the danger which he fears, he is not at fault. The confusion of mind caused by such negligence is part of the injury inflicted by the negligent person.'"

The jury by their general verdict found that plaintiff was not guilty of contributory negligence, and this question was, we think, properly before them for determination. Was this general verdict inconsistent with the special issues of fact found by them, and was it in violation of the instructions of the court? The following instructions were given at defendant's request, and it is these that defendant insists should have entitled defendant to a verdict had they been followed:

"(11) You are instructed that the law is well settled that the railway track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and to listen for approaching trains, and that, if he sees a train or engine approaching upon the track, he must not place himself in a dangerous position by attempting to cross in front of it; and if, seeing the train or engine approach, he attempts to cross in front thereof, and an accident happens by which he is injured, no recovery can be had against the railroad company for such an accident.

"(12) You are further instructed that one intending to cross a railroad track of a steam railway must avail himself of every opportunity to look and listen for approaching trains, and what he must do in such a case

must depend upon circumstances. If the view is obstructed, he should take greater pains to listen for approaching trains. If, taking these precautions, he would have seen and heard the approaching train, the very fact of injury would raise the presumption that he did not take the required precaution. If, therefore, you believe from the evidence that if the plaintiff, by stopping instantly at any time when the train was in view of him, could have avoided the accident, then the accident occurred through the contributory negligence and want of care of the plaintiff, and your verdict should be in favor of the defendant.

"(13) You are further instructed that, if you find from the evidence that the plaintiff approaching the track upon which the accident occurred could have seen the cars in time to have avoided the accident, if he had stopped instantly, it was the duty of the plaintiff to so stop; and, if you further find that instead of stopping at such time the plaintiff endeavored to cross in front of the approaching train, and the accident occurred on account of such attempt to so cross, instead of stopping instantly, then the accident occurred from the contributory negligence and want of care of the plaintiff, and your verdict will be in favor of the defendant."

Instruction 11 is addressed to the conduct of a person who sees a train approaching while he is in a position to avoid the injury, which is not this case.

Of the instruction marked 12 this may be said: The jury were justified by the evidence in finding that plaintiff exercised the ordinary care required of an ordinarily prudent man in approaching the crossing, and were the judges of the question whether he took the proper precautions required of such a person. The latter part of the instruction is not clear as to its meaning. If by the terms "when the train was in view of him" plaintiff could have avoided the injury "by stopping instantly," the court meant to say when plaintiff first saw the train, and this we think is what the jury might have taken to be the meaning, the instruction is outside the evidence; for plaintiff did not see the train approaching until his front wheel was on the track, and to have then stopped instantly would have meant certain injury, if not death. If the term "in view of him" meant that plaintiff might have seen the approaching cars under some possible circumstances, it is misleading, and should not have been given. But we think the jury had a right to attach a meaning to the instruction such as would harmonize with the evidence, and would not be inconsistent either with their general verdict or their findings on the special issues. And we think, too, the court must have had in mind the evidence in giving the instruction, and intended to convey to the jury by the term "in view of him" the meaning that the train was actually in sight of plaintiff. The jury by their general verdict found that

plaintiff at no time saw the train in time to avoid the injury by stopping instantly, and we see no inconsistency between the verdict and these instructions.

By instruction marked "13" the jury were told that if plaintiff "could have seen the cars in time to have avoided the accident, if he had stopped instantly, it was the duty of plaintiff to so stop." This is but saying that it would be negligence if plaintiff failed so to do. But the court also instructed the jury, and the instructions must be read together, that "negligence is always relative to some circumstance of time, place, or person. It is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. * * * In order, to absolve the plaintiff from the charge of contributory negligence, it is only necessary that you believe that he exercised ordinary care under the circumstances." Whether the plaintiff, in approaching the track upon which the accident happened, could have seen the cars in time to have avoided the accident by stopping instantly was a question which the jury were to determine under all the circumstances appearing in the case. The jury found as a fact that he did not see the train in time to have avoided the accident, and they found also that, considering all the circumstances, in approaching the train he acted with ordinary care and prudence. Why, we may ask, was plaintiff called upon to stop instantly to avoid a danger which he neither saw nor was warned against, nor had reason to believe existed?

In considering the special issues we are to be guided by certain well-settled principles or rules of law. The Code provides: "Where a special finding of facts is inconsistent with the general verdict, the former controls the latter and the court must give judgment accordingly." Code Civ. Proc. § 625. It was said in *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 606, 14 Pac. 383: "We do not think the court should strain the language of a finding to make out a case of conflict. The findings should be reconciled if it can reasonably be done, and be so construed *ut res magis valeat quam pereat*"; i. e. that the end may be promoted rather than destroyed. Under the title "Absolute inconsistency requisite to control" Mr. Clementson, in his recent work on *Special Verdicts*, at page 139 et seq., collects the rules and cites the authorities in their support. In *Union Traction Co. v. Vandercook*, 32 Ind. App. 621, 69 N. E. 486, it is said: "Authorities need not be cited in support of the proposition that the general verdict determines all material issues in appellee's favor; that all reasonable presumptions will be indulged in favor of the general verdict, and none indulged in

favor of the answers to the interrogatories; that if the answers are to control, they must be in irreconcilable conflict with the general verdict; that if the answers are antagonistic or inconsistent, they neutralize each other, and will be disregarded; and that the answers override the general verdict only when both cannot stand, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues." Mr. Clementson says: "The special findings must exclude every theory which will sustain the general verdict, and are inconsistent only when, as a matter of law, they will authorize a judgment different from that which the general verdict will permit." Clementson, *Sp. Ver.* p. 139.

Special issue 2 was a finding that no warning was given by any one before plaintiff crossed the track. The only evidence of any circumstance indicating that a warning was given was the shout heard 100 feet south, and in the opposite direction from any danger. "Warning" is defined to mean "previous notice; caution against danger." Webster. The jury were the judges whether this outcry by some one unknown to plaintiff, was understood, or ought to have been understood, by him to be a warning in the sense the jury had a right to apply the term.

Findings 1 and 4, read together as they should be, were that the accident could have been prevented if plaintiff had stopped instantly when he first reached a point where he could have seen the approaching cars (finding 1), which point was about 7 feet (finding 2). The jury having found, and upon sufficient evidence, as we have already seen, that plaintiff was not guilty of contributory negligence, there is no necessary or irreconcilable conflict between that finding and special findings 1 and 4. The jury said, in effect, by the special findings that, when plaintiff was within 7 feet of track 4 he could, by some possibility, have seen the approaching cars under some circumstances, and if, seeing the cars under those circumstances, he had instantly stopped, the accident might have been averted. But the jury by their general verdict found that under the circumstances as they in fact appeared he did not see the approaching cars and that if he had seen them, he could not have stopped instantly. The special issues wholly ignore the existing circumstances, and are hypothetical. It is possible for the answers to be true and the general verdict also true. It was said, in *Baltimore & O. S. W. R. Co. v. Rosborough*, supra: "In an action for injuries received at a railroad crossing, the general verdict, finding that plaintiff exercised due care, was not overcome by answers to interrogatories showing that he could have discovered the danger in time to avoid it had he looked in a certain direction at a certain time, since the facts specially returned do not exclude the existence of circumstances warranting the conclusion that

he exercised due care." Syllabus. If it is reasonably possible to so construe the special findings of a jury as to sustain their general verdict, it must be done. *Ready v. Peavey Elevator Co.*, 89 Minn. 154, 94 N. W. 444. Both the general verdict and the special findings may be true. Hence they are not inconsistent. *Id.* We think it is possible to give the special findings a reasonable construction so as to avoid any conflict with the general verdict.

The jury said, in the special finding 5, that plaintiff did not approach track 4 in such manner that he could have stopped instantly. In the first place, plaintiff was not, under all circumstances, required to so approach the track, but the interrogatory implies that it was his duty to do so. We have shown that the duty to stop is relative to time, place, and circumstances. The interrogatory does not relate to any particular distance from track 4 at which he failed to so approach this track. Furthermore, in answering the interrogatory negatively, the jury may have taken the word "instantly" in its true meaning, and yet consistently have found plaintiff free from contributory negligence. In *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349, the indictment for murder charged that the deceased "instantly" died. The question was whether it was certain as to time and place. Said the court: "'Instantly,' say lexicographers—those who define it etymologically, and those who give it legal meaning—implies 'without any intervention of time'; 'allows not a particle of delay'; 'makes an interval too small to be appreciated.'" I think it may be safely stated, as within the knowledge common to all men, that in approaching a train on horseback, by carriage, by bicycle, or other vehicle, to stop instantly, as that word is defined, would be impossible, and we must, under the rules of law already stated, assume that the jury gave the word the meaning found in dictionaries, and, so understanding its meaning, the jury might properly have found as they did by the general verdict.

The defendant complains of instruction numbered 7, which is as follows: "The plaintiff's right to recover is not affected by the fact that he may have contributed to his injury, if he was not in fault in so doing. If the plaintiff's share in the transaction was innocent, and not incautious, it furnishes no excuse for the defendant. If you find that the plaintiff was suddenly put in peril by the negligence of the defendant, without having sufficient time to consider all the circumstances, he is to be deemed excusable for omitting some precautions or making an unwise choice under this disturbing influence; and, even if you find that, in his bewilderment, being otherwise innocent of contributory negligence, he ran into dan-

ger by trying to cross the track ahead of the cars, such action on his part, would not be contributory negligence." Defendant contends that there is no warrant in law or in the evidence for this instruction. The instruction, we think, has much warrant in the evidence, unless what has been already pointed out in this opinion is unwarranted. The circumstances stated in the instruction as excusing plaintiff in some degree are made subject to the condition that plaintiff is "otherwise innocent of contributory negligence," and that his "share in the transaction was innocent, and not incautious," and that he "was not in fault." We can discover no error in this instruction, and, besides, we do not think the jury could possibly have been misled to defendant's injury by this instruction. See *Dufour v. C. P. R. R. Co.*, 67 Cal. 322, 7 Pac. 769; *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 521, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; *Bilton v. S. P. Co.*, 148 Cal. 450, 83 Pac. 440.

Many of the rules relied upon by defendant were laid down with reference to the circumstances surrounding each particular case, and often where the plaintiff was guilty of gross negligence, as in *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651, the opinion speaks of plaintiff's conduct as a "reckless race with death," "almost an act of madness." The effort should be to apply settled principles of law to the facts in the particular case as they existed at the scene of the injury, rather than determine the matter by matching cases.

The judgment and orders are affirmed.

We concur: BURNETT, J.; HART,

9 Cal. App. 759
UTAH-NEVADA CO. v. DE LAMAR.
(Civ. 543.)

(Court of Appeal, Third District, California.
Feb. 1. 1909.)

1. APPEAL AND ERROR (§ 564*)—FAILURE TO PROPOSE STATEMENT—EXTENSION OF TIME—RELIEF.

The application of appellant for relief from default for failing to present the statement on appeal within the time required by law was supported by affidavits showing that appellant's attorney suffered from a severe affliction of the eyes, of several years' standing. There was nothing to show that other counsel were not able and willing to prepare the statement. *Held*, that the denial of the application was within the court's discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2505; Dec. Dig. § 564.*]

2. APPEAL AND ERROR (§ 564*)—FAILURE TO PROPOSE STATEMENT—EXCUSE—RELIEF.

Failure to present the statement, on appeal from an order denying a new trial, within the statutory time cannot be excused on the ground of want of knowledge of the attorney as to the statutory provision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2505; Dec. Dig. § 564.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Utah-Nevada Company against Joseph R. De Lamar. From an order denying the application of plaintiff for relief from its default in failing to propose, within the time required by law, its statement on appeal from the denial of its motion for a new trial, it appeals. Affirmed.

McGowan, Squires & Westlake, for appellant. Pillsbury, Madison & Sutro, for respondent.

BURNETT, J. The appeal is from an order of the superior court denying the application of appellant to be relieved from its default in failing to propose, within the time required by law, its statement on appeal from the order denying its motion for a new trial, and refusing to settle the statement.

On February 26, 1907, findings and a judgment in favor of the defendant were filed and entered. The motion for a new trial was made upon affidavits, and upon the minutes of the court, and it was denied on June 27, 1907. On July 2, 1907, the trial judge made an order extending plaintiff's time 30 days within which to prepare and serve the statement. Similar orders for 5, 7, and 7 additional days, respectively, were made by Judge Coffey in the absence of Judge Seawell, the trial judge, and none of these orders was served upon the defendant or his counsel. On August 24, 1907, plaintiff served upon defendant its proposed statement on appeal. On September 3, 1907, the defendant served his proposed amendments, but expressly objected to the settlement of the statement, upon the ground that the court had no jurisdiction to settle the same, for the reason that it was not served in time; "that under the provisions of section 661 of the Code of Civil Procedure the time of the plaintiff to prepare and serve its proposed statement of the case, on appeal from the order denying its motion for a new trial, as extended by said last-mentioned order of said court (the order of July 2, 1907), expired on the 6th day of August, 1907, and that, under the provisions of section 1054 of the Code of Civil Procedure, no additional time to prepare or serve said proposed statement could be given." Thereupon, on September 7th, the plaintiff served a notice of a motion to be made by it, on September 13th, to be relieved from its failure to serve its statement within the 40 days. The motion was supported by affidavits, and counter affidavits were filed by defendant. The decision, as we have seen, was against plaintiff.

Appellant concedes that "the court was without jurisdiction to grant an extension of time beyond August 6th," and that "the statement was served just 18 days too late." It is admitted, also, "that the granting or denial of relief for failure to present the statement within the time allowed by law

rested largely in the discretion of the trial court. *Stonesifer v. Armstrong*, 86 Cal. 594, 25 Pac. 50; *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332; *Cole v. Wilcox*, 99 Cal. 549, 34 Pac. 114; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Murphy v. Stelling*, 138 Cal. 641, 72 Pac. 176." But it is insisted that the trial court abused its discretion, and that in determining the question "the appellate court should review the action of the trial court in the light of the rule that the trial court, in case of doubt, should resolve the doubt in favor of the application," quoting from the *Banta Case*, supra. This, however, is not a rule to guide the reviewing court, but the quotation is merely one of the hortatory suggestions to the trial court in which the appellate courts, with commendable zeal, often indulge, but which, we fear, are often disregarded. The appellate court may have a doubt of the correctness of the ruling. It may be of the opinion that the trial court should have ruled otherwise, but that is not a sufficient reason for reversal. It cannot substitute its own judgment for that of the trial court. Otherwise the trial court would be divested of all discretion. It must appear equally clear that the appellate court cannot determine, as a matter of fact whether the trial court had any doubt as to the sufficiency of the exculpation from the apparent negligence; nor, where reasonable men might draw opposing conclusions, can it be held, as a matter of law, that the trial court should have decided the question one way or the other. The sole question for us to decide is, Did the trial court abuse its discretion?

We quote from *Alferitz v. Cahen*, 145 Cal. 398, 78 Pac. 878, the language of Mr. Justice Henshaw: "The sole question presented to this court, upon an appeal such as this, is whether or not there has been an abuse of the discretion vested in the trial court, either in granting or in refusing the motion. Where such abuse has been plainly shown, this court has lent its aid in correction of it, but in all other cases relief has been denied. The whole consideration has been well summed up by Mr. Justice Harrison in *Ingrim v. Epperson*, 137 Cal. 370, 70 Pac. 165, where it is said: 'The rule has been so often declared as not to need the citation of authorities that the action of the superior court, upon an application to set aside a default or grant relief therefrom, rests so largely in its discretion that it will not be disturbed on appeal, unless it shall be made clearly to appear that there was an abuse of this discretion. While it has been said in some cases that this discretion is better exercised when it tends to bring about a decision of the cause on its merits, the rule itself has never been relaxed. This observation has been in the nature of advice to the superior court, and not for the purpose of compelling it to decide in that mode. Unless the record clearly shows that the court has abused its

discretion, its order, whether it be to grant or deny the application, will be affirmed." There is applicable here another observation made by Judge Henshaw, to the effect that if the trial court had reached the opposite determination, and had granted the application, the conclusion would not have been disturbed; but that is far from a declaration that the decision which the court actually reached was unwarranted, and therefore an abuse of its discretion. The question is similarly discussed in *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 479, 82 Pac. 53, and by this court in *Donnelly v. Tregaskis* (Cal. App.) 94 Pac. 383. In the light of these and other decisions we cannot disturb the action of the court below, as it does not appear that the court abused its discretion. On the contrary, we must hold that the facts warranted an inference that the default of plaintiff was not legally excusable. The main circumstance upon which plaintiff relied for acquittal of the imputation of negligence was a severe affection of the eyes of Mr. Houx, the attorney to whom was committed the task of preparing the statement. But, as pointed out by respondent, this trouble was of seven or eight years' standing, and on account of its character must have been known to plaintiff, and to its other counsel in the case, of whom there were four able members of the San Francisco bar.

Even if the afflicted attorney had been the only counsel, under the circumstances the court, without an abuse of discretion, might have rejected the excuse as insufficient. In *Ekel v. Swift*, 47 Cal. 619, it is held, as stated in the syllabus, that: "When an attorney in a cause fails to attend a trial had at a regular term of court, and does not know that the cause is set for trial, and his failure and want of knowledge is caused by an illness of the attorney which was not sudden, but under which he had been laboring for a year, and the other party obtains a judgment for want of an appearance, the facts are not sufficient to warrant an order vacating the judgment." The action of the court in the present instance is less open to criticism, in view of the connection with the case of the other attorneys. There is no showing that they were not able and willing to attend to this important work for which Mr. Houx, on account of his physical condition, was so illly prepared.

The court also was justified in holding that the want of knowledge of Mr. Houx concerning the prohibition of the statute in relation to extension of time cannot be held to be the result of mistake, surprise, or inadvertence. The principle is the same as that involved in the *Ingrim Case*, supra, wherein it is said: "The rules of procedure for the purpose of preparing a record to be used upon an appeal from a judgment are so clearly set forth in the Code of Civil Procedure, and have been

so frequently passed upon by this court, that ignorance of the time within which a statement or bill of exceptions must be prepared and served cannot be the result of mistake or surprise or inadvertence, and the neglect to prepare and serve it within the time prescribed by the Code is not excusable."

Upon the whole we are satisfied that to reverse the order would be an unwarranted interference with the discretion which, under our system, is wisely committed to the conscience and judgment of the trial court, and would be to encourage a relaxation of a wholesome rule that fosters expedition in the determination of causes.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 716

HATCH et al. v. RANEY et al. (Civ. 555.)
(Court of Appeal, Third District, California.
Jan. 27, 1909.)

1. INJUNCTION (§ 4*)—ANTECEDENT ACTS.

A writ temporarily enjoining defendant from interfering with plaintiffs' use of a ditch was improperly issued, where the alleged wrong complained of, destruction of the ditch, was committed more than a year before the writ was issued and served.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. INJUNCTION (§ 172*)—TEMPORARY INJUNCTION—DISSOLUTION—JUDICIAL DISCRETION.

It was not an abuse of discretion to dissolve a writ temporarily enjoining defendants from interfering with plaintiffs' use of a ditch across a defendant's land, where the material allegations of the complaint were denied by an answer supported by affidavits, though plaintiffs filed counter affidavits.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 374-384; Dec. Dig. § 172.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Mrs. Julia Hatch and others against Sheldon J. Raney and others. From an order dissolving a preliminary injunction, plaintiffs appeal. Affirmed.

H. Scott Jacobs, for appellants. Robt. W. Miller, for respondents.

BURNETT, J. The appeal is from an order dissolving a preliminary injunction that was issued on the filing of the complaint. The action was brought to restrain defendants from interfering in any manner with plaintiffs in the use of a certain water ditch extending across the lands of defendant Sheldon J. Raney, plaintiffs claiming an easement therein, and also to quiet "plaintiffs' title in and to said ditch and their right to run water therein over, across, and through the lands of said defendant, Sheldon J. Raney."

The alleged wrong of which complaint is made, the destruction of the ditch, had been committed more than a year prior to the is

suance and service of the writ. Hence the writ was improperly issued in the first instance, and for that reason the court was justified in dissolving it. "The office of a writ of injunction, as its name imports, is peculiarly a preventive and not a remedial one. It is to restrain the wrongdoer, not to punish him after the wrong has been done or to compel him to undo it." *Stewart v. Superior Court*, 100 Cal. 546, 35 Pac. 156, 563. "Besides, it has been decided by the court that a preliminary injunction 'will not be retained where it appears (by the answer, uncontradicted by affidavit) that the acts, the performance of which is sought to be restrained, had been performed before the order for the injunction was made or served.' *Delger v. Johnson*, 44 Cal. 182. A fortiori, where the fact of performance appears in the complaint, as in this case." *Gardner v. Stroever*, 81 Cal. 151, 22 Pac. 483, 6 L. R. A. 90.

But, if it be admitted that sufficient facts were alleged to justify the court in the issuance of the injunction to restrain defendants from interfering with any effort of plaintiffs to restore the ditch, still we must hold that the court did not abuse its discretion in the order of dissolution. The material allegations of the complaint were all denied by the answer, and the latter was supported by certain affidavits set out in the transcript. It is true that counter affidavits were filed by plaintiffs; but, at most, there was simply a conflict in the evidence, and it is impossible for us to say that the court was not justified in acting favorably upon the showing made by the defendants. In *Marks v. Weinstock-Lubin Co.*, 121 Cal. 55, 53 Pac. 362, the Supreme Court said: "It is a well-settled rule that the dissolution or continuance of a preliminary injunction is a matter largely within the discretion of the trial court, and its action will not be disturbed on appeal, unless it appears from the record that its discretion has been abused."

We can see no merit in the appeal, and the order is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 735

PEOPLE v. JU BUCK NING. (Cr. 159.)

(Court of Appeal, First District, California.
Jan. 28, 1909.)

CRIMINAL LAW (§ 1128*)—APPEAL—INSUFFICIENT RESERVATION OF OBJECTION.

Any defect of proof and any variance should appear by bill of exceptions or a statement of the case, and on appeal, on the judgment roll alone, from a conviction of perjury in a robbery trial, the Court of Appeal cannot reverse on the ground that the information in the robbery trial, on appeal, was held to charge larceny only; such information being no part of the record at bar, and appellant being bound to show error by the record.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1128.*]

Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Ju Buck Ning was convicted of perjury, and he appeals from the judgment, and from an order refusing a new trial. Affirmed.

Peter J. Crosby, for appellant. Atty. Gen. Webb, for the People.

HALL, J. Appellant was convicted of the crime of perjury, and in due time appealed from the judgment of conviction, and from the order denying his motion for a new trial. The appeal comes to this court upon the judgment roll alone; there being no bill of exceptions or statement of the case in the record.

It is not contended that the information is in any way defective, nor is our attention called to any error committed by the court in giving or refusing instructions. The matter relied on by appellant for a reversal of the judgment and order in no way appears upon the record in this case. The perjury alleged against defendant is charged in the information to have been committed upon the trial of a certain criminal action, entitled "The People of the State of California, Plaintiff, against Ham Tong, Ho Sing, Louie You, and Louie Poe, Defendants," and in which said action it is alleged that the defendants therein were charged with robbery. We are asked to reverse the judgment and order in this case because in *People v. Ho Sing* we held that the information in that case did not charge the crime of robbery, but only the crime of larceny (6 Cal. App. 752, 93 Pac. 204). But the information in that case is not part of the record in this case, and cannot be considered by us on this appeal. Any defect of proof to support the allegations of the information in this case, and any variance between the proof and the allegations, should be made to appear by a bill of exceptions or a statement of the case settled by the trial judge. In the absence of a bill of exceptions or a statement of the case containing the evidence, we must assume that the allegations of the information were supported by sufficient evidence. It is the duty of the appellant to show error by the record brought to this court upon his appeal.

No error appearing upon the record, the judgment and order must be affirmed; and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

9 Cal. App. 764

PEOPLE v. DEL CERRO. (Cr. 82.)

(Court of Appeal, Third District, California.
Feb. 1, 1909. Rehearing Denied by
Supreme Court April 1, 1909.)

1. LARCENY (§ 75*)—INSTRUCTIONS—TAKING.

In a prosecution for larceny, where the evidence tended to show that accused and one from

whom he claimed to have bought the stolen stock had conspired to steal it, and that the other drove the stock from the ranch some distance, when accused joined him and assisted in driving them to another county, the court instructed that in determining whether accused was guilty of larceny it was not necessary that he actually should have participated in driving the cattle from the owner's possession, but if he knew they were feloniously taken from the owner and thereafter aided and abetted the thief in driving them out of the county, or, not being present, advised and encouraged the commission of the crime, he should be found guilty. *Held*, that the instruction was not objectionable as authorizing a conviction for larceny if accused knew the animals were stolen and afterward received them, merely being an instruction that accused need not be actually present if he otherwise aided and abetted in the taking.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 75.*]

2. CRIMINAL LAW (§ 823*)—INSTRUCTIONS.

The instruction, though not as clear as it should have been, could not have prejudiced accused, in view of another instruction given, that defendant was not charged with receiving stolen property, and that he should be acquitted, though they believed that accused received the property knowing it to have been stolen, unless they believed beyond a reasonable doubt that accused actually stole the animals, or aided and abetted in stealing them, or while absent encouraged the theft.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.*]

3. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUING WHOLE CHARGE.

The entire charge must be considered, and, if it is correct as a whole, there is no error, though parts of it may state a proposition without the exceptions or qualifications to which it is subject under the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

4. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—"REASONABLE DOUBT"—DOUBT ARISING OUT OF EVIDENCE.

The court instructed that the term "reasonable doubt" meant a doubt having some good reason for it arising out of the evidence in the case; such a doubt as the jury could find a reason for in the evidence, and, as applied to the evidence in criminal cases, meant an actual and substantial doubt growing out of the unsatisfactory nature of the evidence, and the entire evidence should be considered, and the jury should entertain only such doubts as arise from the evidence and are reasonable. *Held*, that an objection to the charge that the doubt must arise out of the evidence, on the ground that it might arise from want of evidence, was hypercritical, it simply meaning that the jury could not go out of the record to hunt for a pretext to acquit, nor was the instruction that the jury could only act upon such doubt as they were able to find a reason for in the evidence objectionable, when properly construed, as the reason for a reasonable doubt could come from no other source.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1918, 1921; Dec. Dig. § 789.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

5. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—"REASONABLE DOUBT"—SUBSTANTIAL DOUBT.

The doctrine of reasonable doubt is an actual and substantial doctrine which the jury

should be made to properly understand, and an instruction that it meant an actual and substantial doubt growing out of the unsatisfactory nature of the evidence, and not arising from a mere whim, vagary, or surmise, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1912; Dec. Dig. § 789.*]

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

D. Del Cerro was convicted of grand larceny, and, from the judgment of conviction and the order denying a new trial, he appeals. Affirmed.

Raleigh E. Rhodes, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant was convicted of the crime of grand larceny, and prosecutes this appeal from the judgment and the order denying him a new trial.

The principal points urged for a reversal involve certain instructions given to the jury by the court, and in which it is contended that the law pertinent to the charge and the evidence was erroneously declared.

The property charged to have been stolen consisted of about a dozen head of live stock—horses and mules—and are alleged to be the personal property of Miller & Lux, Incorporated. The animals were taken from what is known as the "New Columbia Ranch" of Miller & Lux, situated in Madera county. The bill of exceptions does not contain the evidence introduced on behalf of the defendant, but the evidence presented by the people shows the facts to be, substantially, as follows: On the 24th of September, 1907, the defendant made arrangements, in his own name, for pasture for a dozen head of young stock with one B. H. Bissell, a farmer at Dry Creek, about 14 miles from the city of Fresno. The animals remained in the Bissell pasture until the 19th day of October, 1907, when the defendant sold them to Bissell for the sum of \$950. In the latter part of November, 1907, it was discovered that the stock had been stolen from Miller & Lux, and the defendant, having been questioned by said Bissell and one White concerning the circumstances under which he acquired possession of the animals, explained that he had bought them from two Mexicans. After his arrest the defendant, while confined in the county jail, made a further statement in explanation of his possession of the stock. In this statement, which was received in evidence at the instance of the people, he again declared that he had bought the stock from a man known by the name of Del Carlo, sometimes called Bisso; that he paid Bisso the sum of \$650 for the stock, and that he made the payment in the barroom of the hotel of one Barsotti, in Madera; that, after having been informed that the stock had been stolen, he wrote a letter of inquiry to as-

certain the whereabouts of Bisso, and subsequently learned that the latter was in San Francisco. Barsotti corroborated the defendant as to the payment of \$650 to Bisso, who, after such payment, departed from the hotel, and was never thereafter seen by the witness.

David Alsop, an employé of Miller & Lux, testified that he had charge of the young stock of Miller & Lux on the Columbia ranch, and that a man named George Del Carlo, also known as and called Bisso, worked for the corporation under the direction of the witness; that he ceased working on and left the ranch about the last of October or November, 1907. This witness stated that Del Carlo was an Italian. R. C. Farris, of Clovis, Fresno county, testified that the defendant came to his place and said "he had some stock he had to sell and get rid of, and he wanted to know if I would sell them for him—sell them or buy them from him. There were 10 head. I told him to bring them ahead and I would see what I could do with them." The defendant drove the stock to Farris' place, but the latter did not buy because he could not agree to the price asked by the defendant. The defendant left the stock at Farris', authorizing the latter to sell the animals if he could. After the lapse of 8 or 10 days the defendant returned, accompanied by a "tall young fellow and a middle-aged man," and drove the stock away.

We have thus presented a sufficient synopsis of the evidence to illustrate and explain the pertinency of the objection of counsel to instruction No. 24, which was read to the jury by the court. The instruction reads as follows: "In determining whether the defendant is guilty of the larceny as charged, I instruct you that it is not necessary for the people to prove that the defendant actually participated in the act of leading or driving the animals away from the possession of the owner. If you believe to a moral certainty and beyond a reasonable doubt that the defendant *knew said animals were feloniously taken, led, or driven away from their said owner, and that the defendant did thereafter aid and abet the thief in taking or driving the animals out of the county of Madera* (italics ours), or, not being present, the defendant has advised and encouraged the commission of the crime charged, then I charge you that it is your duty to find the defendant guilty." It is that part of the foregoing instruction which we have italicized of which complaint is made, and it is contended by counsel for appellant that the jury were thus in effect told that "if the defendant knew the animals were stolen from Miller & Lux, and, after the theft, received the loot and disposed or assisted in the disposition of the same, he is guilty of grand larceny."

We cannot assent to the construction thus given the instruction. It will not for a moment be doubted that the portions of the instruction not in italics correctly state the law, and it is evident that all the court in-

tended or attempted to say to the jury was that, in order to justify a conviction of the defendant under the allegations of the information, it was not necessary that it should be shown that the accused was actually present when the act of the felonious taking of the stock in the first instance was committed, if it were shown beyond a reasonable doubt that he otherwise aided and abetted or assisted in the felonious asportation. And we cannot conceive of any way in which such aid or assistance toward the consummation of the crime could be more effectually given than by taking active part in driving the stock, which the accused knew to be stolen, into another county than that in which it was feloniously taken, or to a point so remote from the place at which the larceny was committed as to at least postpone, if not altogether circumvent, discovery of the thieves and their booty. It was, unquestionably, the theory of the prosecution, fully justified under the evidence, that the defendant and Del Carlo, from whom the accused claimed to have bought the stock, had originally entered into a conspiracy to steal the property, and that in the prosecution of the criminal enterprise the last-named was to do the actual taking of the property from the ranch on which the animals were pastured, while the defendant's part was to dispose of the same, and that, after Del Carlo had driven the animals from the ranch some distance, the defendant, by prearrangement, joined him and assisted in driving the stock into Fresno county. The criticised instruction was undoubtedly given for the purpose of covering such theory.

The charge of the court, so far as it appears in the record, contained a full and clear amplification of the principles of law applicable to the issues submitted for trial, and the evidence received in support thereof. And while the instruction under consideration does not involve that clearness of expression which should characterize all statements of law to a jury, composed generally of laymen, unfamiliar with legal nomenclature, it must, we think, have clearly appeared to the jury, in view of the other instructions given, that the court did not therein intend to tell them that one who, knowing property to have been stolen, has subsequently received or bought the same, having had nothing to do with its asportation, could be guilty of larceny. By the instruction, numbered 20, the court, in singularly perspicuous language, explained to the jury the elements of which the crime of receiving or buying stolen property by one who knows, when so receiving or buying, that the same has been stolen, is constituted, and declared to the triers that the defendant was not on trial for said offense. The instruction, in part, reads: "* * * And although the jury may believe from the evidence that the animals described in the information were stolen from Miller & Lux, Incorporated, a corporation, and were receiv-

ed by the defendant with a knowledge that they were so stolen, still the defendant is not on trial for, nor charged with, the crime of receiving stolen property, and unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant did actually steal said animals, or that he was concerned in the commission of the larceny, and aided and abetted, or, not being present, advised and encouraged, its commission, you should find the defendant not guilty."

We are of the opinion, as suggested in the outset, that the effect of instruction No. 24, as given by the court, while liable to the criticism that its phraseology is not as clear as it could and should have been, is not to be given the construction to which the appellant subjects it, and that, in any event, considered in connection with the entire charge of the court, particularly with instruction No. 20, the defendant could have suffered no prejudice therefrom. As is said in the case of *People v. Mendenhall*, 135 Cal. 346, 67 Pac. 326: "It has been decided over and over again in this court that the entire charge must be considered, and if, as a whole, it correctly states the law, it is free from error, notwithstanding selected passages may state a proposition without at the same time and in immediate connection stating the exceptions or qualifications to which it is subject in its application to the case in hand." See, also, *People v. Doyell*, 48 Cal. 85; *People v. Flynn*, 73 Cal. 511, 15 Pac. 102; *People v. Wordon*, 113 Cal. 569, 45 Pac. 844; *People v. Quimby*, 6 Cal. App. 482, 92 Pac. 496. The doctrine, as thus stated, is, as the court in the *Mendenhall* Case, supra, declares, "very clearly and very justly applicable" to the instruction in question here.

It is next insisted that the court erred in its instruction upon the doctrine of reasonable doubt. After instructing the jury upon this subject in the oft-approved language of Chief Justice Shaw, in *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, the court proceeded: "The term 'reasonable doubt,' as used in these instructions, means a doubt which has some good reason for it, arising out of the evidence in the case; *such a doubt as you are able to find a reason for in the evidence.* As applied to the evidence in criminal cases, it means an actual and substantial doubt growing out of the unsatisfactory nature of the evidence in the case. It does not mean a doubt which arises from some mere whim or vagary, or from any groundless surmise or guess; and while the law requires you to be satisfied from the evidence of the defendant's guilt, beyond a reasonable doubt, it at the same time prohibits you from going outside of the evidence to hunt up doubt upon which to acquit the defendant. In arriving at your verdict, it is your duty to carefully and candidly consider the entire evidence in the case, and in so doing you should entertain such doubts only as arise from the evidence and are reasonable, as defined in

these instructions." (We have followed counsel for appellant in his brief in the matter of italicizing certain portions of the foregoing instruction.)

The specific criticism directed against said instruction is: (1) That the jury were therein told that they were justified in entertaining such doubt only as they were able to find a reason for in the evidence, and that, therefore, they were in effect instructed that they could not found a reasonable doubt on the lack or absence of evidence; (2) "that such doubt means an actual and substantial doubt"; (3) "that they (the jury) can consider only such doubt as arises from the evidence."

It will perhaps accomplish no useful purpose to suggest generally to nisi prius judges that, in giving their instructions to juries in criminal cases, they should restrict themselves, upon the doctrine of reasonable doubt, to the use, literally, of the language employed by Chief Justice Shaw in his great exposition of that doctrine in the *Webster* Case, supra, and to not undertake to amplify the subject in language of their own. We say that it will perhaps be useless to thus caution trial judges, because the Supreme Court has so often, in the plainest kind of language, warned such judges of the danger of going beyond the language used in the *Webster* Case in explanation of this doctrine, that it would seem that such warnings would be constantly in the minds of those presiding over the trials of criminal cases, so that they would content themselves with the clear and simple language of Chief Justice Shaw, however strong the temptation may be to make the experiment of determining how far they can wade out into deep water without disappearing beneath the surface.

The "reasonable doubt," as defined by Chief Justice Shaw, is good enough for all the courts of last resort of the country, and, it would seem, ought to be good enough for those judges the records of whose cases must finally be reviewed with a view of determining whether an accused has been tried according to the established forms of law.

But, while we think that some portions of the instruction here could have well been eliminated, we are of the opinion that, rightly understood, the instruction is in reality within the definition of the doctrine of reasonable doubt as given by Chief Justice Shaw.

Counsel's principal objection to the instruction is that it limits the source from which a reasonable doubt may arise to the evidence actually produced in the case. It has been held, in some jurisdictions, that an instruction in which it is declared that the reasonable doubt of the defendant's guilt must arise out of the evidence is erroneous. It is so held in *Indiana*, where, in *Brown v. State*, 105 Ind. 385, 5 N. E. 900, the Supreme Court says: "It is not the law that in order to justify an acquittal the doubt must arise out of the evidence, and be such as to cause

a prudent man to hesitate. The doubt may arise from want of evidence." This criticism, we do not hesitate to say, deferentially, is rather hypercritical than sound or substantial. When the court tells a jury that the reasonable doubt must arise from the evidence in the case it is, it would seem, only a sensible understanding of such instruction that what is meant is that such doubt can only arise from the insufficiency of the evidence, in weight, to persuade the conviction that the defendant is guilty. If the evidence is strong enough to establish the guilt of the accused, beyond a reasonable doubt, then, obviously, no reasonable doubt can arise from the evidence. If, on the other hand, it is not of sufficient strength to show guilt beyond a reasonable doubt, then a reasonable doubt necessarily arises from the insufficiency of the evidence to justify a conviction. We think that it is clear that the idea intended to be conveyed by the language that a reasonable doubt must arise from the evidence in the case is that the jury are not authorized to go outside of the record to hunt for a pretext of which they can predicate a reasonable doubt of the defendant's guilt. That such is the meaning of the instruction here is emphasized by the language, "* * *" as applied to the evidence in criminal cases, it means an actual and substantial doubt growing out of the unsatisfactory nature of the evidence in the case." This language states the source from which a reasonable doubt may arise succinctly and correctly. If the nature of the evidence is unsatisfactory—that is, if it is incapable of producing conviction, beyond a reasonable doubt, in the minds of the jurors, of the guilt of the accused—then there arises and exists the reasonable doubt which entitles the defendant to an acquittal, and such doubt is not the offspring alone of the evidence which has actually been produced, but of the failure to produce such evidence as would remove all reasonable doubt. Nor is there any serious objection to that part of the instruction in which the jury were informed that they could act only upon such a reasonable doubt as they "were able to find a reason for in the evidence." This part of the instruction is to be understood, when rationally construed, to mean that the reason from which a reasonable doubt may proceed or upon which it may be formed must be found in the nature or character of the evidence introduced into the record. Manifestly, the reason for a reasonable doubt could legally come from no other source, as we have already endeavored to show.

The language here used is very much different from that employed in instructions upon reasonable doubt held to be misleading and erroneous in the cases upon which appellant relies. For instance, in *Cowan v. State*, 22 Neb. 519, 35 N.W. 408, the instruction contained this language: "* * * It is a doubt

for having which the jury can give a reason based upon the testimony," and it was held that such language was not a correct definition of a reasonable doubt; and a like instruction was condemned and the cause reversed therefor in *Carr v. State*, 23 Neb. 749, 37 N. W. 630. This language is amenable to the criticism that it is misleading, in that a jury might understand therefrom that they were expected to be able to give some reason based on the testimony in the case for the reasonable doubt upon which they acquitted the accused.

Here the instruction contains no such language. There is nothing in the instruction from which the jury could infer that they were required to assign a reason for their doubt. They were simply told, in effect, as we have seen, that a reasonable doubt is a doubt based upon some reason for which the nature of the evidence would furnish justification. *People v. Manasse* (Cal.) 94 Pac. 92.

The court's declaration that such doubt "means an actual and substantial doubt" is also criticised in a general way, but we perceive no merit in the criticism. It is clear that the court intended by the use of that language to say in a different form what it subsequently in the same instruction declared, with clearness, in describing a "reasonable doubt," that such doubt was "not one arising from some mere whim or vagary, or from any groundless surmise or guess." The doctrine of reasonable doubt, in criminal cases, like that of the presumption of innocence, is an actual and substantial doctrine, and not a mere fiction, invented and invoked for the purposes of convenience only, and it is well that juries, in the trial of criminal cases, should be made to fully understand and appreciate its significance and importance as applied in such cases.

The views we have expressed upon the instruction under review are not in conflict with any of the California cases to which our attention has been directed, while our Supreme Court has in a number of instances refused to reverse cases for instructions upon the subject of reasonable doubt much more vulnerable than the one here. See *People v. Kernaghan*, 72 Cal. 609, 14 Pac. 566; *People v. Chun Heong*, 86 Cal. 333, 24 Pac. 1021.

Other alleged errors are assigned in the giving of and refusing to give certain other instructions, but as it is plainly manifest, from an examination thereof, that the court did not err in its action with reference to these instructions, we are not required to give the assignments special attention.

The cause appears to have been fairly tried, and the law of the case fully covered in the court's charge to the jury.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

9 Cal. App. 351

In re LONG'S ESTATE. (Civ. 532.)
(Court of Appeal, First District, California.
Jan. 30, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 225*) — CLAIMS—TIME FOR PRESENTATION.

Code Civ. Proc. § 1490, provides for notice to creditors, requiring them to present their claims to the executor or administrator. Section 1493 provides that all claims must be presented within the time limited in the notice. Section 1510 provides that, if the executor or administrator is a creditor of decedent, his claim must be presented to the judge of the superior court. *Held*, that a claim against an estate by the administrator must be presented within the same time as a claim of any other creditor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 791; Dec. Dig. § 225.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Thomas J. Crowley, administrator of the estate of John Holmes Long, deceased, presented to the superior court a claim against the estate. From an order denying its allowance, claimant appeals. Affirmed.

Hubbs & Jennings and C. M. Jennings, for appellant. W. P. Cauby, for respondent.

KERRIGAN, J. Thomas J. Crowley, administrator of the estate, had a claim against the deceased, evidenced by a promissory note, which claim, duly verified, he presented to the superior court for allowance more than five months after the time for the presentation of claims had elapsed. The claim was rejected on the ground that the time for such presentation had expired. The appeal is from this order.

Appellant contends that the statute does not fix the time within which an executor or administrator must present his claim to the judge for allowance, and that therefore it may be presented at any time before the distribution of the estate. The point has been decided contrary to appellant's contention.

In re James A. Taylor, 10 Cal. 482; *Id.*, 16 Cal. 434; In re Hildebrandt, 92 Cal. 433, 28 Pac. 486; Morrow v. Barker, 119 Cal. 65, 51 Pac. 12.

The sections of the Code of Civil Procedure bearing on this question are sections 1490, 1493, and 1510. Section 1490 provides for a notice to creditors, requiring them to exhibit their claims to the executor or administrator, with vouchers, at a named place. Section 1493 provides: "All claims arising upon contracts * * * must be presented within the time limited in the notice, and any claim not so presented is barred forever. * * *" Section 1510: "If the executor or administrator is a creditor of the deceased, his claim * * * must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judgment is sufficient evidence of its correctness,

and it must be paid as other claims in due course of administration."

Upon the authority of the cases cited it is plain that under these sections all creditors, including administrators and executors, must present their claims for allowance within the time prescribed in the notice to creditors, and that the only difference, as regards their allowance, between the claim of an administrator or executor and that of any other creditor, is that the former must be presented directly to the judge, and the latter to the administrator or executor and to the judge.

The order is affirmed.

We concur: COOPER, P. J.; HALL, J.

9 Cal. App. 737

BAKER v. BAKER. (Civ. 560.)

(Court of Appeal, Third District, California.
Jan. 28, 1909. Rehearing Denied Feb.
27, 1909; Denied by Supreme
Court March 29, 1909.)

1. QUIETING TITLE (§ 43*)—PLEADING AND PROOF—MATTERS IN AVOIDANCY OF DEFENSE.

The complaint being in the ordinary form for actions to quiet title, the answer averring a deed from plaintiff to defendant delivered in escrow, to be delivered to defendant on the death of plaintiff, and no pleading being open to plaintiff after answer, fraud and undue influence in procurement of the deed, though not pleaded, may be shown in avoidance of the deed.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 86; Dec. Dig. § 43.*]

2. DEEDS (§ 211*)—FRAUD IN PROCUREMENT—EVIDENCE.

Evidence, in an action to quiet title, held sufficient to sustain a finding of fraud in the procurement of a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 645; Dec. Dig. § 211.*]

3. EVIDENCE (§ 471*)—OPINIONS—QUESTIONS.

The question asked a third person, with whom the signer of a deed left it, "Did she give up the control of it absolutely at the time it was signed by her?" was objectionable as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2157; Dec. Dig. § 471; * Witnesses, Cent. Dig. §§ 833-836.]

4. ESCROWS (§ 1*)—DEEDS (§ 58*)—DELIVERY.

Merely giving a deed to a third person is not per se a delivery in escrow, or any delivery; the vital element being the intention in parting with the instrument.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 3; Dec. Dig. § 1; * Deeds, Cent. Dig. § 130; Dec. Dig. § 58.*]

5. EVIDENCE (§ 471*)—OPINIONS—QUESTIONS.

The question, "Were you acting for her?" being asked to ascertain whether, in the transaction in which plaintiff signed a deed of her property to her son, prepared by witness, an attorney, and left it with him, he had been employed by her to act as her attorney should have been allowed, as not calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149, 2150; Dec. Dig. 471; * Witnesses, Cent. Dig. §§ 833-836.]

6. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—CURING ERROR.

Error in sustaining objection to question is cured by subsequent questions to the same wit-

ness, which were answered, calling for substantially the same matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4201; Dec. Dig. § 1058.*]

7. ATTORNEY AND CLIENT (§ 72*)—EVIDENCE.

On the issue whether witness was plaintiff's attorney in the matter in which he drew up a deed of all her property to her son, which she signed before him, the questions, who paid him for the work, and whether plaintiff paid him, were proper.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 102; Dec. Dig. § 72.*]

8. DEEDS (§ 203*)—EXECUTION—INDEPENDENT ADVICE—EVIDENCE.

As showing whether plaintiff, an old woman, received independent advice in the matter of signing a deed of all her property to her son, the question whether the attorney who drew up the deed, before whom it was executed, and with whom it was left, was attorney for her or for her son is material.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 604-606; Dec. Dig. § 203.*]

9. DEEDS (§ 203*)—FRAUD IN PROCUREMENT—EVIDENCE.

Evidence that plaintiff was on amicable terms with all her children is pertinent, on the question of intent with which she parted with a deed of all her property to a son, which she left with a third person; that is, on the question whether she would have signed it at all but for the persuasions and misrepresentations of the son and his attorney.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 604-606, 608, 609; Dec. Dig. § 203.*]

10. DEEDS (§ 208*)—DELIVERY—EVIDENCE.

Evidence that plaintiff placed a deed of all her property to her son Z., in the custody of C., with an understanding, so far as she was concerned, that she would subsequently call for and retake possession of it, and that she so declared to Z. and C. at the time, and that she subsequently did demand its return, authorizes a finding that there was no delivery, though at the time she left it she signed the words, written by C. on the envelope in which he placed the deed: "This deed * * * is to be delivered to Z., at my death."

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-630; Dec. Dig. § 208.*]

11. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS OF FACT.

Findings of fact on a substantial conflict of evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3983; Dec. Dig. § 1011.*]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Mary A. Baker against Zachariah D. Baker. Judgment for plaintiff. Defendant appeals. Affirmed.

A. H. Carpenter, for appellant. Ashley & Neumiller and Geo. F. Buck, for respondent.

HART, J. The complaint alleges that the plaintiff is the owner of certain real property, situated in San Joaquin county, and that the defendant claims an interest therein adversely to her; that the claim of the defendant is without any foundation whatever, he having no estate or interest in, or right or title to, said premises. The prayer is for judgment quieting plaintiff's title to the land described in the complaint. The answer de-

nies plaintiff's ownership of the premises, admits that defendant claims an estate and interest in the same, and also interposes an affirmative defense, in which it is averred that the plaintiff conveyed to him said premises by deed, the same being set out in full, and further alleging that said deed was delivered in escrow to one A. H. Carpenter, with instructions to the "escrowee" to deliver the same, upon the death of plaintiff, to the defendant. The court below gave plaintiff judgment, from which, upon a bill of exceptions, the defendants present this appeal.

The main assault upon the judgment involves the contention that the findings upon which it rests are not supported by the evidence. It may be well to explain at this point that, after the institution of this suit, the defendant, Zachariah D. Baker, died, and that thereafter Jennie Baker, his widow, as the administratrix of his estate, and Raymond Baker and others, surviving children of the deceased, by said Jennie Baker, their guardian ad litem, and Jennie Baker, in propria persona, were substituted as parties defendants in the place of the said Zachariah D. Baker, deceased. Before proceeding with an examination of the evidence, for the purpose of ascertaining whether the findings are sufficiently supported thereby, we will consider the pleadings and the issues tendered thereby; it being argued by the appellants that certain evidence admitted at the trial was inadmissible thereunder.

The complaint, as we have seen, is in the ordinary form for actions to quiet title. The answer, as before observed, besides denying the averments of the complaint, sets up an affirmative defense, pleading that plaintiff, prior to the commencement of the suit, executed to the deceased, Zachariah D. Baker, a deed, conveying to him the land in controversy. At the trial plaintiff was sworn as a witness, testified that she was the owner of the land described in the complaint, was then in the possession thereof, and had been in such possession for many years before the inauguration of this action, and thereupon rested her case. The defendants then introduced the purported deed in evidence, and presented testimony showing the circumstances under which said deed was executed. Upon the close of the case for the defendants, the plaintiff, in rebuttal, admitting the making of the alleged deed, offered, and the court received, evidence for the purpose of showing that the same had been procured through fraud and undue influence practiced upon her by her son, the grantee.

It is now contended by the appellants that evidence upon the questions of fraud and of undue influence was inadmissible, because no such questions were within the issues tendered by the pleadings; that such evidence could be pertinent only where fraud or undue influence, or both, had been specially

pleaded and relied upon, and that, no such issue having been made by the complaint, the court erred, to the prejudice of appellants, in allowing proof of the alleged fraudulent practices of the deceased, and alleged acts of undue influence claimed to have been exerted by him upon the plaintiff in the procurement of the execution by her of the deed set up in the answer. The general rule is, it is true, that fraud is never to be presumed, and that when it constitutes an element of a cause of action or of a defense which is of an affirmative nature, and invoked as conferring a right against a party, it must be alleged. *Whetherly v. Straus*, 93 Cal. 286, 28 Pac. 1045. But the plaintiff's cause of action in the case at bar does not rest upon fraud, and the necessity of proving fraud appeared only after the answer of the defendant. *Sterling v. Smith*, 97 Cal. 343, 32 Pac. 320. The case of *Moore v. Copp*, 119 Cal. 433, 51 Pac. 630, was an action to quiet title to certain real property, on which there was a granite quarry, the complaint being in the ordinary form for such relief. The defendant set up, as an affirmative defense, a certain instrument executed by plaintiff, by which the latter agreed to sell and convey to the defendant the portion of the land containing the quarry, etc. The court allowed a jury for the purpose of trying certain special issues, involving the mental competency of plaintiff to make the contract pleaded in the answer, whether the same was executed under undue influence of the defendant, or through fraud, or by mistake. It was contended by the appellant in that case that the special issues were not properly allowed, because not alleged in the complaint. The Supreme Court held against that contention, saying: "In the first instance the law requires the defendant to answer; but, when he has done so, the law in the other instance operates to make answer for the plaintiff without any replication on his part. The many cases decided show various issues thus permitted to be tried, such as: The statute of limitations, in *Curtiss v. Sprague*, 49 Cal. 301; want of consideration, in *Colton, etc., v. Raynor*, 57 Cal. 588; undue influence, in *Rankin v. Sisters of Mercy*, 82 Cal. 88, 22 Pac. 1134; fraud, in *Sterling v. Smith*, supra. In the present case plaintiff could not know, when she filed her complaint, that defendant would answer, nor that, if he did, he would claim under the instrument in question. After answer there was no pleading open to her under our system"—citing *In re Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; *Pomeroy's Remedies and Remedial Rights*, §§ 587, 588.

The evidence shows, and the court finds, as we shall presently see, that the plaintiff was, at the time of the commencement of her suit, and had been for many years prior thereto, in the possession of the premises in controversy. She knew that she had made the deed pleaded in the answer; but, according to her testimony, which we must accept

as representing a truthful narrative of the facts connected with that transaction, since the court below found it to be so, she explicitly declared to the grantee named in said deed and the alleged "escrowee" that she intended to call for and demand possession of the deed, and did in fact do so, thus clearly indicating an absence of intention to part with control and dominion over it, and it is therefore not to be supposed that she could anticipate the defense, if any, which her son might interpose against the relief sought by her, or that he would set up against her claim for a decree a deed which she had every reason to know was not a deed in law, because lacking in the essential element of delivery. Her complaint necessarily declared that the defendant claimed an interest in the land described in the complaint in conflict with her title thereto, and asked the court to require him to exhibit the nature of such claim, so that she could show that the same was without right or any foundation. The defendant having in his answer, and not by way of cross-complaint, set forth the nature of his claim, it would indeed be a curious rule of pleading under our system which would estop her from proving, under the pleadings as they appear here, any fact which would show, or tend to show, the spuriousness of his claim. The evidence upon the questions of fraud and of undue influence was, in our opinion, clearly within the issues, and admissible for the purpose of showing that, notwithstanding the deed relied upon by the defendant, she was nevertheless entitled to a decree quieting her title to the property in dispute. The findings are, in our judgment, sufficiently supported by the proofs.

The history of the transaction out of which arises the claim of appellants to the property described in the complaint, as well as the facts bearing upon plaintiff's ownership of the same, and upon the business relationship existing between the plaintiff and her son Zachariah D. Baker, may be summarized as follows: The plaintiff had been in possession of the land in dispute, comprising about 80 acres, and had resided thereon, for over 40 years. It constituted about all the property she owned. The land, at the time of the signing of the deed in question, was valued at \$100 per acre. Besides Zachariah, she had, when she signed said deed, four other children and a daughter of a deceased child, between all of whom and herself the most friendly relations had always existed. Her husband died about 8 years previously to the commencement of this suit, and at that time (her children being of age and married) she resided alone upon the premises concerned here. About 7 years before this action was commenced, Zachariah and his family took up their residence with her upon said farm, and continued to so reside with her for a period of about 6 years. It appears that Zachariah was in a bad state of health, hav-

ing consumption, from which he died after the complaint herein was filed, and the plaintiff testified that while on the farm he did the ordinary chores about the place, but that whatever service he performed was under her direction and authority.

It seems that in the month of October, 1903, the plaintiff made a deed of gift of the land in controversy to her son, Zachariah, said instrument having been prepared by her attorney, Mr. Neumiller. She kept possession of this deed herself, being careful at all times not to allow it to leave her custody. Zachariah knew of the existence of said deed, and plaintiff testified that on one occasion, on her return to her farm, from which she had been temporarily absent, she looked to see whether the deed was in her trunk, where she had customarily kept the instrument, and discovered that it was missing. She thereupon asked Zachariah and his wife about it, and they admitted taking it from the trunk, placing it in a glass jar, and depositing the jar in a "post hole near the little brick house," situated on the farm. She finally succeeded in securing the return of the deed, and thereafter made a practice of carrying it with her. Zachariah had resorted to various futile devices to obtain possession of the instrument, and at last told his mother that the same was not "solid enough," as, in order to make it effective, it should show a consideration. It seems that Zachariah and his wife had consulted an attorney by the name of Carpenter, who had advised them to have a new deed drawn. In accordance with this suggestion Zachariah induced his mother to accompany him to the office of said Carpenter, in the city of Stockton, on the 5th day of January, 1906, and to consent to the making of a new deed. Plaintiff was at this time 76 years of age and in feeble health. She was a cripple, having some months previously sustained serious injuries in attempting to alight from a railway train. She had never met Carpenter before, and the transaction in his office was conducted when no other persons were present than said Carpenter, Zachariah, and the plaintiff. She declared that, after signing the instrument, she demanded possession of it, and further testified: "Zachariah said, 'Let Mr. Carpenter keep it.' 'Yes,' Mr. Carpenter spoke up, 'I will take care of it; I will keep it.' I said, 'I want my own deed.' Zach. says, 'Let Mr. Carpenter keep it; you might lose it or something.' I says, 'I will come back and get it then.' He took the deed, and he laid it over on the other end of his desk." (The foregoing was not contradicted by Mr. Carpenter, who testified to said transaction.) The deed was placed in an envelope, upon the back of which Carpenter wrote the following words, to which the plaintiff attached her signature: "This deed that is inclosed in this envelope is to be delivered to Mr. Zachariah D. Baker at my death." Carpenter destroyed the first,

and retained possession of the new deed. The plaintiff repeatedly declared to Zachariah and Carpenter that she would return and secure possession of the deed, and on the 1st day of May, 1906, or approximately four months subsequently to the day she signed it, she called at the office of Carpenter, and demanded that the instrument be given into her custody. Carpenter refused to comply with her demand, saying that "Zach. has been up here and tried to get it, too, but I would not give it to him." The new deed, as to the matter of consideration, contained the following: "* * * For and in consideration for the care and support heretofore received and to be hereafter given to her during the remainder of her lifetime, by the said party of the second part, and of the sum of \$10.00." No actual cash was received by the plaintiff for the deed. Subsequently, Zachariah induced his mother to lease the farm. Carpenter, Zachariah's attorney, drew the lease, making the latter a joint lessor with the plaintiff, and providing that the rents should be paid jointly to them, and that upon the expiration of the term possession of the farm should be delivered to Zachariah. Plaintiff testified that she was in bed when she signed the lease, and that the transaction was consummated against her real wishes in the matter. Peter Baker, also a son of plaintiff testified that he met and had a conversation with Zachariah a short time prior to his death, and that the latter said that he had made his mother give him "the place," referring to the premises in dispute. There was other testimony, to which specific reference need not be made, in support of the finding of the court that the deed upon which the defendants rely was never delivered.

The undisputed facts clearly show, as seen, that the plaintiff was aged and enfeebled in health; that she was persuaded by Zachariah, through the false representation that the first or deed of gift was not legally sufficient to transfer an impregnable title, to go to the office of, and consult with, his attorney, with whom she had had no previous acquaintance; that she was then without independent advice, and that, though signing the deed and the instructions relating to the disposition to be made of the instrument, she then demanded possession of the document, and, when eventually induced to leave it with Carpenter, she declared her intention of later calling for and receiving it into her own possession; that she did in fact subsequently demand its possession which was refused by the alleged "escrowee." The theory upon which the finding of the court upon the question of fraud rests is undoubtedly that Zachariah well knew having previously consulted his attorney with respect thereto that the deed of gift delivered would have involved a perfectly valid conveyance to him of the property but that the point uppermost in his mind was to place it where there could be no question of

its delivery and that with such end in view he induced his mother, by misrepresentation, or at least by a mere unfounded pretext, to consent to the preparation, by an attorney of his own selection, of a new deed, and thus open up the opportunity, for which he had been persistently seeking, for placing the instrument in the hands of a friend as "escrowee," from whom delivery would readily follow upon the happening of the contingency upon which, by the terms of the instrument, it depended. In other words, the whole affair, under the well-supported theory of the findings, involved a fraudulently conceived and executed scheme to enable Zachariah to ultimately secure ownership of practically the entire estate of his mother, to the exclusion of her other children, for whose pretermisison no conceivable reason whatever is made to appear from the record. All the essential and vital findings of the court are abundantly sustained by the proofs, and are therefore beyond successful attack.

Appellant assigns a number of alleged errors in the court's rulings during the trial of the case, some of which we will notice.

Counsel for appellant asked the witness Carpenter this question: "Did she give up the control of it absolutely at the time it was signed by her?" The question referred to the conduct of plaintiff with reference to the deed after she had signed it, and called for a declaration from the witness as to the intent with which the plaintiff permitted the deed to remain in his possession. Obviously it called for a conclusion of the witness, or his opinion, as to whether there had been a delivery—a question which manifestly must be determined from all the facts and circumstances by which the act of parting with the possession of the instrument was performed. The mere giving a deed to a third party cannot, it is plain, constitute per se a delivery in escrow, or any delivery; for the vital element in the act is the intention with which the act of parting with the instrument was done.

The court refused to allow the witness Carpenter to answer the questions: "Were you the agent of the plaintiff in any way? And were you acting for her?" It is sometimes difficult to say whether such questions call for legal conclusions or for a fact. Of course, the proposition of whether one is acting as an agent of another is one which must ordinarily be determined from facts and circumstances characterizing their relations. We have little doubt but that counsel, by asking the witness if he was acting for the plaintiff, desired to ascertain whether the witness had been employed by plaintiff to act as her attorney in the transaction, and in that view, the court should have allowed an answer to the question; but, even so, the error was cured by questions later asked the witness by counsel for plaintiff, and of which complaint is made by appellants, as follows: "Who paid you for this work at this time?"

Did Mrs. Baker pay you?" Thus the witness was given an opportunity to state a fact which might, or might not, tend to show, according to whether the questions were answered affirmatively or negatively, that he acted for her on the occasion referred to. These questions were pertinent for the purpose of disclosing whether or not the relation of attorney and client existed between the witness and the plaintiff, and the fact thus sought to be established was material for the purpose of showing whether the plaintiff received, or did not receive, independent advice in a transaction involving the alleged transfer of her entire estate.

The testimony given by plaintiff that she was on amicable terms with her other children was proper and pertinent, as bearing upon the question of the intent with which she parted with the deed; that is, upon the question of whether it is probable she would have signed the deed at all but for the persuasions and misrepresentations of her son Zachariah and his attorney.

There are a few other points urged against the rulings of the court which do not involve substantial prejudice to the appellants, assuming such rulings to have been, strictly viewing them, erroneous.

As we have declared, the findings are amply supported, the decree well sustained and just, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Rehearing.

The discussion in the petition involves only a repetition of the argument presented on behalf of the appellant in the briefs. We deem it proper, however, to make a few further observations concerning one of the points insisted upon by appellant. But, before proceeding to do so, we should say that the original opinion contains the erroneous statement that Mrs. Baker called upon Carpenter and demanded the return of the deed upon which appellant relies to establish his title to the land in dispute, in the month of May, 1906. The evidence discloses that the time at which the demand for the return of the deed was made by the respondent was in the month of May, 1907. But this error cannot affect in the least the conclusion reached in the case. The testimony of the plaintiff is that she placed the deed in the custody of Carpenter, with an understanding, so far as she was concerned, that she would subsequently call for and retake possession of it, and that she so declared to Zachariah and Carpenter at the time she signed the instrument and gave Carpenter possession thereof. She testified that she did subsequently demand that it be returned to her, and that Carpenter refused to comply with her demand. Upon this testimony, which was not contradicted, the court found that there had been no delivery. And if the testi-

mony was true (and, of course, it must be assumed to be), no one will seriously contend that the court's finding and its conclusion of law therefrom are not supported by an impregnable foundation.

The learned counsel for the appellant seem to fail to understand that it is idle, and involves only a waste of time, to undertake to demonstrate to an appellate court, in a case in which there exists at least a substantial conflict in the evidence, that the testimony offered by the party against whom the findings have been made by the court below should be accepted in preference to that from which such findings have been deduced. Can the ingenuity of counsel suggest some test or criterion by which this court can consistently and justly declare that the court below should have rejected the testimony of the plaintiff as being untrue, and accepted that of the defendants as disclosing, as they actually occurred, the circumstances of the transaction resulting in the signing of the deed and the placing of the same in the custody of Carpenter? The question may suggest a problem in psychology, but it is one which must nevertheless be solved and answered agreeably to the evident notion of counsel, if they would overturn the reason underlying the constitutional provision that the reviewing courts in California are limited to the consideration of questions of law alone, and that, to justify a reversal of a cause upon the ground of the insufficiency of the evidence to sustain the findings of fact, the record evidence must be such as to clearly warrant such court in declaring, as a matter of law, that it is too weak to support the findings.

We are satisfied with the conclusion arrived at upon all the points discussed in our former opinion.

The rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

9 Cal. App. 748

REED v. REED. (Civ. 405.)

(Court of Appeal, First District, California.
Jan. 29, 1909. Rehearing Denied by
Supreme Court March 29, 1909.)

1. JUDGMENT (§ 216*)—DECREE—"INTERLOCUTORY DECREE."

An "interlocutory decree" is usually one which determines some matter between the commencement and the end of a suit, but leaves something else to be determined, not being a final disposition of the matter in issue.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 393; Dec. Dig. § 216.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3712-3714; vol. 8, p. 7692.]

2. DIVORCE (§ 165*)—DECREE—CONCLUSIVE—INTERLOCUTORY DECREE.

Civ. Code, §§ 131, 132, provide that, if the court determines that a divorce should be granted, an interlocutory judgment must be entered,

from which an appeal may be taken within six months in the same manner as if it were final, and, after a year from its entry, the court may enter final judgment granting the divorce, and such other relief as may be necessary. *Held*, that where an interlocutory decree was entered granting the wife a divorce and settling the property rights, and no appeal was taken within a year, plaintiff could not thereafter resist the entry of a final decree by alleging adultery committed by defendant after the entry of the interlocutory judgment and fraud in settling the property between the parties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-542; Dec. Dig. § 165.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Divorce action by Nellie B. Reed, also known as Helen B. Reed, against George W. Reed. From a final decree of divorce, plaintiff appeals. Affirmed.

Louis P. Boardman, for appellant. A. Ruef, for respondent.

COOPER, P. J. This is an appeal from a final judgment in a divorce proceeding. The facts are substantially as follows: In June, 1904, the plaintiff commenced the action for a divorce from defendant upon the ground of willful desertion. In the verified complaint it is alleged that there are no property rights involved, and no claim is made by plaintiff for alimony or counsel fees. The answer of defendant denies the desertion, and affirmatively alleges that at the time of the commencement of the action there were property rights in controversy, but that such property rights have since been completely adjusted between the parties. Upon the issues so made, the case proceeded to trial, and findings were filed in June, 1904. The court found in favor of plaintiff as to the willful desertion, and found, further, that, after the action was commenced, the parties settled and adjusted their property rights, and that defendant had paid to plaintiff in such settlement the sum of \$12,500, and further transferred and conveyed to her certain parcels of real estate situated in the city and county of San Francisco and fully described in the findings, by reason of which the court finds that plaintiff "has released and discharged the defendant of and from all claims and demands of whatsoever kind or character in or to any separate or community property owned or possessed by defendant, and has released him from all claims for maintenance and support and for counsel fees or costs herein; and has also released and discharged the defendant of and from all claims of whatsoever kind or character which she may have or claim to have against him to any property belonging to him or standing in his name." The findings contain the following conclusions of law: "That the plaintiff herein is entitled to the decree and judgment of this court, dissolving the marriage now and here-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tofore existing between herself and the defendant, without alimony for her support and maintenance, or for counsel fees or costs herein, and without any claim against the defendant, or against, in, or to any of his separate property, or against, in, or to any of the community property of the parties hereto other than the property conveyed to plaintiff by the defendant as hereinabove set forth." Following the findings an interlocutory decree was duly made and entered on the 3d day of June, 1904. No motion for a new trial was made, and from this decree no appeal was taken.

On June 6, 1905, the year having expired, the defendant made a motion for a final judgment upon said interlocutory decree, which motion was resisted by plaintiff. Upon June 8, 1905, the matter came on regularly for hearing, and plaintiff filed a verified paper, styled "Opposition of plaintiff to defendant's motion for the entry of final decree of divorce, and supplemental complaint for assignment of community property." It is therein alleged "that plaintiff is informed and believes, and upon her said information and belief alleges and states to the court, that shortly after the making and entry of the said interlocutory decree of divorce in this action the said defendant, in violation of his said marriage contract and relation with plaintiff and of said decree, willfully and knowingly entered into an assumed and pretended marriage relation with a certain woman, whose name and identity are now and have been unknown to plaintiff; that said defendant has, during the period of time since the entry of said interlocutory decree of divorce herein, lived and cohabited with said woman openly and notoriously as husband and wife, and has assumed with her all the relations of husband and wife." It is further stated in the said opposition or objections that the property settlement as made by the parties and as settled by the decree of the court was not fair; the allegation being: "That in the course of said negotiations relating to the division, disposition, and assignment of said property belonging to plaintiff and defendant, and resulting in said contract and stipulation, said defendant made various statements and misrepresentations to plaintiff concerning the amount, value, and condition of said community property and his said personal estate, and plaintiff states that in and about the making of said contract and stipulation, and in negotiations relating thereto, there was collusion and fraud, and that thereby and through and by means thereof, and by the said fraudulent misrepresentations of said defendant of and concerning said property, on which plaintiff relied, plaintiff was induced to accept comparatively a small amount of said property in settlement of her rights in and to the same and in said action, and did not receive a fair and just proportion of the said community property of plaintiff and said defendant under the pro-

visions of said stipulation and agreement." Plaintiff concluded said objections with a prayer that the motion for a final decree be denied; that the person designated as the alleged wife of defendant be brought in by proper proceedings as a co-respondent, and her pretended marriage with defendant be declared null and void, and that it be adjudged that defendant is guilty of adultery with such pretended wife; that the amount, nature, and value of the community property be ascertained; that it be assigned to the respective parties as to the court may seem proper. The court denied the said motion of plaintiff, and ordered judgment that a final decree of divorce be entered. It will thus be seen that the plaintiff, by this motion, in effect desired to amend her complaint, and allege adultery that had been committed by the defendant after the interlocutory decree with a woman whose name is not given, and whose identity is not known. Even the date when and place where such adultery is supposed to have been committed are not given. The allegation is made "upon information and belief"; but the sources of the information are not given, nor the facts and circumstances which led to such belief. While it is sought to have the decree as to the property rights set aside on the ground of "collusion and fraud," the plaintiff makes no offer to restore the \$12,500 paid to her, nor to reconvey the various lots of land conveyed to her. No facts are set forth to show in what the collusion and fraud consisted. It is not even alleged what is the character or value of the property now owned by the defendant, and which the plaintiff after a year's reflection now desires to reach.

This brings us to the consideration of the question as to whether or not, after the interlocutory decree in a divorce case has been in existence for a full year, and not appealed from or in any way questioned, the parties may bring in witnesses and try the case upon new issues based upon facts that have either occurred or been discovered since the interlocutory decree was entered. May the plaintiff place detectives upon the trail of her husband, and watch him during the entire year to see if he is still faithful to his marriage vow, for the purpose of a new cause of action? We are of opinion that such is not the interpretation to be given to the sections of the Code as amended. The Code provides for a trial, for findings of fact and conclusions of law, and that, if no divorce is granted, final judgment shall be entered accordingly; that, if the court determines that a divorce ought to be granted, "an interlocutory judgment" must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and that from such interlocutory judgment an appeal may be taken within six months after its entry in the same manner and with like effect as if the judgment were final; that when one year has expired after the entry of such interlocutory judgment,

the court on motion of either party or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit them to marry after the entry thereof; and "such other and further relief as may be necessary to complete disposition of the action." Civ. Code, §§ 131, 132. Although the above provisions have been held constitutional (*Deyoe v. Superior Court*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73), they have been the cause of many new questions for the courts. While marriage is the most sacred and important contract known to our civilization, and of the most vital importance, yet it is the only contract that has imposed upon it such condition that the court, after finding that it has been broken and should be dissolved, must wait a full year before granting relief to the injured party. We know of no other case in which, after a full hearing and finding of all the facts, the relief must be withheld and matters stand in statu quo for one year. An interlocutory decree is usually one which determines some matter between the commencement and the end of a suit, which, however, is not a final disposition of the matter in issue. In its usual acceptance and sense it leaves something to be determined before the final decree is entered. The Legislature in the enactment of the sections clearly did not contemplate that at the end of the year either party could file a supplemental complaint, and allege a new cause of action for divorce, or that the defeated party could, by such supplemental pleading, set forth a cause of action by way of recrimination, so as to prevent the party who prevailed at the first trial from having a decree entered after the expiration of the year. If such is the meaning of the statute, a divorce case might be kept in court for years or during the life of the parties. The maxim, "*Interest reipublice ut sit finis litium*," is applicable to such condition. The dominion of things, of personal relations, or property rights and of the custody of the children should not so long remain uncertain as to give rise to numerous suits and prolong or perpetuate litigation. In our opinion the Legislature contemplated that the interlocutory decree should settle the question as to whether or not a divorce should be granted, and the question of the disposition of the property rights properly before the court, for the reason that provision is made, as in any other cases, for a new trial, for an appeal within six months "with like effect as if the judgment were final."

Our attention is called to the fact that the Code provides that upon granting the final decree the court may give "such other and further relief as may be necessary to a complete disposition of the action." This provision evidently relates to such matters as an allowance for the care and custody of the

children of the marriage, or where a sale or partition of the property has been ordered in the interlocutory decree, or where the court has made an order that certain property be conveyed to be held in trust to secure permanent alimony, and matters of such import.

The views we have expressed are not without authority to sustain them. In *John v. Superior Court*, 5 Cal. App. 262, 90 Pac. 53, the same views are in effect expressed in regard to the interlocutory decree. There the court said: "Section 132 gives the court the power of its own motion to enter a final judgment at the expiration of one year from the entry of the interlocutory judgment; and the fact that this authority is given the court would seem to exclude the idea that a trial was contemplated at the time of entering the last judgment. * * * The decision of the court, both as to the granting of the divorce and the disposition of the property, is subject to review on appeal, and certainly it was never intended that there should be a delay of a year, and possibly of a longer period, in case of an appeal from the interlocutory judgment, and then another trial as to issues involving the property rights of the parties, followed by the delay of another appeal from the decision thereon and judgment disposing of the same." See, also, *Barron v. Barron* (Cal.) 96 Pac. 273; *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897. The court said in the latter case: "The judgment entered on September 4, 1903, therefore, constituted a valid interlocutory judgment, declaring the plaintiff entitled to a divorce. As such it was subject to be vacated on appeal or on motion for a new trial, or by proceedings under section 473 of the Code of Civil Procedure. The time for all these proceedings having expired, and no such proceeding to vacate it having been instituted, the court thereupon lost all power by any proceeding in the case to modify or vacate the judgment so far as it constituted an interlocutory judgment."

The judgment is affirmed.

We concur: KERRIGAN, J.; HALL, J.

9 Cal. App. 756

PEOPLE v. LAVERTY. (Cr. 149.)

(Court of Appeal, First District, California.
Feb. 1, 1909.)

1. CRIMINAL LAW (§ 889*)—AMENDMENT OF VERDICT—BY JURY—SUPPLYING OMISSION TO FIND ON PLEA.

Error cannot be predicated on the fact that the jury having returned with the verdict of guilty, without one on the plea of former jeopardy, and the court having stated that it was necessary to pass on such plea, the foreman then and there in open court, by consent of the jurors, signed a verdict finding against such plea, whereupon the jury were polled, and each juror stated the verdict as returned was his

verdict; no intimation having been made by the court as to how the jury should find on the plea, and no objection having been made or exception taken to the jury returning the verdict in open court without retiring.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2112; Dec. Dig. § 889.*]

2. CRIMINAL LAW (§ 1170*)—HARMLESS ERROR.

Error cannot be predicated on the overruling of an objection to a question on an immaterial matter; the question not having been answered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3145; Dec. Dig. § 1170.*]

3. ARSON (§ 25*)—OWNERSHIP OF HOUSE—PLEADING AND PROOF.

The ownership of the house need not be proved as alleged in the indictment for arson, the indictment otherwise sufficiently describing it, and the evidence otherwise identifying it.

[Ed. Note.—For other cases, see Arson, Cent. Dig. § 54; Dec. Dig. § 25.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

George W. Laverty appeals from a conviction. Affirmed.

Wm. H. Johnson, for appellant. U. S. Webb, Atty. Gen., for the People.

COOPER, P. J. The indictment charges the defendant with the crime of arson for having willfully and feloniously in the nighttime set fire to and burned a certain building, described in the indictment, in which there were human beings; said building being alleged to have been then and there the property of one Frederick Brown. The defendant interposed the plea of not guilty, and a further plea of once in jeopardy. After a full and fair trial, the jury found against him on each of said pleas, and returned a verdict finding him guilty of arson in the first degree. Defendant made a motion for a new trial, which was denied. This appeal is from the judgment, and from the order denying his motion for a new trial. It is not claimed that the evidence is insufficient to sustain the verdict; but certain alleged errors are assigned, the most plausible of which we will notice.

The first point urged is that the verdict in favor of the people upon the plea of once in jeopardy was rendered by means other than of a fair expression on the part of the jurors. The record shows that, when the jury returned with its verdict of guilty, it did not return a verdict upon the plea of once in jeopardy. Upon being informed by the judge of the court that such verdict had not been returned, the foreman replied that, by reason of the verdict, it had found the jury did not deem it necessary to pass upon the plea of "once in jeopardy." The judge thereupon informed the jury that it was necessary so to find, and the foreman then and there in open court, by consent of the jurors, signed a verdict finding in favor of the people on the issue of "once in jeopardy."

The jury was thereupon polled by direction of the court. Each juror stated that the verdict as returned was his verdict. No objection was made to the jury returning the verdict in open court without retiring, and no exception was taken. No intimation was in any way given to the jury by the judge as to how it should find upon the issue of "once in jeopardy." It follows that no error could be predicated upon the above facts. We have discussed the alleged error on its merits, although the record shows that the plea of "once in jeopardy" did not state the court in which the jeopardy is claimed to have attached, and fails entirely to show that any evidence was introduced by defendant in proof of the plea.

There was no error committed in overruling the defendant's objection to the question asked of the witness Orvis as to whether or not the defendant informed witness of a prior chattel mortgage at the time of the execution of the note and chattel mortgage to the witness. The witness did not answer the question, but replied that the mortgage itself so stated. Conceding that the subject-matter of the chattel mortgage was immaterial, the defendant made no objection to the witness testifying as to a chattel mortgage being given to him, and the evidence shows nothing further on the subject. It would be highly technical and unreasonable for us to hold that the court erred in overruling an objection to a question as to an immaterial matter when the question was never answered. The same may be said as to defendant's objection, which was overruled to the question asked of the witness Rose, as to whether or not the defendant said anything to the witness the morning after the fire about paying witness some money. Although the objection was overruled, the witness did not answer it. In fact, the record does not show that the witness testified to anything or that he gave any testimony in any manner.

It is claimed that the court erred in refusing the following instruction asked by defendant: "The burden is upon the prosecution to prove every material element of the indictment, and the element of ownership of the building destroyed is a material element of the offense in this case, and if you are satisfied that there is no proof of the ownership of the building alleged to have been burned by Mr. Laverty by Mr. Frederick W. Brown on the day of the fire, he being alleged to have been such owner on the day of the fire, in the indictment in this case, then in that event it is your duty to find him not guilty." It was not necessary for the prosecution to prove the ownership as alleged in the indictment, provided the house was otherwise described sufficiently for purposes of identification, and otherwise identified by the evidence. Pen. Code, §§ 447.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

448, 449, 452; *People v. Handley*, 100 Cal. 370, 34 Pac. 853; *People v. Shainwold*, 51 Cal. 409.

It is not necessary to notice other alleged errors.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; HALL, J.

9 Cal. App. 773

FARMER v. BEHMER. (Civ. 547.)

(Court of Appeal, Third District, California.
Feb. 2, 1909. Rehearing Denied March
3, 1909; Denied by Supreme
Court March 29, 1909.)

1. NUISANCE (§ 75*)—ACTION TO RESTRAIN—WHO MAY MAINTAIN.

Civ. Code, § 3493, provides that a private person may maintain an action to abate a public nuisance when especially injurious to him. Code Civ. Proc. § 731, provides that "an action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened, by a nuisance, * * * and by the judgment in such action the nuisance may be enjoined or abated, as well as damages recovered." *Held*, that an adjoining property owner may maintain an action to restrain the maintenance of a house of prostitution.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 180; Dec. Dig. § 75.*]

2. NUISANCE (§ 80*) — INJUNCTION — WHEN PROPER.

Under Code Civ. Proc. § 526, providing that "an injunction may be granted * * * [subdivision 3] when * * * defendant is doing or threatens, or is about to do, or is procuring to be done, some act in violation of plaintiff's rights," a landowner may be restrained from permitting his tenant to maintain a house for immoral purposes, where it appears that defendant has repeatedly and knowingly leased the premises for such purposes, and intends to continue permitting such use.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 192; Dec. Dig. § 80.*]

3. NUISANCE (§ 61*)—WHAT CONSTITUTES.

A house of prostitution is a nuisance per se.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 142; Dec. Dig. § 61.*]

4. NUISANCE (§ 84*)—INJUNCTION—PARTIES.

In an action to restrain a landowner from permitting his tenant to maintain a house of prostitution, the tenant is not a necessary party.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 197; Dec. Dig. § 84.*]

5. NUISANCE (§ 81*)—ACTION TO RESTRAIN—DEFENSES.

The provision in a lease that "said premises shall not be used as a disorderly house * * * or house of ill fame" is no defense to an action against the landlord to restrain him from permitting the tenant to maintain a house of prostitution, where it appears that such provision was a mere subterfuge, and that defendant had knowledge that the tenant was maintaining such a house, and leased the premises for that purpose.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 193; Dec. Dig. § 81.*]

6. NUISANCE (§ 84*)—ACTION TO RESTRAIN—EVIDENCE.

Evidence of the bad reputation of a house before the date of a lease is admissible to show

its reputation afterwards, and also to show knowledge of the lessor.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 198½; Dec. Dig. § 84.*]

7. LICENSES (§ 11*)—MUNICIPAL POWER.

Santa Rosa City Charter, § 31, authorizing ordinances (subdivision 14) "to declare what are nuisances," and (subdivision 16) "to regulate or prohibit dance houses * * * houses of ill fame * * * and all kinds of disorderly places" (Sta. 1905, p. 879, c. 10), does not authorize an ordinance under which a license could issue permitting the holder to maintain a house for the purpose of prostitution and the sale of intoxicating liquors in violation of general laws.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 18; Dec. Dig. 11.*]

8. STATUTES (§ 94*)—SPECIAL LAWS—"MUNICIPAL AFFAIRS."

The licensing of disorderly or bawdyhouses and the sale of intoxicating liquors is not "municipal affairs" within Const. art. 11, § 6, declaring that "all charters, * * * except in municipal affairs, shall be subject to and controlled by general laws."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 103; Dec. Dig. § 94.*]

For other definitions, see Words and Phrases, vol. 5, p. 4619; vol. 8, p. 7726.]

9. NUISANCE (§ 65*)—ABATEMENT—LICENSE AS DEFENSE.

A municipal license which permits a tenant to maintain a boarding and lodging house and to sell intoxicating liquors is no defense to an action against the landlord to restrain the maintenance of the house in such an immoral and disorderly manner as to constitute a public nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 159; Dec. Dig. § 65.*]

10. NUISANCE (§ 84*)—ABATEMENT—DAMAGES—PERSONS LIABLE.

Under Code Civ. Proc. § 731, authorizing the allowance of damages in actions to restrain a nuisance, damages may be recovered against a landlord who knowingly permitted his tenant to maintain the leased premises in such an immoral and disorderly manner as to be a public nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 199; Dec. Dig. § 84.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Lou Farmer against Daniel Behmer for injunction and damages. Plaintiff had judgment, and defendant appeals. Affirmed.

T. J. Butts, for appellant. R. F. Crawford and R. L. Thompson, for respondent.

CHIPMAN, P. J. This is an action to obtain a decree permanently enjoining and prohibiting defendant from leasing or renting, or permitting the premises described in the complaint, to be leased, occupied, or used, as a bawdyhouse, a house of prostitution or ill fame or a disorderly house, and for damages. Plaintiff had judgment as prayed for and for \$25 and for plaintiff's costs. Defendant appeals from the judgment on bill of exceptions.

The court found that plaintiff is, and "for more than four years last past has been, the owner of the premises and dwelling house"

described in the complaint and situated in the city of Santa Rosa, and that during all said time plaintiff has resided upon said premises and now resides there; that for more than four years defendant has been, and still is, the owner of the premises in the complaint described, on which "defendant more than four years ago erected and has since maintained a two-story house, and during all said time has owned and leased the same, which said house was and is within 40 feet of the said premises of plaintiff and within 182 feet of said plaintiff's residence, and within plain view and hearing thereof"; that "defendant now does, and during all the time since the construction of his said house (except for the period of about two or three months, when the same was vacant) has, knowingly leased and rented the same to various persons for the purpose of prostitution"; that in October, 1904, defendant leased his said premises to one Sadie McLain, a woman known by him at said time to be a public prostitute, and for the purpose of being used and maintained by her as a house of prostitution and a disorderly house, and to be resorted to for the purpose of prostitution; that during all said time (except when vacant as aforesaid) the said premises of defendant were with his knowledge and consent constantly occupied, and still is occupied, by abandoned and dissolute women, and used as and for a house of prostitution; that in October, 1904, when defendant leased said premises to her, she was a public prostitute, which was well known to defendant, and that ever since said time she has employed and still does employ and keep in said house dissolute women and prostitutes "who upon various occasions indulged in vile and indecent and profane language in a loud and boisterous manner, which was frequently heard by plaintiff and the inmates of the said dwelling, and said prostitutes frequently exposed themselves openly and publicly at the windows of defendant's said house, and upon the street, within sight of plaintiff's said dwelling, and in an immoral and indecent manner"; that said Sadie McLain during said time furnished and sold intoxicating liquors therein to various persons without having procured a license therefor as required by the ordinances of said city, and that visitors at said house frequently became intoxicated thereby and were boisterous and disorderly, and often used vulgar and profane language both in said house and upon the street, and indulged in drunken brawls, which were seen and heard by plaintiff and the inmates of her home from her said residence and in going to and from the same; that "because of the said immoral, indecent, and obscene conduct, and vile and profane language and obnoxious sights and sounds, plaintiff's sleep and that of the inmates of her house was frequently disturbed and interrupted, and plaintiff thereby has been, and still is, deprived of the ordinary comfortable and peaceable and respectable enjoyment of her home and domestic

life, and her said property has thereby sustained private, special, direct, and irreparable injury different in degree and kind from that sustained by the public at large"; that, "unless restrained by this court, the defendant will continue to lease and rent his said house and premises for the purposes aforesaid"; that plaintiff has sustained damages in the sum of \$25; that defendant threatens to continue to lease and permit his said house to be used as a house of prostitution and a disorderly house, and unless restrained will continue so to do.

As conclusions of law the court found that the lease from defendant to Sadie McLain, set out in defendant's answer, "was and is unlawful, and no defense to this action, or protection to the defendant," that plaintiff has no adequate or speedy remedy at law and her damage is irreparable, and plaintiff is entitled to the injunction prayed for.

1. That the premises of defendant were erected and used continuously from August, 1893, except for a short time, up to the date of the trial, October 29, 1907, for the purposes found by the court, is clearly proved, and that the conduct of the occupants and its effect upon plaintiff and her household were as found by the court is equally well proven. Defendant himself testified that he built the house to be rented and used by abandoned and profligate women, and yet, although three or four women tenants prior to the lease given Sadie McLain of the class mentioned had occupied the premises and conducted their disreputable commerce for many months, and Sadie McLain had for several months prior to the lease pleaded in defense occupied the premises for like purpose and continued so to do under the lease, defendant testified that he did not know her character or the character of her house, and had no cause for believing that she was keeping a house of this character. The general reputation of the house throughout its tenancy was established by a host of witnesses. Defendant had resided in Santa Rosa for a long period. He collected his rentals monthly, going personally to the premises, and he built the house to be used by women for the purposes found by the court. The circumstances and facts shown were such as to compel the court to reject defendant's testimony that he was ignorant of what was taking place on his premises as knowingly false. The defense interposed goes to the law of the case rather than to the facts, and we will now consider the points urged for reversal.

2. Without stopping to quote from the complaint, we think it quite sufficient in its averments to show special injury to plaintiff. The premises had by the conduct of their occupants become "indecent and offensive to the senses," and, as found by the court, "an obstruction to the free use of property" of plaintiff so as to "interfere with" its "comfortable enjoyment" and the "comfortable enjoyment of life" while residing on it, and was

and is a nuisance. Section 3479, Civ. Code. And "a private person may maintain an action to abate a public nuisance, when specially injurious to him" (Civ. Code, § 3493), and "an action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened, by a nuisance, * * * and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered." Section 731, Code Civ. Proc. The complaint charges injury from a public nuisance, which as to plaintiff is fully shown by averments to be a private nuisance, against which equity will relieve. *Fisher v. Zumwalt*, 128 Cal. 493, 61 Pac. 82. The demurrer was rightly overruled. "An injunction may be granted: (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. * * * (3) When * * * defendant is doing or threatens, or is about to do, or is procuring to be done, some act in violation of plaintiff's rights." Section 526, Code Civ. Proc. The evidence was that defendant had repeatedly and knowingly leased the premises for immoral purposes, and he testified, in substance, that he did not intend to interfere with the lease he had given for these purposes, but did intend to suffer such use of the premises in the future. Defendant's counsel seems to rest his argument here upon the assumption that defendant was ignorant of the purposes for which the Sadie McLain woman rented the house, and that he had not consented to such use or connived at it, and hence she alone is guilty of perpetrating the nuisance and the consequent injury. But the evidence warrants no such assumption. On the contrary, it warrants the finding of the court that defendant is equally guilty as the primary cause of establishing and continuing the nuisance. A house of prostitution is a nuisance per se, and is so regarded wherever situated. *Wood on Nuisances*, § 29; *Pon v. Wittman*, 147 Cal. 280, 81 Pac. 984, 2 L. R. A. (N. S.) 683.

3. It is urged that Sadie McLain is a necessary party, and should have been joined as defendant in the action. Defendant neither demurred nor answered on this ground, and this omission generally would constitute a waiver of the objection. Code Civ. Proc. §§ 430, 434; *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97. In *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 4 Pac. 1152, 56 Am. St. Rep. 80, it was held that "in an action to abate a public or private nuisance all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined, jointly or severally." The case here was tried without this objection being made, and we do not think it is of such character as that the judgment would be ineffectual by reason of not having

made the tenant of defendant a party. If to obtain complete relief plaintiff should be compelled to bring an action against the tenant, it is not a matter of which defendant can complain. As was said in the case last cited: "It is the nuisance itself, which, if destructive of public or private rights of property, may be enjoined"; and defendant's participation in its commission may be enjoined without joining others who may be also guilty.

4. Defendant pleaded a written lease to Sadie McLain, dated March 1, 1905, for five years, at a monthly rental payable in advance, "provided that said premises shall not during the said term be used as a disorderly house, bawdyhouse, or house of ill fame." There was a clause forfeiting the lease for nonpayment of rent, but none for violation of the quoted proviso. Defendant covenanted for the peaceable and quiet enjoyment of the property by the lessee for the term, save only for failure to pay rent, and the lease was not recorded. The evidence shows that the prohibitory clause was a subterfuge and a sham, and was, as the court found, "unlawful and no defense to this action." Having, as the evidence warranted the court in so finding, been entered into by defendant for an unlawful purpose, in fact for the commission of crime (Pen. Code, § 316), the contract was void and nonenforceable between the parties (*Chateau v. Singla*, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63), and it would be a reproach to the law to allow defendant to shield himself by its provisions (*Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207).

5. And this latter case disposes of defendant's objection to testimony as to the character of the house before and after the lease was entered into. Quoting from the syllabus, which is justified by the text, it reads: "Evidence of the prior bad reputation of the house before the date of the lease is not only admissible as tending to show its reputation afterward, but also as tending to show the knowledge of the lessor, who may not shut his eyes to that which is patent to the community, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledge."

6. Defendant contends that he presented a complete defense in the ordinance of the city of Santa Rosa and the license issued to Sadie McLain pursuant thereto. The trustees of the city put their moral consciousness to sleep and passed an ordinance (since repealed as I understand) requiring all "boarding and lodging houses" located and conducted in the quarter of the city known as the "Red Light District," whose boundaries are by the ordinance defined, to pay a license. While the ordinance speaks of boarding and lodging houses only, its provisions show unmistakably its object to have been to license bawdyhouses. It requires persons conducting the house to keep a register of the name, date of arrival, and departure of each guest,

which shall be open to the inspection of the chief of police, that the keeper of the house shall cause an examination of each guest at least once every two weeks by a qualified physician, and that such physician shall deliver to the person so inspected "a certificate of the result of his inspection" which must "be posted in a conspicuous place in the apartment occupied by such guest." It also permits the keeper of such house to furnish and sell to guests and visitors "spirituous, vinous, and malt liquors to be used on the premises and the provisions of sections 9 and 10 of ordinance 238 of the city of Santa Rosa, shall not apply"; i. e., exempting the keepers of these brothels from taking out a license as vendors of such liquors. This ordinance was passed pursuant to the powers given the city by section 31 of its charter granted by statute of 1905 (St. 1905, p. 867, c. 10), as follows, at page 879: "* * *

(14) To declare what are nuisances. * * *

(16) To regulate or prohibit dancehouses, bawdyhouses, houses of ill fame, assignation houses, and all kinds of disorderly places." Defendant introduced in evidence a license reading: "This is to certify that Sadie McLain, for the sum of \$45.00, is authorized to keep, conduct and carry on a boarding house and lodging house No. 720 First street, for the term of three months." We do not believe that the citizens of Santa Rosa in voting for their charter intended to authorize their city trustees to legalize, by licensing, what the statute denounces as crimes, or that the charter could be given such effect had they so intended. It is a novel doctrine that the Legislature may empower a city by its charter to suspend the operation of general laws punishing crime. No one would for a moment contend that murder, manslaughter, larceny, burglary, or any other of the long list of crimes punishable by statute could be condoned or palliated by an ordinance regulating or licensing such offenses. The heinousness or degree of the crime can make no difference. The statute punishing the keeping of a house of prostitution as a crime can no more be suspended in its operation than any other criminal statute. Nor can it be held that the charter provision works a repeal of the general law, for the charter powers may not be exercised so as to conflict with general laws save only in regard to what may properly be called "municipal affairs," and surely the licensing of forms of vice and crime which are both mala in se and mala prohibita cannot be so classed. Const. art. 11, §§ 6, 8, 11. "All charters framed or adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws." Id. § 6. To say that under her license defendant's tenant may keep a disorderly house, may maintain several varieties of a public nuisance, may, by the conduct of her guests,

make plaintiff's home uninhabitable, may, in short, conduct a house in open violation of law—would be intolerable. Nor can defendant be permitted to take refuge under an ordinance or license which could be no protection to his tenant, for he is tarred with the same stick and the odor of her scarlet garments is upon him. He is morally, and possibly legally, as guilty as she. Any other view of the ordinance and the license would import into the term "regulate" a power which, aside from its being in violation of the general law, would shock the moral sense and impute to the citizens of Santa Rosa a contempt for what we must assume to be the better sentiment of the community.

In a very well considered case where the questions here involved were before the court, it was held in *Reaves v. Territory*, 13 Okl. 396, 74 Pac. 951, that an injunction will lie to suppress a common nuisance, and that a license to sell intoxicating liquors and to operate a theater at a place designated will not justify the conducting of such business in a manner offensive to decency and public morals, nor will such license be any protection against unlawfully permitting and maintaining a public nuisance. The case here is much stronger for the immunity claimed under the license is to maintain what is a public nuisance per se and protection is sought for conduct made a crime by statute.

7. Upon the question of damages defendant says: "There are so many reasons why the plaintiff cannot recover damages in this action that it seems like a useless waste of time to call the court's attention to more than one or two."

Upon the evidence plaintiff's ownership of the property claimed by her is shown, and there was evidence of its depreciation in its value much beyond the judgment, which was but for nominal damages. Damages may be recovered as well as relief by enjoining further commission of the nuisance. Code Civ. Proc. § 731. Defendant's argument proceeds upon the assumption that he was guiltless and that the injury complained of was committed by his tenant, who, he claims, was the "intervening, independent author of the injury." But the facts do not warrant this assumption.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

10 Cal. App. 1

In re SHARP'S ESTATE.

O'DONNELL et al. v. MURPHY et al.
(Civ. 585.)

(Court of Appeal, First District, California.
Feb. 4, 1909.)

APPEAL AND ERROR (§ 801*)—MOTION TO DISMISS APPEAL—MERITS.

A motion to dismiss an appeal will be denied, where the whole controversy is based on the question of the jurisdiction of the probate court and its determination would involve the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3162; Dec. Dig. § 801.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by R. H. Lloyd and another for an order directing the payment of a bequest to them made by the will of Honora Sharp, deceased, in which James O'Donnell and others intervene. From a judgment in favor of petitioners, defendants O'Donnell and others appeal. On motion to dismiss. Denied.

Maguire, Lindsay, Houx & Barrett, for appellants. Chas. S. Wheeler, for respondents.

COOPER, P. J. Motion to dismiss an appeal. The last will and testament of Honora Sharp, deceased, was duly admitted to probate in February, 1905. On June 6, 1907, R. H. Lloyd and A. B. Spreckels filed their petition, asking for an order directing the payment of a bequest to them of \$200,000 made by the last will of deceased. James O'Donnell and several other parties, claiming to be all the surviving cousins and heirs at law of said deceased, filed a paper, denominated "Answer and Cross-Complaint, or Opposition to the Petition," in which they alleged and claimed that the bequest of \$200,000 was in fact a secret trust, made for the purpose and with the design of evading the laws of the state of California, limiting the amount of charitable bequests and devises to one-third of the estate. To the answer and cross-complaint so filed petitioners filed a demurrer, claiming that the petition did not state facts sufficient to entitle petitioners to any relief, that the will of deceased disposed of all her property, that the alleged heirs were not persons interested, and that the probate court had no jurisdiction to declare a secret or resulting trust upon the property devised and bequeathed absolutely by the terms of the will, and that such jurisdiction could only be invoked in a court of equity. The trial court evidently took this view of the case, and sustained the demurrer, without leave to amend. Judgment was

accordingly entered in favor of petitioners and against said James O'Donnell and others. This appeal is from said judgment.

The motion to dismiss is made upon the ground that the order admitting the will of deceased to probate is final, that the appellants here are not interested parties in the estate of deceased, and are not aggrieved by the judgment. The determination of such question would involve the merits of the case. The whole controversy is centered in the question as to the jurisdiction of the probate court. We will not examine the merits of a case on a motion to dismiss an appeal. Such motion is, in the usual acceptance of the term, a challenge to the jurisdiction of the appellate court, or based upon some alleged failure of the appellant to comply with the statutes or the rules of court in taking and perfecting his appeal, such as serving notice, giving the undertaking, filing the transcript, etc. Here there is no challenge to the jurisdiction of the court, or alleged failure to comply with the rules or statutes as to appeals. See *Ricketson v. Torres*, 23 Cal. 636; *Foscalina v. Doyle*, 48 Cal. 151; *Corder v. Speake*, 37 Or. 105, 51 Pac. 647; *In re Williams* (Cal.) 36 Pac. 6; *Ohlandt v. Joost* (Cal.) 53 Pac. 213; *Leonis v. Leffingwell* (Cal.) 55 Pac. 897.

The motion is denied.

We concur: HALL, J.; KERRIGAN, J.

10 Cal. App. 3

COWELL v. LINFORTH et al. (Civ. 555.)

(Court of Appeal, First District, California.
Feb. 4, 1909.)

LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—ACTION—COMPLAINT.

A complaint by a landlord in unlawful detainer, alleging that on a specified day a notice in writing, requiring payment of rent due under the lease or possession of the property described, was served on defendants named, etc., a copy of which notice, so served, was annexed to the complaint, was not objectionable for failure to charge the manner in which the service was made, or that it was made by plaintiff, or some one authorized by her to make it.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Helen E. Cowell against A. W. Linforth and others. Judgment for plaintiff, and defendant Monarch Investment Company appeals. Affirmed.

Joseph E. Bien, for appellant. Olney and Mannon, for respondent.

COOPER, P. J. This is an appeal by the Monarch Investment Company, one of the defendants, from the judgment on the judgment roll alone. The action is one in unlawful

detainer against a tenant for holding over without the landlord's permission after default in the payment of rent and three days' notice in writing requiring its payment. The sole point made by appellant is that the special demurrer to the plaintiff's complaint should have been sustained, for the alleged reason that the complaint does not show the manner in which the service of the notice was made, nor that it was made by the plaintiff, or by any one authorized by her to make such service.

The allegation in the complaint is "that on the 15th day of January, 1908, a notice in writing requiring the payment of the rent due under said lease, stating the amount then due thereunder, to wit, \$2,700, or possession of the property hereinbefore described, was served upon the defendants A. W. Linforth, Monarch Investment Company, a corporation. * * * It is further alleged that a copy of the notice so served is annexed to the complaint, marked "Exhibit A," and made a part thereof. The notice, which is admitted to be in proper form, describes the property, and is signed: "Helen E. Cowell, by W. H. George, Attorney in Fact." It was only necessary for the plaintiff to allege that she served notice in writing upon defendant, or that notice in writing was served upon defendant, and prove that she served it, or had it served. The statute (Code Civ. Proc. § 1162) provides three different methods of serving notice, and the plaintiff was only required to allege the ultimate fact, to wit, that she did serve notice. The evidence, of course, in such case, would have to show that notice had been served; but it was not necessary to inform the defendant minutely as to every detail of the manner in which the notice was served. And so, as to the authority of the agent who gave the notice, it was necessary that the notice be given by plaintiff or by some one authorized by her.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

10 Cal. App. 29

HICKMAN-COLEMAN CO. v. LEGGETT.
(Civ. 539.)

(Court of Appeal, First District, California.
Feb. 5, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 97*)— CONTRACT OF EXECUTOR.

Where an executor employs a broker to sell land belonging to the estate, the executor acts in his individual capacity, and is individually liable for the broker's services, as he has no capacity to create a liability against the estate, being only entitled to credit in his accounts for expenditures made in good faith and for proper purposes.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 411; Dec. Dig. § 97.*]

2. EXECUTORS AND ADMINISTRATORS (§ 97*)— CONTRACT WITH EXECUTOR—BROKER'S SERVICES.

An executor wrote plaintiff's manager, authorizing him to find a purchaser for real estate belonging to the estate at \$20,000, the executor stating that he would pay plaintiff's commission of 5 per cent. on that amount, or on any amount that the executor might accept from a purchaser obtained by plaintiff, if the determination of the question rested solely with the executor; otherwise, he would recommend to the court that that commission be paid plaintiff. Plaintiff procured a purchaser at the price stated; but the sale was not consummated, because another appeared in court and bid \$22,000 for the property. *Held*, that under the rule that a contract must be interpreted so as to make it operative, if possible, the agreement would be held to be the individual contract of the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 411; Dec. Dig. § 97.*]

3. EXECUTORS AND ADMINISTRATORS (§ 97*)— CLAIMS—ALLOWANCE.

Where an executor employed a broker to sell land belonging to the estate, the court could not fix the broker's compensation without a request by the executor, as the allowance must be made to the executor, and not to the broker.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 411; Dec. Dig. § 97.*]

4. EXECUTORS AND ADMINISTRATORS (§ 97*)— EMPLOYMENT OF BROKER—COMPENSATION.

Where an executor in his individual capacity employed a broker to sell land of the estate, and bound himself to pay the broker 5 per cent. on the bid accepted by the executor, or such amount as the court might determine should be proper, the executor, on performance by the broker, was bound to pay one or the other of such amounts, and so, if he failed or refused to invoke the action of the court to determine the proper amount, he was liable for the 5 per cent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 411; Dec. Dig. § 97.*]

5. EXECUTORS AND ADMINISTRATORS (§ 97*)— SALE OF REAL ESTATE—ALLOWANCE TO BROKER.

An executor employed plaintiff to sell land of the estate at a specified price. Plaintiff procured a purchaser at that price; but other brokers put in a higher bid for another purchaser, and the court confirmed the sale to the latter. Such brokers were not employed to make the sale by defendant, and had no claim against defendant, either individually or as an executor. *Held*, that an allowance of commissions by the court to them was erroneous, and did not affect plaintiff's right to recover commissions against the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 411; Dec. Dig. § 97.*]

6. BROKERS (§ 63*)—SALE OF REAL ESTATE— BROKER'S COMMISSIONS.

Where plaintiff was employed by the executor to sell land of the estate, and plaintiff procured a purchaser in accordance with the required terms, the fact that the property was sold to another offering a higher price was no defense to plaintiff's claim for commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79-96; Dec. Dig. § 63.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Hickman-Coleman Company against Joseph Leggett, individually and as executor of Amanda M. Scales, deceased. Judgment for defendant, and plaintiff appeals. Judgment in favor of defendant individually reversed and remanded, with directions to overrule the demurrer to the first and second counts of the complaint.

A. A. De Ligne, for appellant. Ernest J. Mott, for respondent.

HALL, J. This is an appeal from a judgment entered against plaintiff upon an order sustaining defendant's demurrer to plaintiff's complaint. The complaint is in four counts. The first two counts state, or attempt to state, a cause of action against defendant individually for services rendered to defendant by plaintiff in procuring a purchaser for real estate belonging to the estate of Amanda M. Scales, deceased, of whose will defendant was the sole executor. In the third and fourth counts plaintiff seeks to charge defendant, as executor, for services as broker in obtaining a purchaser for real estate belonging to said estate. The demurrer was general, and was directed separately against each count. The court made an order sustaining the demurrer in general terms, and entered a judgment against plaintiff and in favor of defendant, both individually and in his capacity as executor of the last will and testament of Amanda M. Scales, deceased.

We will first consider the question presented by the ruling of the court upon the demurrers to the third and fourth counts. It is but fair to appellant to state that we do not understand him to seriously contend that either of these counts states a cause of action against defendant in his capacity as executor. It is only in such capacity that he is sued in those counts. It is well settled that an executor or administrator cannot create any liability against the estate in his charge by his employment of attorneys, brokers, or others to assist him in the performance of his duties. The attorney, broker, or other person employed has no action or claim against the estate. Whatever claim he has, whether it be absolute or conditional, is against the executor or administrator in his individual capacity, who in turn may, if the expenditure was made in good faith and was proper, be credited therewith in the settlement of his accounts with the estate. *McKee v. Hunt*, 142 Cal. 526, 77 Pac. 1103; *Estate of Scott*, 1 Cal. App. 742, 83 Pac. 85; *Maxon v. Jones*, 128 Cal. 77, 60 Pac. 516; *Sterritt v. Barker*, 119 Cal. 495, 51 Pac. 695; *Briggs v. Breen*, 123 Cal. 657, 56 Pac. 633, 886; *McKee v. Soher*, 138 Cal. 367, 71 Pac. 438, 649; *Estate of Willard*, 139 Cal. 501, 73 Pac. 240, 64 L. R. A. 554. The rule is thus stated in the marginal note to section 356,

Woerner's Am. Law of Administrators: "Executors and administrators cannot bind the estate by any contract although assuming to do so, but they are primarily liable to the creditor." As appellant states in his reply brief that he believes "that the point is settled in this state that the executor or administrator cannot bind the estate, or make the estate directly liable to the real estate broker for services performed in assisting the executor or administrator in making sales of property of the estate," and only framed the counts against defendant as executor in order to present to the court every theory of the case, we need not discuss these counts further. The demurrer was properly sustained as to the third and fourth counts, and judgment was properly entered in favor of defendant as executor of the last will and testament of Amanda M. Scales, deceased.

This brings us to a consideration of the first and second counts, wherein defendant is sued in his individual capacity. The first count states the facts according to their legal effect, while the second count pleads the facts in detail upon which, it is evident from the brief of appellant, that plaintiff relies for a recovery. In this second count the formal matters as to the death of Amanda M. Scales, testate, the probate of her will, and the appointment of defendant as executor thereof are alleged, as well as that a certain piece of real estate situate in the city of Sacramento was a part of her estate. It is then alleged that defendant individually entered into a contract with plaintiff, by means of a letter addressed to Frank Hickman, the manager of plaintiff. The letter is set forth in full, and is as follows:

"San Francisco, February 18, 1907.

"Frank Hickman, Esq., Sacramento, Cal.—
Dear Sir: I have consulted with my friends here who are interested in the matter of the estate of Mrs. Scales, and have settled upon the asking price. It is \$20,000.00 I will pay you your commission of 5 per cent. on that amount, or on any amount that I may accept from a purchaser obtained by you, if the determination of the question rests solely with me; and I will recommend that that commission be paid you if the determination of the matter rests with the court. The following extract will show you the extent of the power given me by the will: 'Fourthly. I hereby authorize and empower my executors and trustees named, and the survivor of them, to sell, dispose of, and convey any and all of the real estate, and all of the personal property not hereinabove bequeathed of which I shall die seised or possessed, at any time or times they may see fit, without obtaining the order of any court, and upon such terms and in such manner as to them shall seem best.' I am the surviving executor now, and possess all the power given by this paragraph of the will. You can submit to me any offer that may be made to you, and I will give you a prompt

reply. You can take a deposit if you are offered \$20,000.00.

"Yours truly, Joseph Leggett."

It is further alleged that, acting in pursuance of this contract, plaintiff procured a purchaser for the real estate at the price of \$20,000, and took a deposit from him of \$2,000, and notified defendant thereof, who accepted the offer of such purchaser, one Edward I. Brown, who was both able and willing to complete said purchase; that defendant made return of said sale to Brown to the superior court; and that upon the final hearing of such return a bid of \$22,000 was made for the property by one Mier, and the sale confirmed to him. It is further alleged that at said hearing, upon the application of an attorney for certain devisees under the will of deceased, the court allowed a commission of \$1,100 to the firm that presented the bid of Mier, and directed the executor to pay to said firm out of the assets of the estate said \$1,100. It is further alleged that defendant never employed the said firm, to which the court awarded said commission, to procure a purchaser for said property. It is also alleged that defendant did not at the said hearing request the court to fix any compensation to be paid plaintiff, or to be allowed defendant for that purpose, but expressly refused to do so, and that, although often requested, he has ever since refused to apply to said court for any allowance, or to fix any commission or compensation for the procuring of said purchaser, Brown, and has absolutely repudiated said contract with plaintiff and all liability thereunder. No part of the \$1,000 has been paid plaintiff.

The question raised by respondent is as to the liability of defendant under the writing set forth in the complaint. It is not suggested that plaintiff has not fully performed what he was employed to do, to wit, procured a purchaser satisfactory to defendant, at the price authorized and accepted by defendant. There can be no doubt but that the contract is on its face the individual contract of defendant. While he was dealing with property belonging to the estate, he could not under the law make a contract of this character that would create a liability against the estate. The agreement to pay commission, to be valid at all, must be the individual agreement of defendant. "A contract must be interpreted so as to make it operative and capable of being carried into effect, if it can be done without violating the intention of the parties. *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327; *Sample v. Fresno Flume, etc., Co.*, 129 Cal. 222, 61 Pac. 1085; *McCloskey v. Tierney*, 141 Cal. 101, 74 Pac. 699, 99 Am. St. Rep. 33; *Cullen v. Sprigg*, 83 Cal. 56, 23 Pac. 222; *Adams v. Hopkins*, 144 Cal. 19, 37, 77 Pac. 712; *Alaska Imp. Co. v. Hirsch*, 119 Cal. 249, 257, 47 Pac. 124, 51 Pac. 340; *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 55 Pac. 788; *Sutliff v. Seidenberg*

Stiefel Co., 132 Cal. 63, 64 Pac. 131, 469; Civ. Code, § 1643.

The significant language of the contract is contained in these words: "I will pay you your commission of 5 per cent. on that amount, or on any other amount that I may accept from a purchaser obtained by you, if the determination of the question rests solely with me; and I will recommend that that commission be paid you if the determination of the matter rests with the court." Strictly speaking, this being, as we have seen, the individual contract of defendant, the amount that he might pay did rest solely with him. The amount that might be allowed him in his settlement with the estate did rest with the court. But before the court can fix such amount it is necessary that he as executor ask for such allowance. Whatever allowance is made must be made to the executor, and not to the broker. This is so well established as the law of this state that it is quite unnecessary to cite authorities. Undoubtedly defendant had in mind the right of the court to determine the credit that should be allowed the executor for expenditures made in the performance of his trust when he penned the language above quoted. While the language is not as clear and definite in meaning as it might be, we think it clear that defendant bound himself to pay to plaintiff 5 per cent. on the bid accepted by him, or such amount as the court might determine to be proper. He must pay one or the other. He alone under the law can obtain the fixing of the amount by the court. As he has failed and refused to invoke the action of the court, and thus by his own fault made it impossible to procure a determination by the court, he is liable to plaintiff for the 5 per cent. fixed by himself.

The fact that the court, at the hearing of the return, fixed and directed the payment, out of the assets of the estate, of a commission to a firm not employed in writing or at all by defendant, does not affect the right of plaintiff to his commission earned under his written contract. If the facts alleged in the complaint are correct, it is difficult to understand upon what theory such order was made. As this firm was not employed to make the sale, in writing or at all, by defendant, it had no claim against defendant, either individually or as executor, and in any event it was error to make an allowance directly to such firm of brokers. *Estate of Kasson*, 119 Cal. 489, 51 Pac. 706, in addition to cases cited supra. However that may be, such allowance cannot affect plaintiff's right under its contract.

Neither do we see any force in the contention of respondent that because no sale could be made without being confirmed by the court, and that the court did not confirm the sale to Brown, but to a higher bidder at the hearing, plaintiff is not entitled to his commission. Before any sale could be made or

confirmed, it was necessary to procure a purchaser who would make an offer that could be accepted by the executor and reported to the court for its action. This was what plaintiff was employed to do, and he did it, with the result that the property was in fact sold, and for a sum in excess of the amount fixed by defendant, to the manifest advantage of the estate. Plaintiff having fully performed his contract is entitled to his commissions. *Maxon v. Jones*, supra, and cases there cited. For these reasons the court erred in overruling the demurrer as to the second count, as well as to the first count, where the facts are alleged according to their legal effect.

The judgment in favor of defendant individually is reversed, and the court is directed to overrule the demurrer to the first and second counts of the complaint. In other respects the judgment is affirmed, and the cause is remanded to the trial court for further proceedings under the first and second counts of the complaint.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 36

PASHGIAN v. STEPHENSON. (Civ. 563.)
(Court of Appeal, Second District, California.
Feb. 5, 1909.)

APPEAL AND ERROR (§ 452*)—PROCEEDINGS BY TRIAL COURT PENDING APPEAL.

Additional findings and another judgment, rendered by the trial court pending appeal from the first judgment, are none the less without jurisdiction because of the subsequent dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2212; Dec. Dig. § 452.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by John S. Pashgian against S. B. Stephenson. Judgment for defendant. Plaintiff appeals. Reversed.

John M. Eshleman, M. W. Conkling, Conkling & Brown, and Eshleman & Swing, for appellant. F. C. Farr, for respondent.

ALLEN, P. J. Appeal by plaintiff upon a bill of exceptions from a judgment rendered in defendant's favor. The action was one for forcible entry and detainer. The court below tried the case on the 30th day of October, 1907, and on such date rendered judgment in favor of defendant and against plaintiff. On February 28, 1908, plaintiff gave notice of appeal from such judgment, and on the 3d day of March following filed his undertaking on appeal. There is nothing in the record indicating that any motion for a new trial was filed, or any order made in reference thereto, notwithstanding which the court, on May 15, 1908, against plaintiff's objections,

signed and filed in said action another set of findings and conclusions of law, and rendered another judgment in the same proceeding in defendant's favor and against plaintiff. From this last judgment, plaintiff also appeals. The appellant has dismissed his first appeal, and nothing remains for consideration but the appeal from the judgment of May 15, 1908.

It is conceded by both parties, and very properly so, that the court below was without jurisdiction to file additional findings or render any judgment thereon after the appeal from the first judgment was perfected and pending in this court. The fact that the appeal which terminated the jurisdiction of the trial court has since been dismissed does not in any wise affect the question involving the power of the trial court to act in the manner stated while such appeal was actually pending.

The judgment made and entered on May 15, 1908, is therefore reversed, with costs to appellant.

We concur: SHAW, J.; TAGGART, J.

9 Cal. App. 783

PEOPLE v. NICKEL et al. (Civ. 639.)

(Court of Appeal, First District, California.
Feb. 3, 1909.)

1. OFFICERS (§ 52*) — TERM — COMMENCEMENT AND EXTENT.

Where an officer's term is fixed at a term of years without specifying the date for its commencement, the incumbent holds his office for the full term from the date of his election or appointment.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 72; Dec. Dig. § 52.*]

2. SHIPPING (§ 15*)—PORT WARDENS—TERM.

Pol. Code, § 2501, established the office of port warden and fixed their number for the several ports of entry within the state. Section 368 provided for their appointment by the Governor with the consent of the Senate, and section 369 declared that they should hold their offices for a term of four years. *Held*, that the term of a new incumbent in such office commenced on the date of his appointment or reappointment, and not on the termination of the preceding term, and extended for the full period of four years, notwithstanding Pol. Code, § 1003a, declaring that, except in instances otherwise provided in the Constitution, whenever a person shall be appointed by the Governor by and with the advice and consent of the Senate to fill an office, and the appointment is not made until after the expiration of the preceding term, the appointee holds office for the balance of the unexpired term, as provided by the law creating the office.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 15.*]

3. OFFICERS (§ 53*)—STATUTES—APPLICATION.

Pol. Code, § 1003a, providing that whenever a person shall be appointed to fill an office, when the appointment is not made until after the expiration of the preceding term, the appointee holds only for the balance of the unexpired term, as provided by law creating the

office, only applies to offices as to which the commencement of the term is fixed by law.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 53.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Quo warranto by the People, on the petition of U. S. Webb, against R. E. Nickel and another, as wardens of the Port and Harbor of San Francisco. Judgment for defendants, and petitioner appeals. Affirmed.

Attorney General Webb, for the People. J. A. Elston, for respondents.

HALL, J. This is a proceeding in quo warranto brought by the Attorney General to oust each of the defendants from the office of port warden of the port and harbor of San Francisco. The trial court made full findings of the facts bearing upon the questions involved, and gave judgment for the defendants. From the judgment the plaintiff in due time appealed, and the case comes to this court upon the judgment roll.

The problem for solution is as to the effect upon the tenure of office of warden of the port and harbor of San Francisco of section 1003a of the Political Code, which was first adopted in 1903, and went into effect on March 15th of the same year. This section, so far as pertinent to the facts of this case, is as follows: "Except in the instances otherwise provided in the Constitution whenever a person * * * shall be appointed * * * by the Governor, by and with the advice and consent of the Senate * * * to fill an office when the appointment is not made until after the expiration of the preceding term, the appointee holds office only for the balance of the unexpired term as provided by the law creating the office." The office of port warden was established by the Political Code as adopted in 1872. Section 2501 of said Code fixes the number of port wardens for the several ports of entry within the state. Section 368 (Pol. Code) provides for their appointment by the Governor with the consent of the Senate, and section 369 (Pol. Code) provides that port wardens shall hold their offices for "the term of four years." It will be thus seen that the term of office of a port warden is simply fixed as a period of time—four years—and no particular date is established for either the beginning or ending of the term. Under such circumstances it is well established that each incumbent takes a term, running from the date of his appointment, equal in duration to the period of time fixed by the statute as the term of the office. This is the rule in the absence of a statutory provision to the contrary, even where a particular incumbent is appointed or elected to fill a casual vacancy, and it is certainly the rule where a particular incumbent is elected or appointed to the

office after the expiration of the term of the preceding incumbent. 23 Am. & Eng. Ency. of Law, 418, and cases there cited, particularly *Hughes v. Buckingham*, 5 Smedes & M. (Miss.) 632; *McAffee v. Russell*, 29 Miss. 84; *State v. Johns*, 3 Or. 533; *State v. Wentworth*, 55 Kan. 298, 40 Pac. 648, and *People v. Langdon*, 8 Cal. 1. Where the term is fixed at a given period of time only, and no particular date is established for the beginning or ending of the term, such term is said to run with, or is attached to, the officer, and does not run with, and, is not attached to, the office. In other words, a new term does not commence upon the determination of the preceding term until the appointment of a new incumbent, or the reappointment of the person in office to a new term. The time that a particular incumbent holds over after the ending of his proper term has been called a prolongation of the old term. "It is in no sense a new term." *People v. Edwards*, 93 Cal. 153, 28 Pac. 831. The new term begins only upon the making of a new appointment. Accordingly, under the provisions of the Political Code above referred to, as they have stood since the adoption of the Codes in 1872, until the adoption of section 1003a in 1903, port wardens have been appointed from time to time, and each appointee has held his office for a period of four years from the date of his appointment, irrespective of whether or not his immediate predecessor may have held over for a greater or less period after the ending of his four-year term.

We do not understand appellant to contend that this practice was not correct, or not in accordance with the law as it existed prior to March 15, 1903. Appellant does contend, however, that section 1003a changed the law as regards the tenure of office of port wardens and others whose term is simply fixed at a given period of time. While the facts are fully set forth in the findings of the court, it is quite unnecessary for us to state the facts in detail. It is sufficient to say that each of the defendants claims to hold by virtue of an appointment made in truth and in fact less than four years prior to the present time, although some time after the expiration of a preceding four-year term. The pertinent language of the section is: "When the appointment is not made until after the expiration of the preceding term, the appointee holds office only for the balance of the unexpired term as provided by the law creating the office." But, as we have shown, under the law creating the office of port warden, no term commences until a person is appointed to the office. There can be no "balance of an unexpired term as provided by the law creating the office" until a term has commenced. The section under discussion does not attempt to fix when a term shall commence. Although we may fully concede that an ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pointment made after the expiration of a four-year term is made after "the expiration of the preceding term," it does not necessarily follow that in all such cases there must be a "balance of an unexpired term." Whenever the law fixes a given date as the beginning of a term, such term attaches to and runs with the office. As soon as that given date is passed, there is a balance of an unexpired term to be filled.

The language of the section fitly applies to such cases only, and can have no operation where no new term has commenced. In passing the section in question the legislative mind seems not to have been directed to the question of fixing a time for the beginning of terms of office, but only to the matter of fixing the time an office may be held when the appointment is made after a term has commenced. The Legislature correctly assumed that in many cases, where an appointment might be made after the termination of a preceding term, a new term would have commenced under the existing law; and in such case provided that the appointee should hold only for the balance of such unexpired term. The most that can be claimed for the language of the section in question is that it, by implication, changes the rule of law as to when a term of office shall begin when no given date is fixed by the statute for the beginning of the term. Changes by implication in well-established and certain rules of law are not favored, and we do not think we should enter the realm of conjecture for the purpose of giving a meaning to language beyond its ordinary and natural signification.

As the term of each defendant did not begin until he was appointed, and four years have not elapsed since the appointment of either, each is entitled to hold the office to which he was appointed until the expiration of the period.

The judgment is therefore affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 5

CALIFORNIA CASKET CO. v. MCGINN
et al. (Civ. 542.)

(Court of Appeal, First District, California.
Feb. 4, 1909. Rehearing Denied by Supreme Court April 5, 1909.)

1. JUDGMENT (§ 145*)—DEFAULT—OPENING DEFAULT.

A default judgment will not be set aside on the ground that, "at the time of entering the said pretended default and the said alleged judgment, the time allowed defendant by law in which to answer the complaint herein had not expired," where defendant does not accompany the motion with any answer, affidavit of merit, or showing of defense of any sort.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 293; Dec. Dig. § 145.*]

2. JUDGMENT (§ 153*)—OPENING DEFAULT—LACHES.

The motion to open a default judgment, made six months after entry of default, on the ground that the default was prematurely entered, should be denied for laches.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 300; Dec. Dig. § 153.*]

3. JUDGMENT (§ 132*)—JURISDICTION OF DEFENDANT—DEFAULT—PREMATURE ENTRY.

As the court acquires jurisdiction of defendant by service of summons (Code Civ. Proc. § 416), a default judgment is not void for want of jurisdiction, though prematurely entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 210-220; Dec. Dig. § 132.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the California Casket Company, a corporation, against Eugene McGinn and Annie Byrne, doing business as McGinn Bros. From an order setting aside a default judgment, plaintiff appeals. Reversed.

Rigby & Rigby and Wal. J. Tuska, for appellant. Campbell, Metson, Drew, Oatman & Mackenzie, for respondents.

COOPER, P. J. This appeal is from an order setting aside a default judgment. It appears from the record that on the 11th day of October, 1906, plaintiff filed its complaint in the superior court, alleging that defendants were indebted to it in the sum of \$1,869.54 upon an account for goods, wares, and merchandise sold and delivered to defendants within the two years last past, no part of which had been paid. On the same day a summons was issued in due form under the seal of the court, which was returned and filed on November 12, 1906, with an affidavit of service in due form by Charles S. Johnston, showing personal service upon each of the defendants on October 31, 1906. Upon said return being filed, on the application of plaintiff, a judgment was duly entered by default on said last-named day for the amount prayed for, together with costs. On the 13th day of November, 1906, the attorneys for the defendants sent to the attorneys for plaintiff a prepared stipulation, to the effect that the default judgment might be set aside; but they did not tender or offer to file any pleading or answer, and the attorneys for plaintiff declined to sign the requested stipulation. On the same day plaintiff's attorneys returned the stipulation, and wrote to the defendants' attorneys, stating the date of the entry of the judgment, the amount thereof, and in the letter stated, "If your clients say that amount is incorrect we will advise plaintiff to consent to vacate, and let you in to defend." This letter was not answered by defendants' attorneys until December 4, 1906, in which letter defendants' attorneys stated that they had gone over the matter carefully with Mr. McGinn (one of the defendants), and that McGinn

"Is positive in his recollection that the summons and complaint were served on him on November 1st, and not on October 31st, as appears on the return of service." This letter concluded with some propositions as to a compromise settlement. On December 5, 1906, the plaintiff's attorneys, in a letter answering the letter from defendants' attorneys, stated: "We are in receipt of yours of yesterday. The person who made the service stated that the service was made Wednesday, October 31st, and he made an affidavit accordingly. We shall call your attention to our letter of November 13th, wherein we stated that if your clients say that the amount sued for, \$1,869.54, is incorrect, we will advise plaintiff to consent to vacate and let you in to defend. To that letter we have no answer." This letter concluded by declining to accept the offer of compromise of defendants as unreasonable. On December 10, 1906, defendants' attorneys again wrote to plaintiff's attorneys, but, without saying anything as to the merits of the case, stated: "We would like to have default opened in this case and defend on the merits. You don't seem to be satisfied with our offer of compromise." To this letter plaintiff's attorneys replied December 11th, stating: "We fail to see what merits your clients have in this matter, and must therefore decline to open the default." This letter does not appear to have been answered, and the correspondence ceased.

Plaintiff's attorneys took out execution February 4, 1907, and an alias execution on February 14, 1907, but evidently without result, for on the 29th day of April, 1907, they filed an affidavit and procured an order for the examination of one of the defendants as to his property. On May 13, 1907, defendants' attorneys served and filed a motion to set aside the default judgment, "because, at the time of entering the said pretended default and the said alleged judgment, the time allowed said defendant by law in which to answer the complaint herein had not expired." This motion was accompanied by the affidavit of Eugene McGinn, in which he stated: "That the summons in the above-entitled action was served on him on the 1st day of November, 1906, and was not served on him on the 31st day of October, 1906, as set forth in the affidavit of service of Charles S. Johnston on file herein, or at any other time than on said 1st day of November, 1906." The motion was not accompanied by any affidavit of merits, or any verified answer, or any answer of any kind; nor was it accompanied by any statement that defendant had any defense of any kind to the action. On May 23, 1908, the court made an order finding that the summons was served on the 1st day of November, 1906, and not on the 31st day of October, and "setting aside the judgment heretofore entered on the 12th day of November,

1906, and permitting the said defendant Eugene McGinn to file his answer to plaintiff's complaint."

The motion was not made under section 473 of the Code of Civil Procedure, which provides that the court may in its discretion, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. There was no claim of mistake, surprise, or excusable neglect by defendants. In fact, their attorneys state in their brief: "This is not an application to set aside a default under section 473 of the Code of Civil Procedure." They place their entire reliance upon the claim that the court was without jurisdiction to enter the judgment, for the reason that at the time of its entry the time for answering had not expired. They claim that the summons was served November 1, 1906, and that the 11th day of November, 1906, was Sunday; hence that they had the whole of Monday, November 12th, in which to answer. The error of the defendants, and in which the court below was led, was in treating the judgment as having been entered without jurisdiction. It is no doubt true, as a general proposition, that a court will vacate or set aside a judgment void on its face, or one rendered without jurisdiction over the person or subject-matter upon motion, and this without an affidavit of merits. The judgment, being void, is regarded by the courts as waste paper, and something which they will set aside on motion at any time; but in this case the court had jurisdiction both of the subject-matter and of the defendants. It is not questioned that the court had jurisdiction of the subject-matter. It is admitted that prior to the entry of judgment defendants were personally served with summons. The service of this summons gave the court jurisdiction of the defendants. Code Civ. Proc. § 416. The court then having jurisdiction of the defendants, the entry of the judgment, being premature, was irregular, but not without jurisdiction. It is said in Freeman on Judgments: "When the entry is premature, the defendant not yet being in default, there are authorities which speak of the judgment as being void, but they are doubtless inaccurate in expression, and probably not intended to assert anything except that the court, proceeding prematurely, will, if applied to within a reasonable time, set aside the judgment and give defendant the hearing to which he was entitled." The entry of the judgment in this case was at most an irregularity; and no doubt, if defendants had moved promptly or within a reasonable time, and filed the proper affidavit of merits, the court would have been authorized to give them relief, provided it found that the service was made

on November 1, 1906, and not on October 31st. Instead of pursuing this course, the defendants waited an unreasonable time, during which time the plaintiff had incurred expense, and then did not even suggest that they had any meritorious defense or defense of any kind, but asked the court to set aside a judgment regular on its face for a mere irregularity. It is a rule of universal application that a court will not set aside a judgment valid on its face, in a case where it had jurisdiction, except the party desiring to be relieved makes at least an apparent showing of honesty and good faith, by showing that he has a defense to the action on its merits; and this rule goes even farther, and a preponderance of the decision is to the effect that a court of equity, notwithstanding the alleged want of service, will not interfere to set aside a judgment unless it appears that the result will be other or different from that already reached. *Freeman on Judgments*, § 498, and cases cited. In *Parrott v. Den*, 34 Cal. 79, the court said in speaking of this matter: "Every consideration of expediency and justice is opposed to the opening up of cases in which judgment by default has been entered, unless it be made to appear *prima facie* that the judgment as it stands is unjust."

In *Gregory v. Ford*, 14 Cal. 143 (73 Am. Dec. 639), the court said: "Courts of chancery do not lightly interfere with judgments at law. It is only for the prevention of fraud, or to relieve from substantial injury or gross injustice, that its high and extraordinary power of interference by injunction is ever resorted to. It is never exerted merely for the correction of informalities or irregularities in legal or judicial proceedings. He who seeks to avail himself of such defects must prosecute his remedies at law. From a court of equity he can receive no countenance. A court of chancery, too, looks well to the consequences of its acts. The case must indeed be a strong one which would induce it to nullify a judgment at law, and thus, as here, put it in the power of a debtor to plead the statute of limitations to a debt which he does not deny to be justly due." While the quotation had reference particularly to courts of equity, the same rule has been applied in other cases; and particularly will the same rule be applied in this state, where courts of law and equity administer the same relief. The language in *Gregory v. Ford* was quoted with approval in the later case of *Eldred v. White*, 102 Cal. 600, 36 Pac. 944, where it was held that a judgment and decree of foreclosure obtained against plaintiff upon a forged and unauthorized appearance would not be set aside in order to allow the plaintiff to plead the statute of limitations. The court there said: "It is not averred or found that appellant did not make and execute the notes and

mortgage, or that the judgment was taken for too much, or that it was unjust, and the court found that appellant had not thereby sustained any damage. It is not claimed that appellant was not generally within the territorial jurisdiction of the court rendering the former judgment, or that said judgment is not regular or valid on its face."

We have carefully examined the cases cited by respondent, but in our opinion, while they use language which to some extent gives countenance to his contention, they do not sustain him. In *Norton v. Atchison*, etc., R. R. Co., 97 Cal. 388, 30 Pac. 585, 32 Pac. 452, 33 Am. St. Rep. 198, the judgment was entered upon a false return of summons; no service of summons having ever been made. The proceeding was to quash the return of summons. It is there evident that the court had no jurisdiction of the defendant. In *Crescent Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797, the judgment was obtained upon a fraudulent stipulation, signed by the nominal parties and not the real parties in interest, and hence the court was without jurisdiction as to the real party in interest, and not only this, but the motion was accompanied by an affidavit of merits.

We conclude that the order is erroneous, and must be reversed, and it is so ordered.

We concur: HALL, J.; KERRIGAN, J.

10 Cal. App. 5

CALIFORNIA CASKET CO. v. MCGINN
et al.

(Supreme Court of California. April 6, 1909.)
JUDGMENT (§ 153*) — OPENING DEFAULT — LACHES.

A motion to open a default judgment, made six months after entry of default, on the ground that the default was prematurely entered, should be denied for laches.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 300-304; Dec. Dig. § 153.*]

In Bank. Petition in the Supreme Court for rehearing after judgment by the District Court of Appeal. Petition denied.

For former report, see 100 Pac. 1077.

PER CURIAM. The petition for rehearing in this court after judgment by the District Court of Appeal is denied.

The opinion of the District Court of Appeal reversing the order of the superior court is based upon two grounds: First, that the defendants had been guilty of laches in making their motion to vacate the default, and that the motion should have been denied on this ground; second, that their application should have been accompanied by an affidavit of merits. We are satisfied that the first of these positions is well taken. We do not express any opinion upon the other question discussed by the District Court of Appeal,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. e., whether an affidavit of merits is required to accompany a motion to vacate a default where the ground of the motion is that the default was entered before the expiration of the time allowed by law to the defendant in which to appear and plead.

(155 Cal. 359)

NILES v. GONZALEZ et al. (L. A. 2,043.)
(Supreme Court of California. March 19, 1909.)

APPEAL AND ERROR (§ 901*)—APPEAL FROM ORDER DENYING NEW TRIAL—SHOWING NOTICE OF MOTION.

While plaintiffs, in support of their motion to dismiss an appeal by certain defendants from an order denying a motion for new trial, have the burden of showing affirmatively that T., a defendant other than appellants, a necessary party to the motion for new trial, was not served with notice of intention to move for a new trial, and that she was not one of the parties moving for the new trial, and did not participate in the hearing of such motion, and so had to be served with such notice of intention, yet, the motion to dismiss being denied, and the appeal being for hearing on the merits, the burden shifts, and appellants, to prevent an affirmance on the ground that the trial court did not have jurisdiction to grant the motion, must show that T. was a moving party, or was served with notice, or participated in the hearing.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 901.*]

Department 2. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Nydia S. Niles, executrix of, and substituted plaintiff for, William Niles, deceased, against Lillian L. Gonzalez, M. G. Gonzalez, and another. From an order denying a motion for new trial, defendants Gonzalez appeal. Affirmed.

J. Wiseman Macdonald, for appellants.
Ward Chapman, for respondent.

MELVIN, J. One phase of this case was considered by the Supreme Court on motion to dismiss the appeal. The motion to dismiss the appeal from the judgment was granted, and the court denied respondent's motion with respect to the appeal from the order denying appellants' motion for a new trial. See *Niles v. Gonzalez*, 152 Cal. 90, 92 Pac. 74. Since that decision was filed William Niles died and Nydia S. Niles, executrix of his last will and testament, has been substituted as respondent in his stead.

Respondent contends that the order denying the motion of the defendants Gonzalez for a new trial should be affirmed by reason of the fact that no showing is made of service of notice upon Mrs. Tarr, the other defendant, and also because there is nothing in the record to indicate that she participated in the motion. In passing upon the motion to dismiss the appeal from the order denying a new trial, Mr. Justice Sloss expressed the law in the following language: "It is

well settled that the notice of appeal from an order denying a motion for a new trial need be served only on the parties who were adverse to the motion in the court below. *Watson v. Sutro*, 77 Cal. 609, 20 Pac. 88; *In re Ryer*, 110 Cal. 556, 42 Pac. 1082; *Johnson v. Phenix Ins. Co.*, 146 Cal. 571, 80 Pac. 719. If Mrs. Tarr was not a party to the motion in the superior court, she was not an adverse party upon whom notice of appeal from the order had to be served. The record before us fails to show that she was such adverse party. The notice of intention to move for a new trial is not incorporated in the transcript. The statement on motion for new trial is entitled 'Statement of Defendant Lillian L. Gonzalez on Motion for New Trial,' and states that it is proposed by said defendant as a statement to be used 'on motion for new trial.' Whether or not the defendant Tarr participated in the proceedings leading up to the settlement of the statement, or gave or received notice of intention to move for a new trial, or, upon the hearing, appeared either in favor or in opposition to the granting of the motion, is not shown. All that is contained in the record in addition to the statement is the copy of a minute entry showing the action of the court on the motion. This entry reads: 'On this cause defendants' motion for a new trial is denied.' In view of the fact that the notice of appeal purports to be given by the defendants Gonzalez, this entry might well be taken to indicate that the motion was made by these defendants. But, if we give it the construction suggested by the respondent, namely, that Mrs. Tarr, who was one of the defendants, is included among those whose motion for a new trial is denied, it would appear that she joined with her co-defendants in asking for a new trial, and in that view the record would not show that her interests upon that motion were adverse to those of the other defendants. *Barnhart v. Edwards*, 111 Cal. 431, 44 Pac. 160. We think the burden is upon a respondent, moving to dismiss an appeal for want of service upon an adverse party, to show from the record that the party not served was adverse in interest. 'Only parties who appear from the record to be adverse need be served.' *Estate of Ryer*, 110 Cal. 556, 42 Pac. 1082; *In re Bullard* 114 Cal. 462, 46 Pac. 297. Here the record does not show affirmatively that Mrs. Tarr was an adverse party to the action in the court below. We are not here called upon to decide whether a failure to serve Mrs. Tarr with notice of intention to move for a new trial in the court below (assuming that she did not join in the motion) would furnish good ground for affirming the order denying a new trial, nor is it necessary here to decide whether, in considering such appeal on its merits, this court

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

would presume that notice of intention to move for a new trial had or had not been given to the codefendant."

In another part of the same decision this language is used: "The decree declared that the plaintiff was entitled to the specific enforcement of his contract against Lillian L. Gonzalez, and was entitled to receive from her a good and sufficient deed of conveyance of the property upon payment to her of the sum of \$107.38. It further declared that the defendant Jennie R. Tarr is the owner and holder of the Gonzalez note and mortgage above referred to, and that said Jennie R. Tarr is entitled to receive from the plaintiff, and the plaintiff is required to pay to her, as a condition to the specific performance of said contract and as a condition to having said mortgage satisfied of record, the sum of \$578.30. The decree orders the plaintiff to pay to the clerk of the court within 10 days the sum of \$107.38 for the defendant Lillian L. Gonzalez, and the sum of \$578.30 for the defendant Jennie R. Tarr. Within 10 days after the payment of said sums, the said Lillian L. Gonzalez is ordered to execute and deliver to plaintiff a deed of the property, and said Jennie R. Tarr is ordered to enter a satisfaction of her mortgage. We think it is clear that this decree grants Mrs. Tarr certain substantial rights of which she might be deprived upon a reversal, or upon any conceivable modification of the judgment, and that she is, therefore, an adverse party who should have been served with the notice of appeal."

Mrs. Tarr being a necessary party to the motion for a new trial, it was incumbent upon the moving party in the former proceeding to show affirmatively that she was not served with notice of intention to move for new trial, that she was not one of the moving parties, and that she did not participate in the hearing of the motion. But does not the burden shift when the matter comes to this court on appeal from the order denying the motion for a new trial? And in the absence of an affirmative showing that Mrs. Tarr was either a moving party, or was served with notice, should not this court presume that the superior court did not have jurisdiction to grant the motion for a new trial, and that said motion was therefore properly denied? On appeal all intendments are in favor of the regularity of the action of the trial court. Error will never be presumed, and the burden is upon the appellant to show that it exists. *Cutting Fruit Packing Co. v. Canty*, 141 Cal. 692, 75 Pac. 564; *McLennan v. Wilcox*, 126 Cal. 51, 58 Pac. 305. There is nothing in the record to show that Mrs. Tarr was a party to the motion for a new trial, that she took any part in the hearing of said motion, or that she was served with notice of intention to move for a new trial. Her answer was separate from that of the defendants Gonzalez, she was represented by her own attorney, and the state-

ment on motion for new trial is signed by the attorney for defendant Lillian L. Gonzalez and the attorney for the plaintiff. The order denying the motion for a new trial is as follows: "On this cause, defendants' motion for a new trial is denied." It is also a significant circumstance that Mrs. Tarr's attorney does not join in the notice of appeal from the order denying a new trial.

It seems obvious that appellants have failed to meet the burden imposed upon them, and we are therefore bound to assume that the court below did not acquire jurisdiction to grant a new trial. In *Herriman v. Menzies*, 115 Cal. 26, 44 Pac. 661, 35 L. R. A. 318, 56 Am. St. Rep. 81, this court says: "Section 659 of the Code of Civil Procedure, however, requires that the party intending to move for a new trial shall 'serve upon the adverse party a notice of his intention.' The 'adverse party' upon whom this notice is to be served is determined by the same rules as is the 'adverse party' upon whom a notice of appeal is to be served, viz., every party whose interest in the subject-matter of the motion is adverse to or will be affected by the granting of the motion or changing the former decision of the court; and a failure to serve such adverse party with the notice of an intention to move for the new trial will be attended with the same consequences as a failure to serve an adverse party with a notice of appeal from the judgment. The superior court can have no jurisdiction to re-examine an issue of fact that it has tried, and change its decision thereon, unless all the parties to the issue and former decision are properly before it. In the present case the plaintiffs sought a recovery against Mrs. Taylor, and, upon the trial of the issues involving her liability, the court made certain findings of fact in her favor, and determined that she was under no liability to account for any moneys that she had received. The action is for an accounting by all of the defendants as partners in the enterprise, and it is evident that an adjustment of their several rights and obligations growing out of the partnership venture cannot be had unless all of the parties to the transactions are before the court. The effect of granting a new trial would be to vacate the former findings of fact, and compel Mrs. Taylor to again litigate a controversy which had been decided in her favor. A new trial of these issues cannot be had without affecting her interests, and, as she has not been brought before the superior court at the hearing of the motion for a new trial, that court had no jurisdiction to grant the motion, and its order denying the same was properly made." See, also, *U. S. v. Crooks*, 116 Cal. 43, 47 Pac. 870.

It follows that the order denying defendants' motion for a new trial must be sustained.

We concur: HENSHAW, J.; SLOSS, J.

(155 Cal. 323)

MENTONE IRR. CO. v. REDLANDS ELECTRIC LIGHT & POWER CO. et al.

(L. A. 2,155.)

(Supreme Court of California. March 16, 1909.)

1. APPEAL AND ERROR (§ 867*) — REVIEW — SCOPE — APPEAL FROM ORDER ON MOTION FOR NEW TRIAL.

Conclusions of law are reviewable only on appeal from the judgment, or from an order made under Code Civ. Proc. §§ 663, 663½, authorizing the vacation of a judgment which is inconsistent with the findings of fact, and cannot be considered on an appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3480; Dec. Dig. § 867.*]

2. PLEADING (§ 123*)—GENERAL DENIAL.

A general denial puts in issue all the material allegations of a verified complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 255; Dec. Dig. § 123.*]

3. WATERS AND WATER COURSES (§ 42*)—NATURAL WATER COURSES—RIPARIAN RIGHTS—EXTENT OF RIGHT TO USE WATER.

A riparian owner has the right to make any use of the water, beneficial to himself on the riparian land, which his situation enables him to make; but, if his use involves a consumption of the water, he cannot use more than his reasonable share as compared with other riparian owners, and he must not pollute the water to the injury of others entitled to it, and the water he does not consume must be returned to the stream before it passes his land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 33, 34; Dec. Dig. § 42.*]

4. WATERS AND WATER COURSES (§ 46*)—NATURAL WATER COURSES—RIPARIAN RIGHTS—MECHANICAL PURPOSES.

The owner of riparian land has the right to use the water in its natural course on the land for generating electric power, though the power is carried away and used on nonriparian land of others; and he has also the right, if it is more convenient and effective so to do, to turn the water out of its natural channel at the upper ends of his possessions, carry it in an artificial channel over the land, use it for generating such power, and turn it all back into the stream within his lands, provided such interference with natural conditions does not unduly injure those who have rights in the water, including the underflow.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 37; Dec. Dig. § 46.*]

5. WATERS AND WATER COURSES (§ 87*) — SUBTERRANEAN WATERS — ACTIONS.

Evidence, in an action to enjoin the diversion of the underflow of the stream by means of pipe lines and dam above plaintiff's land, examined, and held sufficient to sustain a finding that plaintiff's supply was not affected by defendants' interference with natural conditions.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 87.*]

6. APPEAL AND ERROR (§ 1008*)—REVIEW—QUESTIONS OF FACT—FINDINGS.

A finding of fact, based on conflicting inferences reasonably deducible from the evidence, is as conclusive as where the conflict arises directly from the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3955; Dec. Dig. § 1008.*]

Department 1. Appeal from Superior Court San Bernardino County; Waldo M. York, Judge.

Action by the Mentone Irrigation Company against the Redlands Electric Light & Power Company and others. From an order denying plaintiff's motion for a new trial after judgment for defendants, plaintiff appeals. Affirmed.

Works, Lee & Works and Harris & Harris, for appellant. H. H. Trowbridge and Gregg & Surr, for respondents.

SHAW, J. The plaintiff, claiming as an appropriator of water from a stream known as "Mill creek," sues to enjoin alleged injurious diversions from the stream. Judgment was given in the court below in favor of the defendants. The appeal is from an order denying the motion of plaintiff for a new trial. The trial took place in March or April, 1904. For some reason, not explained in the record, the findings were not filed until June, 1906, and the bill of exceptions was not settled until June 14, 1907.

It is not claimed that the findings do not cover all the material issues. There are no specifications of errors of law occurring at the trial. The specifications in the bill of exceptions that the conclusions of law embraced in the findings are erroneous are not available on appeal from an order denying a new trial. The conclusions of law are always merged in, and superseded by, the judgment (Roberts v. Hall, 147 Cal. 437, 82 Pac. 66); and, even if necessary thereto they can be reviewed only on appeal from the judgment, or from an order made under sections 663 and 663½, Code Civ. Proc. (Swift v. Occidental, etc., Co., 141 Cal. 165, 74 Pac. 700; Great Western G. Co. v. Chambers, 153 Cal. 310, 95 Pac. 151; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828). We think, however, that the points urged by the appellant are fairly presented by the specifications of the insufficiency of the evidence to support the findings. The complaint was not verified, and hence the general denials of the answers put in issue all the material allegations.

The complaint, in substance, is as follows: The plaintiff is, and has been ever since December 1, 1887, the owner of the right to take and use all the water flowing above and below the surface of the ground on and along a certain tract of 160 acres of land at the lower end of Mill creek, through which tract said creek flows. Mill creek rises in the San Bernardino mountains, and flows westerly about 25 miles to the plaintiff's land. The water of the creek consists of a stream flowing on the surface in connection and contact with an underflow through the porous material, composed of sand, gravel, and boulders, with which the channel is filled. This material is kept saturated, and the under-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

flow is supplied by waters sinking into it from the surface stream. The plaintiff obtains said water from the underflow of the creek, on the land aforesaid, by means of a tunnel extending into said porous material, beneath the surface of the ground. At that point there was ordinarily no surface flow of the creek. Some additional water from the underflow of the creek was obtained from springs rising in the vicinity, and also by means of an open cut on said land across and into the bed of the creek. These waters were appropriated and used for irrigation and domestic use on other lands not contiguous to the stream. After the plaintiff had acquired these water rights, the defendant Redlands Electric Light & Power Company, which we will hereinafter call the "Power Company," acting in concert with the other defendants, some 48 in number, whom we will call the "Ditch Owners," made a dam in the creek, at a place about 3 miles above the plaintiff's tunnel, by which dam they diverted all of the surface flow of the creek, and 300 miner's inches of the underflow thereof, into an impervious pipe, in which pipe they carried said waters down the canyon some 14,000 feet to a power house, where it was used by the Power Company for generating electric power. After passing through this power plant, these waters were turned into a rock-lined ditch, some 600 feet in length, from which they were discharged into the original bed of the creek and from thence flowed about one-fourth of a mile to a dam of the Ditch Owners aforesaid, and were there by them turned into their ditch, and carried away, and used on lands situated about Crafton and Redlands, not riparian to the stream. This dam is about half a mile above the plaintiff's tunnel. We will designate it in this opinion as the "Crafton dam."

It appears by the findings and evidence that for many years before the construction of the plaintiff's tunnel the Ditch Owners had diverted and used all waters of the creek usually flowing on the surface above the dam, and that they had thereby acquired the paramount right to all of the surface flow reaching that point to the extent of 2,500 miner's inches. This maximum amount was a flow seldom attained by the stream, except in times of floods from heavy storms. For all practical purposes they possessed the right to divert all of the water of the creek which, under natural conditions, would usually flow on the surface at their dam. But they had not acquired, and did not possess, any right to take at that point any part of the underflow in order to obtain the 2,500 inches. This right of the Ditch Owners is not directly alleged in the complaint, but it is conceded by the plaintiff, and no complaint is made on that account. The gravamen of the plaintiff's action is the alleged interference by the defendants with the underflow, and the alleged diversion thereof into said pipe line, and by that means into said ditch at the Craf-

ton dam, whereby it is prevented from reaching the gravel beds surrounding the plaintiff's tunnel. In this behalf it is alleged that the effect of the diversion of the 300 inches of the underflow into the pipe line, and its discharge into the natural channel so near to the Crafton dam, was to carry it swiftly to the dam, and thence into the ditch, giving it no sufficient time to penetrate into the gravels below, and consequently to dry up and diminish the underflow that would otherwise pass beneath the surface at the Crafton dam, and thence down under the creek bed to the tunnel, cut, and springs from which plaintiff obtained its supply, whereby the plaintiff was deprived of the 300 miner's inches of the underflow to which it is entitled.

The plaintiff's claim is that this interference with this natural flow of the water is unlawful. Several reasons are advanced in support of this claim. The Power Company owns the land on which the power house stands, and all the intervening land between the power house and the dam at the head of its pipe line, and all this land is riparian to Mill creek. The electricity generated at the power house by the use of the water from the pipe is carried away to Redlands and other places not on the stream, and there used for light, heat, and power. The plaintiff makes the novel proposition that the use of the water to generate electric power by means of a power house situated on riparian land is not a use within the scope of the riparian rights which attach to the land, unless the electric power is not only generated upon that land, but is also applied and used within its confines. There is no merit in this proposition. The riparian owner, by reason of the situation of his land on the stream, has the right to make any use beneficial to himself on the riparian land which his situation enables him to make, except that, if his use involves a consumption of the water, he may not use more than his reasonable share as compared with other riparian owners, and that he must not pollute the water to the injury of others entitled to it, and that the water he does not consume must be returned to the stream before it passes his land. Gould on Waters, §§ 213, 204, 208; 2 Farnham on Waters, § 495, p. 1645, sec. 471, p. 1591, §§ 475, 476; Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; Bathgate v. Irvine, 126 Cal. 144, 58 Pac. 442, 77 Am. St. Rep. 158. There may be other qualifications of his right, but they do not affect the present question. The use of the water in its passage through his land to operate a power plant thereon is as clearly within his rights as is his right to operate a mill thereon with which to grind grain, or to operate any other machinery, than which there is no more ancient or well-established feature of riparian rights. The theory of the plaintiff on this point would seem to come to this: That in the process the water is in some way transformed into electricity, and in that form is car-

ried away and used on nonriparian land. If this were correct, perhaps the use would not be included in the riparian right, and perhaps even a prior appropriator below could prevent such use if it worked injury to his right. But no such thing occurs. The water is not changed into electricity, nor carried away by the process. It is not the water that becomes electricity. It is the force of gravity, the weight of the water, which turns the wheels, and, being converted into electric power, is carried away on the wires, the water itself being turned back into the stream, precisely as in the case of its use to turn an ordinary mill wheel.

The Power Company, being the owner of the riparian land, has the full right to use the water in its natural course on its land for that purpose. It has also the right, if it is more convenient and effective so to do, to turn it out of its natural channel at the upper end of its possessions, carry it in an artificial channel over the land, use it for generating power thereon, and turn it back into the stream within its lands below, provided such interference with natural conditions does not unduly injure others who have rights in the water. Gould on Waters, § 213; Farnham on Waters, § 495, p. 1645. Hence, if this diversion of the water from the natural channel causes a diminution of the underflow which would otherwise go to plaintiff's use, and an addition to that which naturally would go to the Ditch Owners, and the plaintiff's rights under its appropriation are prior in point of time to the diversion by the pipe line, we have little doubt that the plaintiff would be entitled to some relief. On behalf of the Power Company it is argued that this diversion on its riparian land is an exercise of its riparian rights, of which a prior appropriator below cannot be heard to complain. This may be admitted for argument's sake so far as the Power Company is concerned, for it does not diminish the quantity of water, nor consume it, but turns it all back into the stream above the lower boundary of its land. But it is alleged that the Power Company and the Ditch Owners, by this method of carrying the water, have taken up part of the underflow which would naturally have gone to plaintiff's use, and have caused it to run into the ditch at the Crafton dam as an artificial increase of the surface stream going to the Ditch Owners. If this were true, the plaintiff might, at least, be entitled, as against the Ditch Owners, to have his artificial increase of the surface stream delivered to it at the Crafton dam, or at that point turned into the natural channel below the dam, where it might sink into the gravels and feed the plaintiff's source of supply. It is unnecessary to inquire further as to the precise extent and form of the relief to which plaintiff might be entitled in the case supposed, since we have reached the conclusion that the findings of the court that the plain-

tiff's water supply is not affected, and that the plaintiff is not damaged by the action of the defendants, must be sustained.

The plaintiff insists that the court has found that the Ditch Owners, in order to obtain the maximum flow of 2,500 miner's inches to which they are entitled, have the right to take up all of the underflow, at the dam or elsewhere, if necessary, and has decided that this contingent right to the underflow is paramount to the right of the plaintiff to have the underflow pass under the dam for its use. One paragraph of the findings states that, by reason of the porous character of its bed, some of the water of Mill creek sinks below the surface of the ground and forms a subterranean stream, in addition to the surface flow and in direct contact with it. At another place the findings state that the Ditch Owners are entitled to take and use "all of the flow of the said Mill creek, to the extent of 2,500 inches of water," miner's measurement. These findings, if considered together, but apart from the context, are somewhat ambiguous, and might be understood to give the Ditch Owners a right to take out at their dam the underflow there running as well as the surface stream. But, when considered in connection with the other parts of the findings, and with the pleadings and judgment, we think it is clear that the court intended to refer only to the surface flow by the phrase "all of the flow of said Mill Creek" in the foregoing passage. Any other construction would make this finding contrary to all the evidence, and to the repeated concessions of both parties throughout the trial. There was no contention, or attempt to prove, that the Ditch Owners ever had, or ever claimed to have, the right to take any water other than the entire stream flowing on the surface of the ground at the Crafton dam, or that they ever claimed the right to take at that point any of the water there flowing beneath the surface in the interstices of the porous material. The contention that this finding is contrary to the evidence would be well taken if the finding could properly be construed to include such underflow, but it is without foundation when the finding is given its true meaning as referring solely to the surface stream there flowing. Furthermore, if construed as claimed by the plaintiff, this finding would be outside of the issues. There is no averment that the Ditch Owners claimed the right to go below the surface at the Crafton dam and take out the underflow, or that they had done so, or threatened to do so. No issue was tendered on that subject by the complaint. The thing complained of, as before stated, is the taking up of the underflow at a point nearly three miles above the Crafton dam, and carrying it down in a pipe so that it reached the Crafton dam as surface flow instead of underflow, and, as part of a surface stream, was

there taken into the defendants' ditch by means of the dam that was used to divert the stream prior to the construction of any pipe line.

The main question of fact in the case arises upon those findings which involve the right of the defendants to maintain the diversion through the pipe line, and the effect of that diversion upon the amount of underflow going to plaintiff's tunnel, cut, and springs. The court found, in effect, that the subterranean water diverted and carried down the canyon in said pipe line, and by that means mingled with the natural surface flow and turned into the defendants' ditch at the Crafton dam, did not constitute any part of the subterranean waters which would naturally flow to and feed the plaintiff's source of supply, and that the interference with natural conditions did not operate to diminish plaintiff's supply. If this is true, the diversion by means of the pipe line would cause no damage to plaintiff. The court, accordingly, expressly found that the plaintiff was not damaged by the acts of the defendants.

We think these findings are supported by sufficient evidence. There was evidence to the effect that, although the diversion of all the surface and subterranean flow into the pipe line at the upper dam caused the surface stream to disappear in the natural creek bed from that place of diversion down to the point where the water was again returned from the pipe line to the natural bed, a few hundred feet above the Crafton dam, there was nevertheless enough water from other sources coming into the creek bed, and into the channel below the head of the pipe line and above the Crafton dam, to fill all the porous material of the canyon at that dam to overflowing, thereby contributing some water to the surface stream, with the result that there was more water in the surface stream at the Crafton dam than was discharged from the pipe line. In other words, the evidence tended to contradict the allegation of the complaint that the underflow was fed from the surface flow at the point in the course of the creek immediately above the Crafton dam; and, on the contrary, it indicated that at that point the underflow fed and increased the surface stream. From these facts the conclusion is reasonable, and indeed almost irresistible, that the bed of the canyon, so called, and the porous material thereof containing the underflow, was filled to its utmost capacity at the Crafton dam, and that not only did the normal quantity continue to pass the dam as underflow, and find its way to plaintiff's diversion works, after the construction of the pipe line as before, but that some of the underflow was forced up to the surface at that point. This, according to the evidence, was caused by a narrowing of the canyon at that place, diminishing the carrying capacity of the porous material composing the bed of the creek.

It would follow from these conditions that the addition of more water to the natural channel above the Crafton dam could add nothing to the underflow at the dam, and would serve only to increase the quantity of the surface stream going to the Ditch Owners or into the bed of the creek below, if it was more than their maximum allowance. It may be conceded that there was evidence tending to show that the stream did not increase between the Crafton dam and the power house, and that this, if true, would justify a different conclusion. But this amounts to a mere conflict in the evidence, or in the inferences reasonably deducible therefrom. In such cases the decision of the trial court is as conclusive as where the conflict arises directly from the evidence. *Barker v. Gould*, 122 Cal. 240, 54 Pac. 845; *Yarwood v. West, etc., Co.*, 132 Cal. 208, 64 Pac. 275.

The grade of the bed of the creek is very steep, being about 250 feet per mile, and from this fact the plaintiff argues that, if the creek bed above were kept filled for its whole length, there would be more pressure and the underflow would pass under the Crafton dam with greater velocity, and consequently in greater quantity, than when filled only for a short distance above the dam. This is, perhaps, a problem in the science of hydraulic engineering. The experts in that science, or some of them, who testified at the trial, declared that no such effect would follow; and, if such evidence is competent, this would be sufficient to support the finding. If we consider it as a matter of judicial cognizance, we are of the opinion that the engineers were right. If the underlying porous material in which this underflow runs had constituted a confined conduit, or was covered by impervious material, so that little water could escape, and it were kept full for its entire length of three miles, with a total fall of 750 feet in that distance, of course the pressure would cause tremendous velocity at the point of discharge. But it bears no resemblance to such a conduit. It has no impervious covering, but is at all points open on the surface, and the excess of the underflow at any point would pass at once into, and become a part of, the surface stream. It can maintain no more pressure than a surface stream or open flume of equal grade. If such a flume for that length and grade were kept filled by discharges into it at a point half a mile above its lower end, the velocity below that point would be as great as if it were filled for its entire length above it, and any addition at any point farther above would merely cause an overflow at the place of minimum capacity, and would add nothing to the velocity below such overflow. If we suppose that one person had the right to take from such a flume all the water except that flowing in the lower six inches of a cross-section of the flume, and

another person below had the right to this lower six inches, we have conditions substantially identical with the case at bar. If such flume were kept filled only a short distance above the place of diversion, the person below would receive the same amount of water as if it were filled at its upper end and ran full for its entire length. The engineers referred to gave testimony substantially to this effect. In the present case there would be, of course, a very slight increase in the pressure upon the underflow from any increase in the depth of the surface stream at the dam, but it is not seriously claimed that this few inches in increased height of the surface of the stream would have any appreciable effect upon the velocity of the underflow at the dam, or on the amount thereof, that would find its way to plaintiff's supply.

The evidence also showed that the plaintiff's supply absolutely ceased for several years, and this, it is claimed demonstrates the injury arising from the pipe line. But this failure is accounted for by the fact that it occurred during an excessive and prolonged drought, continuing for the unprecedented period of four years, during which, even in the rainy seasons, no water flowed past the Crafton dam over the gravel beds containing plaintiff's supply, whereas in ordinary years there was, during a considerable portion of each rainy season, large quantities of water flowing over these gravel beds, into which it would sink and be kept stored until the dry seasons, then to supply the plaintiff's tunnel.

The conclusion we have reached as to the sufficiency of the evidence to support these findings renders the other findings immaterial. If the acts of the defendants do not damage the plaintiff, and do not diminish the water which would naturally flow to its place of diversion, it is immaterial whether the pipe line diversion was made before or after the inception of the plaintiff's appropriation, or whether the place where the water was turned back into the natural channel of the creek was, as the findings state, 1,000 feet above the Crafton dam, or less than that distance. We find no ground upon which it can be said that there is not sufficient evidence to support the findings.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

155 Cal. 333

In re McNEIL'S ESTATE. (S. F. 4,915.)
(Supreme Court of California. March 16, 1909.
Rehearing Denied April 15, 1909.)

1. JUDGMENT (§ 472*)—COLLATERAL ATTACK—JUDGMENT OF SUPERIOR COURT.

A superior court judgment cannot be held void on collateral attack, unless its invalidity

is apparent from an inspection of the judgment roll.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 908; Dec. Dig. § 472.*]

2. DIVORCE (§ 168*)—DECREE—COLLATERAL ATTACK—INSUFFICIENCY OF COMPLAINT.

Civ. Code, § 128, providing that a divorce shall not be granted unless plaintiff has been a resident of the state for one year and of the county three months next preceding the action, does not impose any limitation on the jurisdiction of the superior court in the matter of divorce, and allegations of residence stand upon the same footing as any other allegations of facts showing the right to a divorce, and an omission of the word "next" from the allegations of residence goes solely to the question of whether the complaint sufficiently stated facts warranting a divorce, and not to the jurisdiction of the court, and cannot be successfully relied on in a collateral attack on the decree of divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 549; Dec. Dig. § 168.*]

3. DIVORCE (§ 168*)—DECREE—COLLATERAL ATTACK—INSUFFICIENCY OF COMPLAINT.

Any defect in a complaint for divorce in the allegation of the acts of cruelty relied on goes solely to the question of whether the complaint sufficiently stated facts warranting a divorce, and not to the jurisdiction of the court, and cannot be successfully relied on in a collateral attack on the decree of divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 549; Dec. Dig. § 168.*]

4. JUDGMENT (§ 497*)—COLLATERAL ATTACK—EFFECT OF RECITALS IN JUDGMENT.

Under Code Civ. Proc. § 670, providing, prior to amendment by St. 1895, p. 46, c. 40, that, if the complaint be not answered, the summons, with proof of service, and the complaint, with a memorandum indorsed thereon that defendant's default in not answering was entered, and a copy of the judgment should constitute the judgment roll, neither the affidavit for publication of summons nor the order therefor constituted any part of the judgment roll and cannot, on collateral attack, be examined to ascertain whether they were sufficient to authorize service by publication of summons, even though improperly inserted in the judgment roll; but they must be conclusively presumed to have authorized such service.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 938; Dec. Dig. § 497.*]

5. DIVORCE (§ 168*)—DECREE—COLLATERAL ATTACK.

A decree of divorce cannot be collaterally impeached by evidence that plaintiff had not had the required residence in the state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 549; Dec. Dig. § 168.*]

6. DIVORCE (§ 168*) — DECREE — COLLATERAL ATTACK — FRAUD.

A decree of divorce cannot be collaterally impeached, in a contest for letters of administration between persons each claiming as the surviving wife of plaintiff in the divorce suit, by evidence that the decree was obtained by fraud on the part of plaintiff and the person whom he subsequently married; but the only remedy is by motion in the original suit within the time limited, or by an action in equity assailing the decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 549; Dec. Dig. § 168.*]

7. JUDGMENT (§ 948*)—FORMER ADJUDICATION—PLEADING.

To avail defendant of the benefit of estoppel by a former judgment, it must be pleaded in the subsequent action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1787; Dec. Dig. § 948.*]

8. DIVORCE (§ 172*)—DECREE—CONCLUSIVE-NESS OF ADJUDICATION.

A nonsuit, in an action for divorce commenced prior to the acts relied on in a subsequent second action for divorce, was not conclusive thereof, for the matter relied on in the former action could not have been the same as that in the latter.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 559; Dec. Dig. § 172.*]

9. JUDGMENT (§ 486*)—COLLATERAL ATTACK—GROUNDS—ANOTHER ACTION PENDING.

A judgment cannot be collaterally impeached by proof that there was a former action pending at the commencement of the action in which rendered, but that is ordinarily a matter which must be pleaded in abatement in the second action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 920; Dec. Dig. § 486.*]

10. DIVORCE (§ 168*) — DECREE — COLLATERAL ATTACK.

A suit for divorce from bed and board was commenced by a wife in Pennsylvania, such a decree operating simply to separate the parties without terminating the marriage, and the husband was personally served and contested the suit. During its pendency he sued in California for divorce and obtained a decree, but, though he subsequently contested the Pennsylvania suit, he did not present the California decree as a defense. Judgment was given in the Pennsylvania suit for the wife granting a divorce from the bed and board. *Held*, that the decree of divorce obtained by the husband in California established his status as an unmarried man, and that the Pennsylvania judgment, though necessarily based upon the fact that the parties were at its date husband and wife, did not have the effect, and could not be relied on in a collateral attack on the California decree, to change the status of the husband from that given him by that decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 549; Dec. Dig. § 168.*]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Edward White and Frank McLaughlin each filed a petition for letters of administration upon the estate of James McNeil, deceased. The petitions were heard together, and from an order granting letters to Frank McLaughlin and an order denying a new trial, Edward White appeals. *Affirmed*.

Sullivan & Sullivan, Theo. J. Roche, and Cassin & Lucas, for appellant. Benj. K. Knight, D. M. Delmas, and W. T. Jeter, for respondents.

ANGELLOTTI, J. Edward White, a petitioner for letters of administration of the estate of James McNeil, deceased, appeals from an order granting letters of administration to Frank McLaughlin, and also from an order denying his motion for a new trial. We shall not consider various objections made by respondent to the consideration of

these appeals, but will proceed with a discussion on the merits of the appeal from the order appointing McLaughlin administrator.

James McNeil died intestate on April 1, 1906. Margaret McNeil, claiming to be his surviving wife, requested the superior court of Santa Cruz county to appoint Edward White as administrator, and White filed his petition for letters, accompanied by Margaret's written request. Louise R. McNeil, also claiming to be the surviving wife of deceased, requested said court to appoint Frank McLaughlin as administrator, and McLaughlin filed his petition for letters, accompanied by the written request of Louise. The petitions were heard together; the court impaneling a jury to determine the question which of the two claimants was the surviving wife. Petitioner McLaughlin made his proof in support of Louise, and rested. Thereupon petitioner White, through his counsel, made his opening statement as to what he would prove in support of Margaret. Counsel for McLaughlin then moved for a nonsuit as to White, on such opening statement, and this motion, after argument, was granted by the trial court. White was not allowed to offer any evidence. The court then directed the jury to find a verdict in favor of Louise, and such a verdict was rendered. The court then made its order appointing McLaughlin as administrator.

It is essential to an understanding of the legal questions presented that a brief statement should be made of certain material facts shown by the evidence in support of the claim of Louise, none of which was proposed to be controverted by Margaret, according to the opening statement of her counsel. Margaret and the deceased intermarried in the state of Pennsylvania on July 4, 1865, and there lived together as husband and wife until about the year 1890. Some time during the year 1890 deceased came to California, and continued to reside in this state until his death. Margaret never left the state of Pennsylvania. On November 19, 1891, deceased instituted an action in the superior court of the city and county of San Francisco against Margaret for a divorce on the ground of extreme cruelty alleged to have occurred during the years 1889, 1890, and 1891. The judgment roll in this action was introduced in evidence, showing service of summons by publication, the entry of Margaret's default on February 24, 1892, for failure to appear and answer, the findings of the court to the effect that all of the allegations of the complaint are true, and a judgment given on February 24, 1892, dissolving the marriage theretofore existing between Margaret and deceased. On March 1, 1902, deceased and Louise were united in marriage in San Rafael, Cal., by a regularly ordained minister of the gospel, and thenceforth lived together as husband and wife until the death

of deceased. The decree of divorce given by the San Francisco superior court has never been vacated or annulled. An attempt was made by Margaret to have it decreed null and void for want of jurisdiction and fraud, by an action in equity instituted in the United States Circuit Court for the Ninth Circuit; the amended bill of the complainant therein being filed therein December 6, 1895. A demurrer to this bill was sustained January 11, 1897, with leave to the complainant therein to amend her bill within 10 days. No amendment was made, and subsequent to the death of deceased, viz., on July 5, 1906, judgment was given therein that the action be dismissed. This judgment was received in evidence over the objection of White that, as the time for appeal therefrom had not expired, it was not admissible. Counsel have elaborately argued the question of the effect of this judgment pending the time within which an appeal might be taken, but, in our view of the case, we regard it as entirely immaterial. It was not a judgment purporting to annul or vacate the superior court judgment, and the most that can be said for Margaret in the matter is that she has an action pending looking to the annulment of the superior court judgment. The mere pendency of such an action could not impair the force of such judgment in the slightest degree.

Learned counsel for White earnestly assert that it was gross error for the trial court to refuse to allow them to introduce evidence in support of Margaret's claim, in view of their statement that they proposed to prove "that Louise R. McNeil is not the surviving wife of James McNeil, deceased, but that Margaret McNeil is the widow, and entitled to succeed to the widow's share of the decedent's estate." If this were all, undoubtedly their claim would be well based; but it is apparent from the record that this was simply a statement by counsel of a legal conclusion upon the specific facts which they expected to prove and which they detailed at great length. After the motion for a nonsuit had been made, counsel amplified the statement previously made, and there was no intimation in the court below and there has been no intimation in any of the briefs that counsel had any evidence to offer other than such evidence as was detailed in the statements made before the trial court. Regardless of the question whether it is a proper or commendable practice to grant a nonsuit on the opening statement of counsel, or whether there is any such thing known to our law as a motion for nonsuit on the hearing of rival applications for letters of administration, it is apparent that the order appealed from should not be reversed merely for the purpose of allowing the appellant to offer evidence that would not be admissible to impair the effect of the case made by the other applicant. The case is practically simply one where certain evidence

has been offered and excluded by the trial court.

We are thus brought to a consideration of the matters which White sought to prove in support of Margaret's claim that she was the surviving wife of deceased. There was and is no pretense that she again became his wife after the judgment of divorce given on February 24, 1892. Her claim is based entirely on the marriage of July 4, 1865, which she contends has never been dissolved. If the divorce judgment is to be given full effect as a valid judgment between the parties thereto, it is apparent that her contention must fail, for by its terms the marriage relation theretofore existing between her and deceased was thereby terminated. It was therefore essential for her, in order to prevail, to show that this judgment was for some reason void or inapplicable. Unless she could do this, the judgment must necessarily stand as an insuperable obstacle to the establishment by her of any claim that she continued to be the wife of deceased. Any attack in this proceeding upon the divorce judgment is, of course, essentially a collateral attack. It is thoroughly settled in this state that a judgment of one of our superior courts cannot be held void upon collateral attack unless it is void upon its face, i. e., unless its invalidity is apparent upon an inspection of the judgment roll. If it is valid on its face, extrinsic evidence is not admissible on a collateral attack for the purpose of impeaching it.

In the case at bar, it was claimed the divorce judgment was void upon its face, but it was not necessary for appellant to introduce any evidence in support of this claim, as it was stated he proposed to do. The judgment roll in that action had been introduced in evidence by respondent, and its correctness was not questioned. It was not proposed to show that the papers so introduced in evidence by respondent were not true and full copies of the original papers in the action attached together by the clerk of the superior court as the judgment roll therein. Whether or not the judgment was void on its face was to be determined solely upon an inspection of such of those papers as, under the law, constituted the judgment roll in the action. The contention that the judgment is void on its face is based on the claim that the complaint for divorce was fatally defective in two particulars. At the time the action was brought, section 128 of the Civil Code provided, as it does now, that "a divorce must not be granted unless the plaintiff has been a resident of the state for one year, and of the county in which the action is brought three months next preceding the commencement of the action," and the allegations of the complaint as to plaintiff's residence were that he is and has been a resident of the state for "more than one year preceding the commencement of the action," and of the city and county of San Francisco

"for more than three months preceding the commencement of the action," omitting the word "next." The cruelty alleged consisted of abusive and slanderous statements habitually made by the defendant of and concerning plaintiff to various persons, occasioning him grievous mental suffering, and the making of these statements was alleged solely on information and belief.

If we assume that there is force in either of these objections, it is apparent that they go solely to the question whether or not the complaint sufficiently stated facts warranting a divorce, and that the alleged defects in no degree affected the jurisdiction of the court to hear and determine the action, provided the court obtained jurisdiction of the person of the defendant. This is, of course, obvious as to any defect in the allegations of acts of cruelty, and, we think, equally clear as to any defects in allegations of residence. The superior court is by the Constitution given general jurisdiction of actions for divorce. Under this grant, when a complaint is filed asking for a divorce, the court at once acquires jurisdiction of the subject-matter of the action, regardless of whether or not the complaint states facts warranting the granting of a divorce, and when it has obtained jurisdiction of the person of the defendant it has the power to hear and determine the cause. In so hearing and determining, it is proceeding in the exercise of its lawful jurisdiction, which involves the power to determine the sufficiency of the facts alleged as a ground for divorce. If it errs in its conclusion in this matter, it is simply error in the exercise of its jurisdiction, which can be corrected only in the way provided by law for a review of the action of the trial court, and which cannot be reached on collateral attack or even reviewed in any other action. In *Estate of James*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60, which, like this, was a contest for letters of administration involving the question which of two women was the surviving wife of deceased, one relying on a decree of divorce purporting to dissolve a former marriage between the deceased and the other woman, this court said: "The attack here made upon the judgment in *James v. James* is collateral, and it is well settled that the judgment of a court having general jurisdiction of the subject-matter involved in the judgment cannot be successfully attacked in a collateral proceeding, because of an imperfect or defective complaint in the action in which it was rendered. If the facts stated in the complaint are not sufficient to entitle the plaintiff to the relief demanded therein and awarded by the judgment, the action of the court in deciding otherwise and rendering its judgment in accordance with the prayer of the complaint can be nothing more than error. [Citing cases.] The complaint in *James v. James* was sufficient to inform the court and the defendant therein of the relief which the

plaintiff demanded and of the facts upon which he based his right to the relief sought, and this was all that was necessary in the way of a statement of facts to give the court jurisdiction of the subject-matter of the action." See, also, *Le Mesnager v. Variel*, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91. Section 128 of the Civil Code, relative to residence of the plaintiff, does not impose any limitation on the jurisdiction of the superior court in the matter of divorces, but simply prescribes certain facts as essential to the making out of a case warranting a divorce, and allegations in regard to residence stand upon the same footing as any other allegation of facts showing the right to a divorce. If they are defective in any respect, and the court nevertheless holds them to be sufficient, we have nothing more than error in the exercise of jurisdiction.

It is earnestly claimed by learned counsel for appellant that, by reason of these alleged defects in the complaint, the superior court failed to acquire jurisdiction of the person of the defendant in the divorce case, and that the judgment is therefore void. The point in this connection is that to authorize a service by publication of summons, which was the only service attempted in that action, it must appear either by the affidavit made on the application for an order of publication, or by the verified complaint on file, "that a cause of action exists against the defendant in respect to whom the service is to be made" (section 412, Code Civ. Proc.), and that unless a cause of action is shown by such affidavit, or by the verified complaint on file, the order for publication and publication are void, and the court therefore without jurisdiction over the person of the party so attempted to be served. It is asserted that the affidavit for publication in the divorce action also wholly failed to show a cause of action. The authorities doubtless sustain the position taken by appellant in this regard, if the defect alleged is apparent on an inspection of the judgment roll; but the difficulty with his claim is that such defect is not shown by the judgment roll. At the time of the divorce action, neither the affidavit for publication of summons nor the order for publication constituted any part of the judgment roll under our law (section 670, Code Civ. Proc.), so far as material, then reading as follows: "Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment roll: First. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment." It was not until 1895 that the section was amended by making such affidavit and order part of the judgment roll. St. 1895, p. 46, c. 40; *People v. Davis*, 143 Cal. 673, 877, 77 Pac. 651; *People*

v. Temple, 103 Cal. 447, 453, 37 Pac. 414; Hahn v. Kelly, 34 Cal. 391, 404, 94 Am. Dec. 742. The cases just cited all require us to hold that the affidavit for publication and the order therefor, not being a part of the judgment roll under the law, cannot on collateral attack be examined for the purpose of ascertaining whether they were sufficient to authorize service by publication of summons, even though improperly inserted in the judgment roll or contained in the bill of exceptions. They must be conclusively presumed to have been all that the law required to authorize such service. In Hahn v. Kelly, supra, it was said that two prior cases, one of which was Forbes v. Hyde, 31 Cal. 342, relied on by appellant, was improperly decided so far as this point was concerned, on the assumption that the affidavit was a proper part of the judgment roll. The effect of what we have said is, as applied to this case, that, if the divorce complaint failed to state a cause of action, it must be conclusively presumed here that the affidavit for publication did state a cause of action, and that an order for publication was lawfully made thereon.

No other defect apparent on an inspection of the judgment roll is suggested. It must therefore be held that the divorce judgment is not void on its face. Other matters, as to which it was proposed by appellant to introduce evidence, were the following:

1. It was proposed by appellant to show that deceased had not been as a matter of fact a resident of the state of California for one year next preceding the commencement of the divorce action. Such evidence was not admissible to impeach the divorce judgment on this collateral attack. The question whether he had been such a resident, and, consequently, was entitled to a divorce if he showed good ground otherwise therefor, was one to be determined solely in the divorce action itself, and the ruling of the court thereon cannot even be reviewed in any other action (Le Mesnager v. Variel, supra), much less reviewed on such an attack as we have here. The divorce judgment is conclusive on this question.

2. It was proposed by appellant to show that the divorce judgment was obtained by fraud and conspiracy on the part of deceased, and Louise, whom he subsequently married. It is elementary that no such showing against a judgment is allowable on a collateral attack of this character, and that the only remedy of the aggrieved party in such a case is by motion in the original case within such time as may be allowed by law, or by an action in equity assailing the decree and seeking relief therefrom.

3. It was proposed to show that in the year 1888 deceased commenced an action in the state of Pennsylvania against Margaret to obtain an absolute divorce from her, and that in this action he was nonsuited. The proposed evidence would have been immate-

rial for at least two reasons. To avail a defendant of the benefit of estoppel by former judgment, it must be pleaded in the subsequent action, and in no case can the second judgment be collaterally impeached by a showing thereof. There was no estoppel by former judgment, for the matter alleged as constituting ground for divorce in the former action commenced in 1888 could not be the same as the matters alleged in the California action, which were as to alleged acts of cruelty committed in the years 1889, 1890, and 1891.

4. It was proposed to show substantially as follows: In March, 1890, Margaret commenced in the proper Pennsylvania court an action to obtain a decree of divorce from bed and board on the ground of adultery and desertion. Under the laws of Pennsylvania, such a decree would operate simply to separate the parties, without terminating the marriage. Deceased was personally served with process therein and contested the action. During its pendency he commenced the California action and obtained the judgment therein. Although he subsequently contested the Pennsylvania action by counsel, he never presented as a defense thereto the California judgment. In June, 1893, Margaret having withdrawn her charge of adultery, judgment was given by the Pennsylvania court granting Margaret a divorce from bed and board on the ground of desertion and awarding her alimony. This judgment was affirmed on appeal. We are unable to perceive any ground upon which this evidence would have been effectual to avoid the force of the California judgment. We have not been able to find any authority for the proposition that a judgment valid on its face may be collaterally impeached by proof that there was a former action pending at the time of the institution of the action in which it was rendered. That is ordinarily understood to be a matter which must be pleaded in abatement in the second action. The point made by learned counsel in regard to this matter is that the validity of the California judgment was presumptively involved in the Pennsylvania action, and that the Pennsylvania court must be held to have determined in an action where it had power to so determine as between the parties that the California judgment was void, and that the parties were still husband and wife. In his statement in the lower court he expressly declared that deceased did not in any way allege or make any claim under the California judgment in the Pennsylvania court. So far as the point made by counsel in this action is concerned, the decision in Estate of James, 99 Cal. 374, 379, 33 Pac. 1122, 37 Am. St. Rep. 60, is in point. James had procured a divorce from his first wife in the state of Missouri. He subsequently returned to New York, and his first wife there brought an action against him for a divorce from bed and board and for alimony. She obtained the

decree sought. This judgment was relied on by the first wife as establishing that James and she were husband and wife at the time the same was given, and as avoiding the force of the Missouri decree. This court said, through Mr. Justice De Haven: "The validity of the decree of divorce obtained by James in the state of Missouri was not directly put in issue in that action, and there is nothing in the record to indicate that it was even brought to the attention of the court of New York rendering this latter judgment. We do not think that the judgment just referred to, although it is necessarily based upon the fact that the parties thereto were then at its date husband and wife, is a bar to the right of the respondent to assert in this proceeding the binding force of the former decree rendered in the state of Missouri in the case of James v. James, and the lawfulness of her subsequent marriage to the deceased in this state. The decree of divorce obtained by the deceased in Missouri was valid, and established the status of the deceased as an unmarried man, leaving him free to again enter into the marriage relation with any other person consenting thereto. His failure to plead the judgment of divorce in bar of the subsequent action brought by the petitioner for the separation from bed and board, and the judgment of the court in New York decreeing such separation, did not have the effect to change the status of deceased from that which was given him by the decree of divorce rendered in the state of Missouri. After that decree, and until reversed or vacated by some appropriate proceeding, his status as a single man could not be changed without his consent." This fully answers the point made by appellant.

It is unnecessary to notice here other matters which it was proposed to prove. Although some of them were matters which, if proved, would entitle Margaret to relief against the divorce decree in an equitable action, they were clearly matters which could not be shown on this collateral attack on such decree.

It follows from what has been said that no prejudicial error was committed by the trial court, and that upon the admitted facts the trial court was bound to hold that Louise was the surviving wife of deceased, and that her nominee was entitled to letters of administration.

The orders appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.

155 Cal. 345

RECLAMATION DIST. NO. 535 v. CLARK.
(Sac. 1,646.)

(Supreme Court of California. March 18, 1909.
Rehearing Denied April 17, 1909.)

1. LEVEES (§ 18*)—"REPAIR."

Pol. Code, § 3459, provides that if further assessments are required to protect, maintain, or

"repair" the works of a reclamation district, the trustees must present to the supervisors a statement of the work done and to be done, and that the board must direct an assessment. *Held*, that proceedings to restore 1,500 feet of washed-out levee were properly had under the section, and that the landowners were not entitled to the advice of the supervisors before the work was done.

[Ed. Note.—For other cases, see Levees, Cent. Dig. §§ 8, 9; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6096-6101; vol. 8, p. 7785.]

2. LEVEES (§ 18*)—REPAIR—POWER OF SUPERVISORS.

The supervisors cannot modify the terms of the trustees' report or statement provided for by such section, and hence cannot be required to hear testimony under objections of landowners to the report.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 8; Dec. Dig. § 18.*]

3. LEVEES (§ 22*)—TRUSTEES—FRAUD.

That a trustee of a reclamation district would be more benefited by a repair ordered than other landowners does not show fraud vitiating an assessment for the cost, especially since he did not become a trustee until after the original contract was made; it not being illegal for a landowner to serve as trustee when reclamation works are being constructed.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 21; Dec. Dig. § 22.*]

4. LEVEES (§ 22*)—REPAIRS—ASSESSMENTS—VALIDITY—ACT OF TRUSTEES.

That a trustee of a reclamation district acted as an overseer under contractors who did repair work does not invalidate the assessment for the work, since the only claim in his behalf was allowed after the statement and report for fixing the amount of the assessment was filed; the trustees being empowered under Pol. Code, § 3454, to fix their own compensation.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 21; Dec. Dig. § 22.*]

5. APPEAL AND ERROR (§ 1061*)—HARMLESS ERROR—FAILURE TO RULE.

Any error in failing to rule on a motion for nonsuit was harmless where the motion was without merit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4210; Dec. Dig. § 1061.*]

6. LEVEES (§ 25*) — REPAIR — PROCEEDINGS—COLLATERAL ATTACK.

In an action by a reclamation district to enforce payment of an assessment for work done, defendant landowner could not attack the trustees' finding that the work was properly done, where warrants for the cost had been duly issued and had been approved by the supervisors.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 24; Dec. Dig. § 25.*]

Department 2. Appeal from Superior Court, Sacramento County; N. D. Arnot, Judge.

Action by Reclamation District No. 535, by George Swanston and others, trustees, against Anna E. Clark. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Chauncey H. Dunn and Wm. M. Sims, for appellant. Philip S. Driver and A. L. Shinn, for respondent.

MELVIN, J. This is an action by a reclamation district to enforce payment of an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

assessment levied against the lands of appellant. Judgment was for plaintiff. This appeal is from the judgment and from the order denying defendant's motion for a new trial. It appears that this reclamation district was organized in 1891. The original plan of reclamation, with several modifications, was carried out and the work was completed prior to 1904. In February of that year, about 1,500 feet of the levee was washed out, and the trustees of the district thereafter entered into certain contracts for the repair of this crevasse. The trustees caused warrants of the district to be issued in payment for the work done under these contracts. The warrants called for the payment of something more than \$94,000, and they were issued and delivered prior to June 10, 1904. On the last-mentioned date, the trustees filed with the board of supervisors of the county of Sacramento a petition setting forth the fact that original plans and estimates for the work of reclamation and its cost had been theretofore approved by the board of supervisors, that the original assessment and various subsequent assessments had been duly levied upon the lands of the district, and that the amounts collected had been spent in the work of reclamation, which had been completed in accordance with the original plans. The petition also described the break in the levee occurring in February, 1904, and alleged the necessity for immediate repair of the levee according to the original plans of the district. A statement that the work was almost completed also appeared in the petition, and the petition contained an averment that there were outstanding warrants for \$94,377.48 issued in payment for said work. In the petition was the further statement that the additional sum of \$34,500 would be necessary to complete the work of restoring the levee to its original condition, and that the incidental expenses would amount to \$6,122.52; the three sums mentioned making a total of \$135,000. Upon the day of the presentation of the petition to the board of supervisors, several of the owners of land in the district appeared by their attorneys and asked for a postponement in order that they might voice their objections to the assessment. The requested delay was refused, and the board of supervisors made an order approving the statement, report, and estimate of the trustees of the reclamation district, and appointing three commissioners of assessment. Upon the report of these commissioners, or their successors, was based the designation of the amounts due from the various property owners.

There are a number of assignments of error, but only a few of them received notice either in the briefs or at the oral argument. Of these, the first is the contention of appellant's counsel that the board of trustees acted beyond their authority in entering into contracts to close the crevasse in the levee, that

the warrants issued for payment of the indebtedness constitute no claim against the district, and that therefore the assessment levied to pay these illegal warrants is null and void. The theory of appellant's counsel is that the new work was not a mere repair, but was something arising under a new and unexpected contingency, necessitating an additional and supplemental plan for the reclamation of the lands of the district. This, they say, brings the matter under section 3455 of the Political Code, and requires the submission of the plan to the board of supervisors as a prerequisite to the prosecution of the work. Without considering whether or not section 3455 of the Political Code would thus limit the jurisdiction of the trustees of the district, we feel impelled to accept respondent's theory that section 3459 of the Political Code must prevail. That section is as follows: "If the original assessment is insufficient to provide for the complete reclamation of the lands of the district, or if further assessments are from time to time required to provide for the protection, maintenance, and repair of the reclamation works, the trustees must present to the board of supervisors of the county in which the district is situated, or if the district is situated in more than one county, then to the board of supervisors of the county in which the greater portion of the lands in said district is situated, a statement of the work done or to be done, and its estimated cost, and such board must make an order directing the commissioners who made the original assessment, or other commissioners, to be named in such order, to assess the amount of such estimated cost as a charge upon the lands within the district, which assessment must be made and collected in the same manner as the original assessment."

The application to the board of supervisors was in the form required by the above section, and the board of supervisors found that the additional and supplementary assessment was required for "the protection, maintenance and repair" of the reclamation works of the district. *Santa Cruz R. P. Co. v. Broderick*, 113 Cal. 633, 45 Pac. 863, is cited in opposition to the contention that the mending of the break in the levee was a work of "repair." The doctrine of that case does not seem to us to be applicable here. In that case the work did not even purport to be repairs upon the street, but a contract was made between the city and the plaintiff whereby the street was to be paved with bituminous rock for a number of blocks. There was no advertisement for bids, and none of the acts required to give the city jurisdiction of the subject-matter were performed. The mere fact that the break in the levee of this reclamation district was a large one did not remove the work of closing it from the category of "repairs." It has been held that the replacing of a worn-out super-

structure upon the unimpaired piers and abutments of a bridge should be construed as a "repair" under the terms of a statute requiring counties to keep certain bridges "in repair." *Howe v. Commissioners of Crawford County*, 47 Pa. 362. See, also, *Heath v. Manson*, 147 Cal. 700, 82 Pac. 331. The power to repair having been given to the trustees of the district, and the sort of repairs required upon reclamation works being frequently extensive and arising under circumstances of pressing emergency, it follows that the authority of the trustees must be quite broad. That independent action on the part of the trustees of the district is contemplated is shown by the phraseology of section 3459 of the Political Code, wherein the trustees are required to present to the board of supervisors a statement of the work "done or to be done." This provision negatives the theory that the landowners in the reclamation district are entitled to the advice of the members of the board of supervisors before any new work is done.

Appellant assigns as error the refusal of the board of supervisors upon application for the appointment of commissioners to hear complaints of owners of property within the district, and the exclusion of evidence of this fact at the trial is also made a subject of complaint. The record shows, however, that both Mr. Dunn and Mr. Shinn testified with reference to the session of the board of supervisors in which this matter came up. The latter testified that Mr. Dunn asked for a continuance of the matter so that he might produce witnesses and might contest the petition. He asserted that Mr. Dunn did not ask the board to have any witnesses sworn at that time and did not offer to introduce any testimony. Mr. Dunn's account of the matter agrees with that of Mr. Shinn, but contains the additional statements that he had learned but a few minutes before the time of its presentation that the report was to be offered that day, and that he told the supervisors of the desire of his clients to object to the amounts of the assessment, to the bills rendered, to the indebtedness stated, and to the alleged facts set up in the petition. He also stated that the member making the motion to adopt the report expressed the opinion that the board had nothing to do with the facts—that the report spoke for itself. We find no provision in the statute requiring the board to hear testimony in such matters, and we cannot, without placing something in the statute which is not there set down, hold that the board of supervisors has power to modify the terms of the report or statement mentioned in section 3459 of the Political Code. No machinery is provided by law for notice, hearing of testimony, or findings, such as is usually furnished in instances of the board's exercise of judicial functions or the employment of its discretion in matters involving questions of disputed fact. The statute gives the trustees power to order repairs, and, as

an incident of this power, they may enter into contracts for such work. Having the authority, they can extend the time of contractors, as they did here, and can enter into new agreements for labor and material. This may be a dangerous power to bestow upon them, but the Legislature has seen fit to give it to them. They have a wide discretion, and apparently the supervisors are not clothed with authority to review it.

It may be that Trustee Swanston had a special reason for desiring to close the break in the levee, and that he would be more benefited than other landowners by the completion of this protecting embankment. This in itself would not constitute fraud on the part of himself or his associates, especially in view of the circumstance that Swanston did not become a trustee until after the original contract for the repair of the levee had been made. There is nothing illegal in a landowner acting as trustee when reclamation works are in course of construction. *Reclamation Dist. No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887. See, also, *Capital Gas Co. v. Young*, 109 Cal. 140, 41 Pac. 869, 29 L. R. A. 463.

It appears that Trustee Cox acted as day overseer under Clark & Henery, the contractors having in charge the restoration of the levee, and that he received payment therefor in the sum of \$215.50. This does not invalidate the assessment, for the only claim in behalf of Cox was allowed after the statement and report for fixing the amount of the assessment was filed. The trustees have power to fix their own compensation. *Pol. Code, § 3454*.

The court reserved its ruling on defendant's motion for nonsuit, and no ruling was ever formally made upon this motion. Appellant assigns this as error, citing *Raymond v. Glover*, 122 Cal. 477, 55 Pac. 398. It appears, however, that both parties demanded a judgment on the merits by final submission of the cause. Even if we concede that there was error, it was harmless, because there was no merit in the motion. See *Vincent v. Pacific Grove*, 102 Cal. 405, 36 Pac. 773.

Although the court refused permission for the introduction of evidence by defendant out of turn, with reference to the proceedings before the board of supervisors, there was evidence upon this subject at a later stage of the trial.

The trial court did not err in refusing to permit collateral attack upon the findings of the trustees that the work was properly performed. Warrants had been duly issued, and these had been approved by the board of supervisors. *Pol. Code, § 3456*. They were therefore immune from the sort of collateral attack which was attempted. *County of Alameda v. Evers*, 136 Cal. 132, 68 Pac. 475; *County of Santa Cruz v. McPherson*, 133 Cal. 282, 65 Pac. 574; *McBride v. Newlin*, 129 Cal. 36, 61 Pac. 577.

No other alleged errors seem to us of suffi-

cient importance to warrant special mention. We have noticed all points to which our attention has been called in the briefs and have examined the transcript without finding any material departures from proper procedure which would constitute substantial error.

The judgment and order are sustained.

We concur: HENSHAW, J.; LORIGAN, J.

RECLAMATION DIST. No. 535 v. CASEY.

(Sac. 1,647.)

(Supreme Court of California. March 18, 1909.)

Department 2. Appeal from Superior Court, Sacramento County; N. D. Arnot, Judge.

Action by Reclamation District No. 535 against Hugh Casey. From the judgment and from an order, defendant appeals. Affirmed.

Chauncey H. Dunn and Wm. M. Sims, for appellant. Philip S. Driver and A. L. Shinn, for respondent.

MELVIN, J. This case was tried with the case of Reclamation District 535 v. Anna F. Clark (Sac. No. 1,646) 100 Pac. 1091, and it was stipulated that the decision of the Supreme Court in the former case might be followed in this.

Therefore, upon the authority of Reclamation District No. 535 v. Anna E. Clark, the judgment and order appealed from are sustained.

We concur: HENSHAW, J.; LORIGAN, J.

MEMORANDUM DECISIONS.

155 Cal. 322

Ex parte MURPHY. (Cr. 1,484.) (Supreme Court of California. March 11, 1909.) In Bank. Application for writ of habeas corpus by J. E. Murphy against W. H. Marshal, city marshal of South Pasadena. Writ discharged, and petitioner remanded to the custody of the marshal. See 97 Pac. 188. H. C. Mills and Edward W. Rice, for appellant. John E. Carson, City Atty., for respondent.

PER CURIAM. The facts in this case are fully stated in an opinion of the District Court of Appeal for the Second Appellate District, filed in denying petitioner's application for a writ of habeas corpus. See 97 Pac. 199. Our investigations have satisfied us that such opinion correctly states the law applicable on the various claims made by petitioner against the validity of the municipal ordinance for a violation of which he is being prosecuted, and it is unnecessary for us to add thereto in disposing of this proceeding. The writ of habeas corpus heretofore issued is discharged, and the petitioner remanded to the custody of the city marshal of South Pasadena.

PEOPLE v. 'NG GEE DUCK. (Cr. 158.) (Court of Appeal, First District, California. Feb. 4, 1909.) Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge. 'Ng Gee Duck appeals from a conviction. Affirmed. A. B. Foley, for appellant. Attorney General Webb, for the People.

KERRIGAN, J. Appellant was convicted of the crime of rape, and sentenced to serve a term of eight years in the state prison at San Quentin. This appeal is from the judgment. No brief has been filed either by the defendant or by the state. Nevertheless we have carefully examined the record, but we find no error. The judgment is accordingly affirmed.

We concur: COOPER, P. J.; HALL, J.

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155 Cal. 364

GREAT WESTERN GOLD CO. v. CHAMBERS. (Sac. 1,444.)

(Supreme Court of California. March 20, 1909.)

1. PLEADING (§ 34*)—CONSTRUCTION—INTRODUCTORY ALLEGATIONS.

In determining whether the facts alleged in the complaint, so far as they relate to a particular cause of action, are sufficient, all the introductory allegations will be considered as applying thereto, so far as they may be necessary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-68; Dec. Dig. § 34.*]

2. BROKERS (§ 34*)—DECEIT AND FRAUD IN PURCHASE OF MINE—LIABILITY TO PRINCIPAL.

Plaintiff employed defendant as its agent to buy a mine for not to exceed \$150,000. Defendant actually bought it for \$90,000, concealed the fact from plaintiff, fraudulently caused it to be conveyed to a confederate, and, by representing that he had bought it for \$150,000, induced plaintiff to execute a contract with the confederate, agreeing to buy the mine at that price, \$20,000 to be paid in cash, \$90,000 in one year,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and \$40,000 in 18 months. Plaintiff paid the cash payment, and, after obtaining a reduction of the remainder to \$110,000, paid that sum also; thus, by reason of defendant's fraud, paying \$40,000 more than the actual price for which defendant purchased for his account. *Held*, that these facts alleged and found sufficiently made out a case of damages for deceit and fraud, and entitled plaintiff to a judgment recovered for \$40,000.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 26; Dec. Dig. § 34.*]

3. BROKERS (§ 34*)—JOINT AND SEVERAL LIABILITY—DECEIT AND FRAUD IN BUYING A MINE FOR ANOTHER.

The fact that it did not appear that defendant himself obtained all of the \$40,000 of which plaintiff was defrauded was wholly immaterial to his liability for that amount.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 34.*]

4. BROKERS (§ 34*)—DECEIT AND FRAUD IN PURCHASE OF MINE—LIABILITY TO PRINCIPAL.

The voluntary payment of the balance of the price of a mine bought by his agent, after the purchaser entered into and partly executed the contract to buy the property, is no defense to the agent, sued for deceit and fraud in the transaction.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 34.*]

5. TRIAL (§ 397*)—FINDINGS BY COURT—NECESSITY OF EMBRACING ALL ALLEGATIONS OF COMPLAINT.

Failure to find on all the allegations of a complaint is immaterial, where the findings embrace all the facts necessary to constitute a particular cause of action alleged in the complaint.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 397.*]

In Bank. Appeal from Superior Court, Shasta County; Charles M. Head, Judge.

Action by the Great Western Gold Company against James J. Chambers. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles A. Garter and Milton S. Hamilton, for appellant. Bush & Perry, Sweeney & Sessions, and Rickel, Crocker & Tourtellot, for respondent.

SHAW, J. This is an appeal from a judgment in favor of plaintiff against the defendant for the recovery of the sum of \$40,000. There was also an appeal from an order denying defendant's motion for a new trial, which was disposed of by the affirmance of the order in an opinion of this court in bank, filed April 1, 1908 (153 Cal. 307, 95 Pac. 151). The present appeal from the judgment was then pending, and was, as counsel apparently then supposed, submitted with the appeal from the order. The printed transcript contained no copy of the notice of the appeal from the judgment, nor anything to show that such an appeal had been taken. This defect had been corrected by an order of the district court of appeal of the third district, made while the case was pending in that

court, but when the case was transferred to this court after the decision of the district court, neither that order, nor any copy of it, or of the notice, was forwarded with the record to this court. In disposing of the case upon the former submission, the printed record alone was before us, and, believing the appeal from the order denying the motion for a new trial to be the only appeal then pending, we refused to consider points which could arise only upon the appeal from the judgment. The latter appeal was consequently left undecided by the former opinion. At the solicitation of counsel the case was again placed on the calendar for argument upon the questions presented by the appeal from the judgment.

Treating the case as an action to recover specific sums of money belonging to the plaintiff, converted by defendant to his own use, or due from defendant to plaintiff in matters connected with the agency, or for damages caused by the fraudulent conduct and deceit of the defendant, and not for a general accounting of defendant's transactions as plaintiff's agent, it is apparent that the complaint states, or attempts to state, several causes of action, arising out of different transactions. The defendant claims that it must be so treated, and upon that theory he asserts that there is a misjoinder of causes of action and that, as to some of the separate causes stated, there is no sufficient statement of facts. It is not necessary to consider the question of misjoinder at all, or to consider the sufficiency of the statements of fact in the different causes of action, except the one declaring upon the cause of action arising upon the purchase by defendant, as agent for and on behalf of plaintiff, of the property known as the "Afterthought Mine." The facts alleged in the complaint, so far as they relate to this cause of action, are clearly sufficient. In that behalf it may be remarked that we will consider all the introductory allegations of the complaint as applying to this particular cause of action, so far as they may be necessary. The findings in respect to this cause of action are, in effect, that all the allegations of the complaint relating thereto are true. The facts alleged and found, briefly stated, were that the plaintiff employed defendant, as its agent, to buy said mine for plaintiff at a price not exceeding \$150,000; that defendant actually bought it for \$90,000, concealed that fact from the plaintiff, fraudulently caused it to be conveyed to a confederate, and, by representing that he had bought it at the price of \$150,000, induced plaintiff to execute a contract with the confederate agreeing to buy the mine at that price, \$20,000 to be paid in cash, \$90,000 in one year, and \$40,000 in 18 months; that plaintiff paid the cash payment of \$20,000, and, after obtaining a reduction of the

remainder to \$110,000, paid that sum also, thus, by reason of defendant's fraud, paying \$40,000 more than the actual price of \$90,000, for which defendant had purchased the mine for plaintiff's account, the price for which, if defendant had been honest, the plaintiff would have procured the property; and that plaintiff was thereby damaged in the sum of \$40,000. There are other details alleged and found which it is unnecessary to state.

These facts sufficiently make out a case of damages for deceit and fraud, and they entitle plaintiff to the judgment for \$40,000, which the court gave. There are other allegations and findings which perhaps may have entitled plaintiff to a heavier judgment, but it expressly waived any claim for any greater amount. All the allegations and findings as to the other demands may therefore be considered as surplusage, and the judgment is sufficiently supported by the averments and findings on this transaction alone. The fact that it does not appear that the defendant himself obtained all of the \$40,000 of which plaintiff was defrauded is wholly immaterial. The plaintiff, by defendant's fraudulent misconduct as its agent, was made to pay \$40,000 more than it would have paid for the property if the defendant had acted fairly. This was a damage occasioned by the defendant's fraud, and it is of no consequence, so far as plaintiff's right of action is concerned, whether the defendant, or his confederate, got the money. Nor did the voluntary payment of the balance of the price by the plaintiff, after it had entered into and partly executed the contract to buy the property, constitute a defense available to the defendant. These questions are fully considered and disposed of in the opinion rendered on the appeal from the order. It is proper to state that there is nothing in the findings to show that the reduction of the price named in the contract was made as a compromise or settlement of the cause of action for the fraud here complained of. The point that the court did not find upon all the allegations of the complaint is immaterial, in view of the findings embracing all the facts necessary to constitute the particular cause of action concerning the Afterthought mine. Whether the waiver by the plaintiff of the recovery of any sum exceeding \$40,000 is to be treated as a withdrawal or abandonment of the other claims set forth in the complaint or not, it is clear that it caused no injury to the defendant, inasmuch as the remaining cause of action is sufficient as a foundation for the judgment given by the court.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

155 Cal. 390

In re HITE'S ESTATE.

HITE v. MERCANTILE TRUST CO. et al.
(S. F. 5,131.)

(Supreme Court of California. March 25, 1909.
Rehearing Denied April 23, 1909.)

1. WILLS (§ 270*)—SUIT TO REVOKE PROBATE
—ISSUANCE OF CITATION—NECESSITY.

The failure to issue citation on a petition to revoke a will, as required by Code Civ. Proc. § 1328, as amended in 1907 (St. 1907, p. 314, c. 250), providing that a citation must be issued to the executor or the administrator with will annexed, within a year necessitates, in the absence of a general appearance by the executor or administrator, a dismissal of the petition and proceedings based thereon.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 270.*]

2. WILLS (§ 271*)—PROCEEDINGS TO REVOKE
WILL—SPECIAL APPEARANCE.

An administrator with will annexed, who appeared merely to move to dismiss the petition to revoke the probate of the will for failure to issue the required citation, did not appear generally, though he did not designate his appearance as special.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 626; Dec. Dig. § 271.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition by Lucy Hite to revoke the probate of the will of John R. Hite. From an order dismissing the petition made on motion of the Mercantile Trust Company, administrator with will annexed, the petitioner appeals. Affirmed.

Stanton L. Carter, for appellant. E. W. McGraw and Titus & Creed, for respondents.

HENSHAW, J. On the 2d day of January, 1907, the will of John R. Hite was admitted to probate. On December 31, 1907, appellant filed a petition to revoke the probate. No citation upon this petition was ever issued, and on April 16, 1908, the respondent, administrator with the will annexed, moved to dismiss the petition for failure to issue the required citation. The court accordingly made an order dismissing the petition and all proceedings based thereon. That the action of the court in this respect was correct is not even debatable. Section 1328, Code Civ. Proc., was amended in 1907 (St. 1907, p. 314, c. 250), and the amendment was in effect when the petition for revocation of the will was filed. It provides "upon filing the petition, and within one year after such probate, a citation must be issued to the executor of the will or to the administrator with the will annexed," etc. It was not necessary for the movant to serve all of the parties who might be affected by petitioner's contest. It is sufficient that the petitioner herself was served with notice. This practice has received uniform recognition. Stanley v. Gillen, 119 Cal. 176, 51 Pac. 183; White v. Superior Court, 126 Cal. 246,

58 Pac. 450; *Siskiyou County Bank v. Hoyt*, 132 Cal. 82, 64 Pac. 118; *Grant v. McArthur*, 137 Cal. 270, 70 Pac. 88; *Swortfiguer v. White*, 141 Cal. 576, 75 Pac. 172.

The administrator appeared for the sole purpose of dismissing the citation. It seems to be argued that because it did not designate such an appearance as "special appearance," or as "appearing especially for this purpose alone," it should be construed as a general appearance. Such, of course, is not the rule of construction. In *re Clarke*, 125 Cal. 388, 58 Pac. 22. While it became the duty of the clerk to issue a citation, and, in this sense, the duty was ministerial, it was not a duty which he was called upon to perform, excepting upon the application of a party interested. Code Civ. Proc. § 1708.

For these reasons the order appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

155 Cal. 368

MORE v. CHURCHILL et al. (L. A. 2,204.)
(Supreme Court of California. March 23, 1909.)

1. PARTIES (§ 1*)—PLAINTIFFS—REAL PARTY IN INTEREST.

Civ. Code, § 1559, permitting a third person to sue upon a contract made for his benefit, does not authorize a suit by a principal in an appeal bond to recover, on behalf of his surety, moneys alleged to have been improvidently paid by such surety in satisfaction of a void judgment.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. PARTIES (§ 1*)—CAPACITY AND INTEREST.

Code Civ. Proc. § 1050, and Civ. Code, § 2346, authorizing actions to determine adverse claims, and by a surety to compel his principal to perform the obligation for which the surety has bound himself, do not authorize an action by a principal in an appeal bond to recover on behalf of his surety moneys alleged to have been improvidently paid by the surety in satisfaction of a void judgment.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. PARTIES (§ 1*)—JURISDICTION—MULTIPLICITY OF SUITS.

Equity will not entertain a suit by a principal in an appeal bond to recover on behalf of his surety, who is not complaining, moneys alleged to have been improvidently paid by the surety in satisfaction of a void judgment, upon the ground that only by such suit can the principal prevent the expense of a suit by the surety against him on an indemnity bond given the surety, as plaintiff has, by his own averments, a defense thereto if it should be brought.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 1; Dec. Dig. § 1.*]

Department 2. Appeal from Superior Court, San Bernardino County; S. E. Crow, Judge.

Action by John F. More against Frank G. Churchill and others. Judgment for defendants and plaintiff appeals. Affirmed.

See, also, 4 Cal. App. 219, 88 Pac. 290, and 96 Pac. 108.

Wm. G. Griffith (R. B. Canfield, of counsel), for appellant. Richards & Carrier, James Gooden, and H. C. Booth, for respondents.

PER CURIAM. Plaintiff for cause of action set forth the following facts: The defendant Churchill had prosecuted an action against this plaintiff for the recovery of certain personal property or its value, and had recovered judgment that he have and recover from the defendant the possession of the personal property, or its value, \$1,636.80, with costs of suit. This plaintiff appealed from that judgment, the undertaking upon appeal being given by the defendant the United States Fidelity & Guaranty Company. The judgment of the lower court was affirmed upon appeal, whereupon this plaintiff made tender to defendant Churchill of the personal property, which tender was refused. Thereafter the defendant Churchill procured a judgment, upon his ex parte motion, to be given against the defendant the Fidelity & Guaranty Company, which judgment was voluntarily satisfied by that company. This plaintiff had given to the Fidelity & Guaranty Company an undertaking to indemnify it against loss. He went into the court, and moved and procured the vacation of the judgment against the Fidelity & Guaranty Company so obtained upon motion of defendant Churchill, and upon appeal the order so vacating the judgment was reversed by the Court of Appeal of the Second Appellate District. See *Churchill v. More* (Cal. App.) 96 Pac. 108. In its decision the appellate court held that judgment to be void, but held further that, as More was not a party to it, and that as his rights were in no way affected by it, he could not be heard to complain of it, and as an interloper had no standing upon his motion to vacate it. Following this decision, plaintiff brought this action, alleging all of these matters, and charging that the defendant the Santa Barbara County National Bank had received the money paid by the Fidelity & Guaranty Company in satisfaction of the judgment, with full knowledge of all of these facts. The firm of Richards & Carrier, attorneys at law, had been attorneys for Churchill in the litigation, and they were impleaded, as having actually received the money from the Fidelity & Guaranty Company and having paid it to the bank. For relief plaintiff asked that such of the defendants as might be found to have the actual custody of the money should be adjudged to hold the money in trust for the defendant the Fidelity & Guaranty Company, and be directed to pay it over to this company, or whomsoever the court might find was entitled thereto. A general demurrer to this complaint was sustained, and from the judgment which followed plaintiff appeals.

Upon the face of the pleading it is apparent, and indeed it is not questioned but that plaintiff's endeavor is to recover on behalf of the Fidelity & Guaranty Company, which is not complaining, moneys which he asserts the Fidelity & Guaranty Company recklessly and improvidently paid out under a void judgment. Such altruistic efforts, however commendable in themselves, are not sanctioned by the courts, and are permitted only in a limited class of cases. One of these is declared by section 1559 of the Civil Code, and is that where a third party is allowed to bring suit upon a contract made expressly for his benefit. Another is where a surety may bring suit to compel his principal to fulfill the obligation for which the surety has bound himself. Code Civ. Proc. § 1050; Civ. Code, § 2846. Within neither of these does plaintiff bring himself. He insists, however, that he is not a mere intruder, but has a legitimate standing which a court of equity should recognize. His argument in this respect is that by this action, and only by this action, can he prevent the harassment and expense of litigation at the instance of the Fidelity & Guaranty Company against himself upon the indemnity bond which he gave that corporation. But herein plaintiff mistakes the occasion upon which equity will entertain such a suit and afford such relief. It will at times, and under proper circumstances, entertain one suit to prevent multitudinous litigation. It will allow plaintiff to bring many adverse claimants into court in one litigation that the rights of all may be there determined, to prevent the harassment and expense of a separate action against him by each individual claimant. But such is not this action. If plaintiff could here prevail, he could equally prevail in the prospective action which he fears the Fidelity & Guaranty Company may bring against him. He has, by his own averments, a full and complete defense to such action if it should be brought, and he is, in effect, prosecuting an action, not to prevent a multiplicity of suits, but to prevent the possibility that he may be called upon to defend another action. In other words, he is suing to forestall and prevent a suit against himself which may never be brought, and against which, if brought, he pleads and shows that he has a full and complete legal defense. Or, from another point of view, he is asking that a judgment in favor of the defendant Churchill and against the Fidelity & Guaranty Company, which has become final, and which has been satisfied, shall be set aside, and the money paid by the judgment debtor to the judgment creditor be taken away from the one and restored to the other, at the request of neither. If that judgment, as he asserts, is in law void, he is not injured by it. If it be valid, then it was the duty of the Fidelity & Guaranty Company to pay it, and

plaintiff has suffered no legal injury by that act.

Wherefore the judgment appealed from is affirmed.

155 Cal. 407

TARPEY v. LYNCH. (S. F. 4,931.)

(Supreme Court of California. March 26, 1909.
Rehearing Denied April 23, 1909.)

WATERS AND WATER COURSES (§ 154*)—CONVEYANCES—EASEMENTS AND RIGHTS TO USE WATER.

Where one having an easement in the use of an irrigating ditch appurtenant to his 80-acre estate, over which sufficient water had been distributed by means of temporary channels, divided the estate, and conveyed a 10-acre tract not attingent to the ditch together with the appurtenant one-eighth interest in the water right, the easement became appurtenant to the tract conveyed, the grantee's right being one arising in grant and founded upon the conditions existing when he purchased; and, if, in the enjoyment of such easement, it became proper to carry a ditch to the 10 acres over any portion of the original estate, such estate became the servient tenement for this purpose; the single restriction upon the method of enjoyment being that the extension ditch should be constructed so as to create the least practical interference with the freehold of the servient tenement.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 154.*]

Department 2. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by M. F. Tarpey against T. H. Lynch. From a judgment for plaintiff, defendant appeals. Affirmed.

M. K. Harris, for appellant. Frank M. Short and F. E. Cook, for respondent.

HENSHAW, J. This is an action for an injunction to restrain defendant from interfering with plaintiff's use of a ditch extending over defendant's lands and used by plaintiff to convey water for the irrigation of his own lands. Plaintiff had judgment, and defendant appeals.

Plaintiff's land is the northwesterly 10 acres of section 28. By government subdivisions it is the northwest quarter of the northwest quarter of the northwest quarter of section 28. It is a segregated part of the westerly half of the northwest quarter of this section. This 80 acres, comprising the westerly half of the northwest quarter, was owned by H. S. Crocker. He purchased from the Fresno Canal & Irrigation Company water and a water right for use upon this land, and by the terms of the deed this water right became appurtenant to the land. Subsequently Crocker conveyed his 80 acres to Lynch, defendant herein, "together with the water right and water supply for said land," etc. While so owning this 80 acres, Lynch in April, 1903, conveyed to plaintiff the 10 acres above described, "together with the ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

purtenances, and particularly a one-eighth interest in the water right which is appurtenant to the west one-half of the northwest quarter of said section 28." Some years prior to the purchase by plaintiff there was in existence a ditch carrying water from the supply of the Fresno Canal & Irrigation Company coming from the east westwardly along the northerly line of section 28, and ending at the northeast corner of the Crocker-Lynch 80-acre tract. There was a continuation of this ditch for some distance southerly along the easterly line of the 80-acre tract, and water had been distributed over the 80-acre tract from this ditch through temporary channels made by plow furrows. The land sloped downward southerly and westerly. Subsequent to the purchase by plaintiff his 10 acres were leased to defendant, and the ditch along the northerly line of section 28 was still further extended along that line until it reached the 10 acres. The land and ditch were used by defendant under his lease for irrigating rooted vines, which were subsequently transplanted. Thereafter, when plaintiff attempted to use this ditch to irrigate his 10 acres, or to extend the ditch from the northeast corner of the Crocker tract over the lands of defendant so as to irrigate his lands, defendant interfered, denying his right to enter upon his land to construct such ditch. This action resulted.

Against the judgment appellant invokes the familiar rule expressed in section 1104 of the Civil Code to the following effect: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." Under the provisions of this section and of the numerous adjudications recognizing the same principle, he contends that respondent's rights to an easement are governed entirely by the physical conditions as they existed at the time when he acquired the 10 acres; that by the severance of this 10 acres the only easements or servitudes created by and passing by implication with the grant were those corresponding to the benefits or burdens existing at the time of the sale. *Quinlan v. Noble*, 75 Cal. 252, 17 Pac. 69. Applying this principle to existing conditions, respondent argues that as the ditch did not extend to the Tarpey 10 acres when that land was sold, but extended only to the northeast quarter of the 80 acres, there passed to the 10 acres no right to extend the ditch over the lands of the grantor in order that the grantee might avail himself of the water right which admittedly was conveyed as appurtenant to the land. Ap-

pellant's position in other language then is this: That notwithstanding a ditch had been brought to a corner of the 80 acres and water had been distributed over the 80 acres, including the 10 acres, through temporary channels sufficient for the purpose of distribution while the 80 acres was held under one ownership, yet, when 10 acres not attinent to the ditch had been sold with the water right, the grantee could not exercise his right by means of an extension of the ditch, although all of the land contiguous to the ditch or its existing extensions could use it. Such, however, is not the law. It is not in serious dispute that there was an easement in the use of the ditch appurtenant to the 80 acres, and that for the purposes of the 80 acres while held in single ownership no permanent extension of the ditch was required. But, when the land was segregated and a separate parcel sold, the easement became appurtenant to the segregated portion. If in the exercise of the enjoyment of this easement it became proper to carry a ditch to the 10 acres over any portion of the original estate, such estate became the servient tenement for this purpose. *Currier v. Howes*, 103 Cal. 431, 37 Pac. 521; *Washburn on Easements* (4th Ed.) 42. Nor is the grantee's right under such circumstances to be confounded with the grant of a right of way for ingress and egress created by necessity as an easement appurtenant to the granted lands over the original estate. This is not an easement of necessity having its origin in necessity and ending when the necessity ceases. It is a right arising in grant, and founded upon the condition of things existing when the grantee purchased. Until the 80-acre estate was divided, the ditch at its northeast corner which was extended some distance southerly along its easterly line was sufficient for the purpose of irrigating the whole tract. When a detached 10 acres was sold, there went with it the water right and by necessary implication the right to employ proper means to convey water in the enjoyment of that right. The single restriction upon the method of enjoyment is that the extension ditch should be constructed so as to create the least practical interference with the freehold of the servient tenement. That such were the means employed in this case admits of no doubt for the extension ditch was constructed along the north line of section 28 to a considerable extent in the county road, and was, in fact, constructed by defendant himself the owner of the servient tenement during the time when he leased and himself desired to put water upon this 10 acres.

Section 28 to the north and separated from section 21 only by a county road between the two sections, is owned by plaintiff, and is planted to vineyard. One of the ditches of the Fresno Canal & Irrigation Company extends east and west along the northerly line of section 21. It is argued

that, as plaintiff owned section 21, he could carry the water from the ditch of the Fresno Irrigation Company over his section 21, and so to his 10 acres in section 28. But the fact that plaintiff happened to own section 21 is an accidental circumstance having no bearing upon the controversy.

A ditch extends along the westerly line of sections 28 and 21 known as the "Egger's Ditch." It is argued that plaintiff should be compelled to take his water from this ditch. This argument is likewise for the reasons above given foreign to the consideration, but, in addition, it is in evidence and it is found by the court that it would be practically impossible to irrigate the land by this ditch which extends along the lowest side of the 10 acres.

For these reasons, the judgment appealed from is affirmed.

We concur: LORIGAN, J.; MELVIN, J.

155 Cal. 371

POTRERO NUEVO LAND CO. v. ALL PERSONS CLAIMING, ETC. (S. F. 5,130.)

(Supreme Court of California. March 24, 1909.)

1. APPEAL AND ERROR (§ 424*)—NOTICE—PARTIES TO BE SERVED.

Notice of appeal need be served only on the parties who appear by the record to be adverse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2152; Dec. Dig. § 424.*]

2. APPEAL AND ERROR (§ 799*)—NOTICE—ADVERSE PARTIES—BURDEN OF PROOF.

Parties moving to dismiss an appeal for want of service of notice of appeal on other parties have the burden of showing from the record that there were other adverse parties to be served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3158; Dec. Dig. § 799.*]

3. APPEAL AND ERROR (§ 424*)—NOTICE—PARTIES TO BE SERVED.

A judgment in a suit under the McEnerney act (St. Ex. Sess. 1906, p. 78, c. 59) against "All persons claiming," etc., to quiet title, has to be several and independent, so that notice of appeal by plaintiff from a judgment dismissing the complaint as to two persons who appeared and pleaded title to certain of the lands described in the complaint need not be served on defaulting defendant or on the whole world.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2152; Dec. Dig. § 424.*]

4. QUIETING TITLE (§ 53*)—APPEAL—NOTICE—SERVICE ON ADVERSE PARTIES.

The rules of practice relating to appeals in a suit under the McEnerney act (St. Ex. Sess. 1906, p. 81, c. 59), to quiet title, being under section 12 those applicable to other civil actions, the appeal may be in the alternative method provided by St. 1907, p. 753, c. 410, adding new sections to the Civil Code, and requiring no service on adverse parties.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 104; Dec. Dig. § 53.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Potrero Nuevo Land Company against All Persons Claiming, etc. From an adverse judgment, plaintiff appealed. Motion to dismiss denied.

A. Everett Ball, for appellant. Page, McCutchen & Knight, C. Irving Wright, Thomas, Gerstle, Frick & Beedy, Stoney, Rouleau & Stoney, and F. J. Castelhun, for respondents.

HENSHAW, J. Plaintiff brought its action under the provisions of the McEnerney act (St. Ex. Sess. 1906, p. 78, c. 59) to establish and quiet its title to certain lands within the city and county of San Francisco. Theresa Cuneo and Auguste Deprette appeared, pleaded title each, respectively, to one 50-vara lot embraced within the lands described in the complaint, and asked for a judgment of dismissal of the complaint as to themselves and the lands in question. The court, for reasons not necessary here to consider, gave judgment "that said complaint be and the same is hereby dismissed as to defendants Theresa Cuneo and Auguste Deprette." From this judgment plaintiff appeals within due time, filing its notice of appeal upon the 3d day of December, 1908. This motion is made to dismiss the appeal upon the ground that the notice of appeal was served only upon Theresa Cuneo and Auguste Deprette. It is argued that, while in terms the complaint is dismissed only as to the named defendants, this judgment of dismissal operates in favor of all persons in the world who claim or may claim any interest in the real property as to which the complaint was dismissed; that, therefore, to successfully appeal under such circumstances, the appellant must serve notice of appeal upon the whole world. The answer to this argument is twofold: First. That it was necessary to serve only the parties who appear from the record in the proceedings in which the appeal was taken to be adverse. In re Ryer, 110 Cal. 556, 42 Pac. 1082. The burden is upon the party moving to dismiss the appeal to show from the record that a party not served was adverse, and, where the record does not show affirmatively that a party not served was an adverse party to the motion in the court below, the appeal will not be dismissed. Niles v. Gonzales, 152 Cal. 90, 92 Pac. 74. Defaulting defendants are not adverse parties to other defendants when there is no joint relation alleged between them, and a judgment against each is several and independent. Kenney v. Parks, 120 Cal. 24, 52 Pac. 40. That the judgment under the McEnerney act must be several and independent is beyond any question. Second. The rules of practice relating to appeals under the McEnerney act are those applicable to other civil actions. McEnerney Act, § 12. The alternative method of taking appeals

provided in the act to add new sections to the Civil Code (St. 1907, p. 753, c. 410) was in force before this appeal was taken. It requires no service upon adverse parties. *McPhee's Estate* (Cal.) 97 Pac. 878. The appeal in this case was taken in conformity with this alternative method.

For these reasons, the motion to dismiss is denied.

We concur: LORIGAN, J.; MELVIN, J.

(155 Cal. 352)

BANK OF WILLOWS v. GLENN COUNTY.
(Sac. 1,655.)

(Supreme Court of California. March 18, 1909.)

TAXATION (§ 356*)—ASSESSMENT—MODE—DEDUCTION OF INDEBTEDNESS FROM CREDITS—"OBLIGATION BY WHICH DEBT IS SECURED"—"MORTGAGE OR TRUST DEED"—"CREDITS"—"DEBT."

Const. art. 13, § 1, permits the Legislature to provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of the state. Pol. Code, § 3617, subd. 3, provides that a mortgage, deed of trust, contract, or other obligation by which a debt is secured, when land is pledged for the payment and discharge thereof, shall, for the purposes of assessment and taxation, be deemed an interest in the land so pledged, and by subdivision 6 the term "credits" means those solvent debts not secured by mortgage, or trust deed, owing to the person assessed, and the term "debt" means those unsecured liabilities owing by the person assessed to bona fide residents, and section 3628, provides that in assessing solvent credits, not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due bona fide residents, and section 3650, subd. 15, provides that in entering assessments containing solvent credits, subject to deduction as provided by section 3628, the assessor must enter in the proper column the value of debts and deduct them therefrom. Const. art. 13, § 4, provides that a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purpose of assessment and taxation, be deemed an interest in the property thereby affected. Pol. Code, § 3627, contains the same provision. *Held*, that in view of the history of the constitutional provisions as shown by the debates, and of the legislative construction thereof, a collateral security of credits by a loan on personalty was not a mortgage, etc., or "other obligation by which a debt is secured," within Const. art. 13, § 4, that section applying only to liens on land; nor was it a "mortgage or trust deed," within section 1, so that the person assessed on such credits was entitled to have his debts deducted therefrom; and Pol. Code, § 3629, subd. 6, directing the assessor to require each person assessed to show separately all solvent credits unsecured by trust deed, mortgage, or other lien on real or personal property owing to such person, etc., is not applicable, not referring to the assessor's duty in making the assessment, but only prescribing the form of the taxpayer's return for the assessor's information.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 596; Dec. Dig. § 356.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1728-1733, 1865-1886.]

Department 2. Appeal from Superior Court, Glenn County; William M. Finch, Judge.

Action by the Bank of Willows against the County of Glenn. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Frank Freeman, Charles L. Donohoe, and Claude F. Purkitt, Dist. Atty., for appellant. Elliott McAllister, for respondent.

HENSHAW, J. This is an action to recover the amount of \$2,442.16 taxes paid under protest, and alleged to have been illegally collected by the tax collector of the county of Glenn for state and county taxes. Certain solvent credits of the plaintiff were secured by liens on personal property. The assessor refused to make a reduction from such solvent credits of the amount of debts due from the bank to bona fide residents of the state. The question presented, then, is whether the holder of solvent credits secured by collateral security on personal property is entitled to have his assessment upon such credits reduced by the amount of his indebtedness to bona fide residents of the state.

Section 1, art. 13, of the Constitution declares as follows: "The Legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state." For the information and guidance of assessors and taxpayers, the Legislature proceeded to define words and phrases as used in its fiscal laws. It declared (Pol. Code, § 3617, subd. 3): "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, when land is pledged for the payment and discharge thereof, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the land so pledged." It declared further (section 3617, subd. 6): "The term 'credits' means those solvent debts, not secured by mortgage or trust deed, owing to the person, firm, corporation, or association assessed. The term 'debt' means those unsecured liabilities owing by the person, firm, corporation, or association assessed to bona fide residents of this state, or firms, associations or corporations doing business therein." Then in consonance with article 13, § 1, it declared: "In assessing solvent credits, not secured by mortgage or trust deed, a reduction therefrom shall be made of debts due to bona fide residents of this state." Pol. Code, § 3628. And it further declared, in specifying the duty of the assessor that, "in entering assessments containing solvent credits subject to deductions, as provided in section three thousand six hundred and twenty-eight of this Code, he must enter in the proper column the value of the debts entitled to exemption and deduct the same." Pol. Code, § 3650, subd. 15. As to mortgages, the Constitution in

article 13, § 4, declared that: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property thereby affected." Having given legislative construction to this language as above quoted from Pol. Code, § 3617, subd. 3, the Legislature then declared in conformity with the Constitution that: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby." Pol. Code, § 3627.

Having thus before us the scheme of assessment provided by the Legislature under the Constitution, we may come to the consideration of the propositions advanced by appellant in support of the assessment here made, by which assessment, it will be remembered, plaintiff was refused a deduction from its credits secured by liens on personal property of its unsecured debts due bona fide residents of the state. Appellant's contentions in this regard are, as we understand them, twofold: First. That under article 13, § 4, collateral security, though but a lien on personal property, is to be considered a mortgage or a deed of trust or a contract or some other "obligation by which a debt is secured," and therefore should be assessed as an interest in the property affected thereby precisely as is assessed a mortgage, deed of trust, contract, or other like obligation affecting realty. Second. These contracts of security on personal property are to be construed as within the exception of article 13, § 1—that is to say, they are to be held to be "mortgages," or "trust deeds," within the meaning of those words as used in article 13, § 1—and therefore the solvent credits which they secure may not be reduced by debts due to bona fide residents of the state.

As to the first proposition, the argument is that the language employed in the Constitution in section 4 of article 13 is broad enough to include, and therefore should be construed to include, every possible form of contract touching personal as well as real property by which a debt is secured. It is recognized by appellant that the decision of this court in *Bank of Woodland v. Pierce*, 144 Cal. 434, 77 Pac. 1012, is at variance with its contention, and that the decision in that case holds, for the reasons there given, that the Constitution, in the sentence quoted, was dealing exclusively with contracts affecting realty; but this difficulty appellant urges can and should be met by a reversal of the *Bank of Woodland* Case, which reversal should be ordered, it is said, because of the extremely faulty and unsatisfactory reasoning of the case, and because it is not true, as the opinion states, that the constitutional debates show that the constitution-

al convention was in this provision dealing with and treating exclusively of land and also because this court was in error in stating that the legislative enactments touching this section 4 established that that coordinate and independent branch of government had interpreted this section as having reference exclusively to liens on land. In support of this contention, appellant's counsel show that the definition of a "mortgage" is broad enough to include a mortgage on personalty, as well as realty. The Code definition is cited. It is then said that, when the Constitution speaks of contracts or other obligations, these words are broad enough to include any contract by which personal property is pledged or a lien thereon given; but, unfortunately, we are not aided by any exposition of the matter further than this. While it is said that the constitutional debates do not bear out the statement of the court, and while it is said that the legislative enactments do not show that that body construed this clause of the Constitution as referring exclusively to land, we are not enlightened by anything further than these mere statements of counsel, and, according to these statements all the weight to which they are entitled, they cannot prevail against the plain evidence of the facts.

Thus as to the meaning which the framers of the Constitution placed upon the first sentence of section 4, art. 13, of the Constitution, a re-reading of their debates confirms the declarations in the *Bank of Woodland* Case to the effect that the constitutional convention was dealing exclusively with liens on realty. Moreover, as originally proposed, the first sentence omitted the words "contract or other obligation," and these words were inserted by an amendment proposed by Mr. Johnson. The meaning and purpose of the amendment we have in the proponent's own language. He says (Const. Debates, p. 907): "The theory is this: We all know that a mortgage is not an interest in the land under the present law, though in some states it is; but under our law it is not an interest in the land. It is merely a security, that is all. It is simply a security to the extent of the debt. Now, the committee say, for the purpose of adjusting this matter, a mortgage shall be treated as an interest in the real estate, which alters our rule. For the purposes of taxation, the mortgage shall be treated as real estate. Then there are two interests in the real estate. One interest is the mortgage, which is held by the mortgagee, and the other is the interest of the holder and owner of the property. There are two interests. Now it is proposed to apportion those two interests so that the tax on each interest shall be according to the value of the interest. The land being the visible, tangible object, according to the theories of taxation, simply bring about this adjustment so that each interest shall pay in proportion to its value. So there is no occasion to rebate. That is

the reason that in the amendment I proposed there is an exception, as far as legislative control is concerned, in regard to rebates on mortgage debts. There is the mortgage, and there is the land, and there is nothing to deduct, because the two interests constitute the entire property. That is the reason the exception was made, that the Legislature shall not have power to deduct debts from credits of that character. The only difference between section 5 and the amendment is this: That the words 'contract or other obligation' are used. In convention I shall move to insert these words, if this passes, as I hope it will. In other words, besides the debt being secured by mortgage or deed of trust, I will move to insert the words, 'or other obligation.' That will bring the two sections into entire conformity, except there is an exception to railroad and other corporations." The discussion and debate is continued, and Mr. Beerstecher (page 908), referring to section 5, itself referred to in the remarks of Mr. Johnson, says: "Section 2 expressly says that the Legislature can by law provide for deductions of debts from credits. The purpose of section 5 is to oblige the man holding liens upon real estate to pay taxes on the amount they hold, and to have the owner of the land pay taxes only on the amount of his interest in the real estate." On page 909, Mr. Smith declares: "As the gentleman who has just taken his seat said, the intention is to get at and tax money represented by mortgages, trust deeds, and other contracts. That is the intention of the section, but I do not think that result will be arrived at. It is simply a roundabout way of taxing land. It distributes the payment between the owner of the land and the owner of the mortgage on the land." And so throughout the debates it will be found that such was the view of the constitutional convention without a dissenting voice, and, as has been pointed out in the remarks of Mr. Johnson, the sole object of adding the words "contract or other obligation" was to make the language conform in meaning with the proposed section 5, or, in other words, as was said in the Bank of Woodland Case, "to cover any and all possible contracts of lien upon realty which the ingenuity of lawyers might attempt to devise to evade the constitutional requirement."

People ex rel. Burke v. Badlam, 57 Cal. 594, was one of the earliest cases in which this court was called upon to construe the new fiscal laws, and it was there said: "A mortgage or trust deed securing a debt is, under the Constitution, to be deemed and treated as an interest in the property affected thereby, and assessable to the owner. The property itself is also to be assessed to its owner; but, to prevent what would otherwise be double taxation, the Constitution requires that, in making the assessment, the value of the security shall be deducted from the value of the incumbered property. Sec-

tion 4, art. 13. So, in the case of credits not secured by mortgage or trust deed, the Legislature may provide that there shall be deducted therefrom debts due to bona fide residents of the state." And that the legislative construction is in consonance with this view would seem to the open mind to be well established by the declaration of its Code enactment to the following effect: "A mortgage, deed of trust, contract or other obligation by which a debt is secured when land is pledged for the payment and discharge thereof, shall, for the purpose of assessment and taxation, be deemed and treated as an interest in the land so pledged." Pol. Code, § 3617, subd. 3.

2. No reason appears therefore for construing section 4 of article 13 otherwise than as the constitutional convention construed it, as the Legislature in turn construed it, and as it has been construed by this court. But appellant next contends that if the views of the court in the Bank of Woodland Case should be adhered to, so that collateral security should not be treated as an interest in the property and assessed like a mortgage upon realty, nevertheless this court may still, and should, construe the words "mortgage or trust deed," in the last sentence of section 1 of article 13, as including chattel mortgages and all other contracts by which a lien on personal property is made security for a debt. In other words, this sentence should limit the right to a deduction from credits of debts due to bona fide residents of this state to those cases only in which the credit is not secured by pledge or lien on real or personal property. But, in addition to all of the reasons heretofore given which forbid such a construction, it may be conclusively shown that it would do absolute violence to the expressed constitutional intent, for it will be noted that in effect the construction contended for is equivalent to a declaration that deductions may be made from credits, provided those credits are not secured by liens on real or personal property. Yet this very proposition was discussed, debated, and voted down in the constitutional convention. As originally proposed, and as finally adopted, the provision read: "The Legislature may provide, except in case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this state." Mr. Johnson offered an amendment to this, which read: "Debts due bona fide residents of this state shall be deductible from credits not secured by real or personal property." Const. Debates, p. 1309. This amendment was voted down, and the language as originally proposed adopted. Const. Debates, p. 1312. It thus appears that the framers of the Constitution, with the question before them, deliberately decided to allow deductions from debts secured by liens on personal property by prohibiting deductions only in the case of debts secured by

liens on real property, which liens were to be treated as an interest in the property affected, and as to which liens an entirely different scheme of taxation was declared. It follows therefore that the construction of the language of section 1, art. 13, for which appellant contends is not permissible. We are in this not unmindful of the language of subdivision 6, § 3629, of the Political Code; but this section has no reference to the duty of the assessor in making the assessment. It speaks only of the nature of the return which the taxpayer shall make. It prescribes its form. It serves to enlighten the assessor as to the condition of the taxpayer's property and enables him the better to comply with the constitutional and legislative mandates governing him in the preparation of his assessment.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: MELVIN, J; LORIGAN, J.

10 Cal. App. 17

BRICKELL v. ATLAS ASSUR. CO., Limited.
(Civ. 556.)

(Court of Appeal, Third District, California.
Feb. 4, 1909. Rehearing Denied by
Supreme Court April 5, 1909.)

1. VENDOR AND PURCHASER (§ 3*)—SALE DISTINGUISHED FROM OPTION—"OPTION"—"A CONTRACT TO PURCHASE OR SELL."

The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5000-5002; vol. 8, p. 7739.]

2. VENDOR AND PURCHASER (§ 3*)—OPTION OF CONTRACT OF SALE OR PURCHASE—TEST TO DETERMINE.

The test in determining whether a contract is a contract of sale or purchase or a mere option is: Could the agreement be specifically enforced?

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

3. INSURANCE (§ 328*) — FIRE INSURANCE — CHANGE OF TITLE AVOIDING CONTRACT.

A fire insurance policy provided that it was to be void unless otherwise agreed on if the interest of the insured should be other than unconditional and sole ownership, or if any change took place in the interest, title, or possession (except change of occupants without increase of hazard). Less than a month after its issuance, without the insurer's assent or knowledge, the insured made a contract with a third person to convey the premises to him, and the other agreed to buy the same, the contract acknowledging receipt of \$3000 of the price, and calling for partial payments of at least \$250 monthly, the whole price to be paid by a fixed date. The contract also required the purchaser to pay all taxes against the premises and keep the improvements insured against fire for the

benefit of the vendor, and provided for re-entry by the vendor on the purchaser's default, with an option to retain payments made as for use and occupation, or to sue for the balance of the price, or to foreclose the purchaser's interest. Under this agreement, the purchaser took and retained possession till the building was destroyed by fire. Held, that this contract was not an option, but a contract of sale and purchase, giving the purchaser an equitable title, whereby the insured lost insurable interest in the property, of which he no longer retained the unconditional and sole ownership, and avoided the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 799; Dec. Dig. § 328.*]

4. INSURANCE (§ 305*) — COMPLIANCE WITH CONTRACT BY INSURED—NECESSITY.

An insurance company is entitled to a substantial compliance by insured with the terms of the contract.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 305.*]

5. INSURANCE (§ 146*) — CONSTRUCTION OF CONTRACT—RULE AS TO LIBERALITY TOWARD INSURED.

In construing insurance policies, great favor is shown to the insured, the contract being construed strictly against the insurer and liberally toward the insured, but the rule does not go so far as to ignore or nullify the express and unequivocal agreement of the insured, nor can it be invoked to change the nature of the contract, but only to resolve an uncertainty or ambiguity in favor of the party likely to be misinformed or imposed on.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295; Dec. Dig. § 146.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by John C. Brickell against the Atlas Assurance Company, Limited. From a judgment for defendant, plaintiff appeals. Affirmed.

J. C. Bates and Myer Jacobs, for appellant.
W. C. Sharpstein, for respondent.

HART, J. The object of this action is to recover the sum of \$5,000 on a policy of insurance for the loss by fire of a two-story frame building, situated in the city of San Francisco, said building, it is alleged, being the property of plaintiff. The court sustained the defendant's demurrer to the amended complaint, and, the plaintiff declining to further amend the same, judgment was entered dismissing the action. From said judgment this appeal is taken.

According to the averments of the complaint, the respondent on the 20th day of September, 1905, issued to the appellant a policy of fire insurance for \$5,000, covering the two-story frame building mentioned for a term of three years from September 19, 1905. It further appears from the complaint that on the 28th day of September, 1905, the appellant entered into a contract in writing with one L. A. Phillips, by the terms of which the former agreed to sell and convey to the latter and Phillips agreed to buy the premises upon which the policy of insurance

herein involved was issued for the sum of \$10,000, of which payments were conditioned in said agreement to be made as follows: \$3,000 upon the "execution and delivery of this agreement, the receipt whereof is hereby acknowledged, and at least \$250.00 on the first day of November, 1905, and \$250.00 on the first day of each month thereafter," with interest on the unpaid portion of the principal at the rate of 6 per cent. per annum, to be likewise paid on the 1st day of each month. It was further agreed by the party of the second part (Phillips) that he would pay the whole of said purchase price and interest on or before the 1st day of November, 1906. The party of the second part further agreed to pay all the taxes assessed against the premises and to keep the improvements insured on the premises against loss by fire in the sum of \$5,000, the loss, if any, to be paid to the first party. The agreement provides that, in the event the second party defaults in any of the conditions or covenants contained therein, the appellant has the option to re-enter and take possession of the premises and terminate the agreement, upon the happening of which contingency he was to retain the part of the purchase price already paid as compensation for occupation and use of the premises, or he was at liberty to bring an action to enforce payment of the remainder of the purchase price, or to foreclose the interest of Phillips. Under this agreement Phillips entered into possession of the premises about October 1, 1905, and retained such possession until the memorable 19th day of April, 1906, when the building was destroyed by fire. The policy or contract of insurance declared upon is set forth in the complaint in *hæc verba*. The following conditions are contained in said policy: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto shall be void * * * if the interest of the assured be other than unconditional and sole ownership * * *; or if any change other than by the death of the insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured or otherwise." It will be observed that the appellant entered into the agreement to sell the premises to Phillips, and gave the latter full and exclusive possession of the same under said agreement within less than a month after the policy of insurance was issued to him by the respondent. There is nothing in the averments of the complaint showing that the defendant assented to the agreement of sale or to Phillips' possession and occupancy of the premises, or had any knowledge of the transaction.

The claim of the defendant is that as the policy of insurance contains provisions that if any change should take place in the interest in the subject of insurance by the volun-

tary act of the insured, or any change effected in the title to the subject of insurance by the voluntary act of the insured, or if any change should occur in the possession of the subject of the insurance, then, in either event, the policy becomes void, and that such changes having taken place, the plaintiff cannot recover. Per contra, the plaintiff contends and undertakes to show that there has been neither change of interest, nor of title or possession. In support of this position, counsel for appellant argue: (1) That the agreement between the plaintiff and Phillips amounts to nothing more than an option by which the latter is given the right to buy the premises within a certain specified time, and that, therefore, the plaintiff was not thereby divested of the legal or any title; that, in any event, Phillips acquired only an equitable interest; and that, in order to render the contract of insurance void by reason of change of title, the insured must part with more than a mere equitable estate in the subject of the insurance. (2) That, assuming this to be the correct view, the possession of the premises by Phillips was the plaintiff's possession. (3) That the plaintiff, notwithstanding the agreement with Phillips, still retained an insurable interest in the property, and that, before the policy can be avoided for this reason, the whole interest of the insured must have passed. The last-mentioned proposition is practically involved in the two previously stated. The demurrer was properly sustained. We have no doubt that the agreement entered into by the plaintiff and Phillips constituted a contract of sale and purchase, and not an option. "The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase." 29 Am. & Eng. Ency. of Law (2d Ed.) 606; *Menzel v. Primm*, 6 Cal. App. 204, 91 Pac. 756. In other words, an option is a right "acquired by contract to accept or reject a present offer within a limited or reasonable time in the future." 21 Am. & Eng. Ency. of Law, 924.

There is no ambiguity or obscurity in the language of the agreement between the plaintiff and Phillips, and its meaning cannot be misunderstood. By its terms the plaintiff agreed to sell and Phillips agreed to buy the premises for the sum of \$10,000, of which the latter, upon taking possession, paid the sum of \$3,000. It is stipulated therein that the balance shall be paid in monthly installments by the 1st of November of the year following that of its execution, and, in case of default in the payments so stipulated or for the violation of certain other of its vital covenants, the plaintiff could re-enter and resume possession, or enforce payment of the balance due, etc. The test, in determining

whether it was a contract of sale and purchase or a mere option, is: Could the agreement be specifically enforced? It is, of course, unnecessary to suggest that no one will for a moment question the proposition that had Phillips completed the payment of the balance due under the agreement he could have enforced the execution of a deed to the premises, and *e converso*, if the plaintiff had so elected, he could have enforced a performance of the agreement by Phillips. The fact that the agreement contains a provision authorizing the plaintiff upon default by Phillips to comply with the conditions of the sale and purchase to re-enter and take possession and treat as compensation for occupation and use of the premises all payments already made does not make the agreement any the less a contract of sale and purchase. If it were only an option, no obligation rested on Phillips to make any payment, except such as might be agreed upon between the parties as a consideration to support such option, until he had made up his mind, within the time specified, to exercise his right of option. And, it may be added, that if in the first instance, or originally, the parties intended that the agreement should operate as an option only, the moment Phillips made the payment of \$3,000 on the principal sum agreed as the consideration for the sale of the property and took possession the agreement ceased to be an option, for the payment of said sum and the act of taking possession could not reasonably be construed as anything other than the actual exercise of the right to purchase, unless it could be said that the \$3,000 payment was intended only as a consideration for the support of the option or the right to purchase, a proposition which would manifestly be absurd, for it is not reasonable to assume that one would pay the sum of \$3,000 as a consideration for the right to buy property valued at \$10,000, or at least offered for sale at that sum.

It is clear that by virtue of the terms of said agreement and its execution to the extent of transferring possession to Phillips, upon his payment of the \$3,000 stipulated therein, a change of possession was effected, and that Phillips became at least the equitable or beneficial owner of the premises. The plaintiff could have enforced the performance of the agreement or recovered for the breach of its terms, notwithstanding the destruction of the building. The covenant by which the vendee obligated himself to maintain insurance upon the property, the same to be paid, in case of loss, to the vendor, was a part of the consideration of the agreement of sale, the effect of which was merely to provide the latter with additional security for the unpaid balance of the purchase price. The vendor, therefore, by the transaction lost all "insurable interest" in the property, by which it is to be understood that he had parted with all such dominion

over and ownership of the premises as to render the contract of insurance between himself and the defendant of no further personal interest to him than that of a mere creditor, or as if he were no more than a mortgagee of the premises, and the insurance on the same, maintained, by the terms of the agreement, at the expense of the mortgagor, were made payable to him as an additional security for the mortgage debt. In short, it may be said that the plaintiff in the contract of sale, in addition to the rights given him by the law either to enforce the specific performance of the terms of the agreement or to sue for damages for the violation of its covenants, expressly reserved to himself the further right, if he desired to exercise it in preference to resorting to the equitable or legal remedy mentioned, to re-enter and resume possession, treating payments already made as compensation for the use of the premises, and also the right to collect and receive for himself the insurance, or so much thereof as would liquidate the balance of the indebtedness, in the event of loss by fire before the full payment of the purchase price had been completed.

It necessarily follows from the construction we have given the effect of the agreement between the plaintiff and Phillips that there can be no merit in the argument upon the question of the change of title that, in order to divest the vendor of all insurable interest in the property insured, both the legal and the equitable title to the premises must have joined or been vested in the vendee. Neither the vendor nor vendee had an absolute title; but the equitable title as such of the vendee was as absolute as the legal title as such of the vendor, both being defeasible—the one by the forfeiture prescribed in the agreement for the nonperformance of the conditions therein specified, the other by the full performance of said conditions. In other words, plaintiff's interest in the insured property was not, to use the language of the policy itself, that "of unconditional and sole ownership."

Obviously the policy of insurance upon which recovery is here sought constituted a personal contract between the defendant and the plaintiff, and the change of title to and possession of the subject of insurance, without the knowledge or consent of the insurer, divested ipso facto the plaintiff of all insurable interest in the insured premises, thus vitiating the contract and rendering it void. *Brighton Beach & C. Ass'n v. Home, etc., Co.*, 113 App. Div. 728, 99 N. Y. Supp. 219, affirmed by the Court of Appeals, 189 N. Y. 526, 82 N. E. 1124. In that case the policy of insurance, as to the conditions with regard to a change of title, possession, and interest, contained a clause similar to that embraced in the policy here, and, in discussing the question of the effect of change of title to, possession of, and interest in the subject of the insurance, the court uses language so per-

tinient to the case at bar that we quote from the opinion in extenso: "The decisions of courts of sister states unite in the proposition that one in possession of real property under a valid contract of purchase is the sole and unconditional owner thereof subject only to the enforcement of payment of the price agreed upon by the holders of the legal title; while the courts of this state have held such a vendee to be the equitable owner of the premises, vendible as his, chargeable as his, capable of being incumbered as his. They may be devised as his. They may be assets. They would descend to his heir, and while he was living be insurable as his. It can hardly be maintained that there can be two sole and unconditional owners of the same property, or two owners legally entitled to exercise the same sole and exclusive rights therein at the same time, and it is clear that such a change of title was effected by possession given the appellant under the contract of sale as to have avoided the policy of insurance. Again, it appears beyond reasonable contention that a change in the 'interest' and 'possession' of Dunne in the insured property accomplished the same legal result. The word 'interest' is broader and more comprehensive than the word 'title.' It embraces both legal and equitable rights. The doctrine contended for by appellant that, when the condition is against a change in the 'title,' there is no breach unless there is a change in the legal title, and that, as long as the insured retains the legal title, the policy is not avoided by a transfer of the equitable title, cannot be applied to a condition against a change of 'interest.' The terms are not synonymous. The true test is whether the vendor has parted with the absolute control and dominion over the property insured. If he has, a change in 'interest' has been effected, and the policy is void. I am of the opinion, also, that there was a change in 'possession' within the meaning of that word as used in the policy. While it is true that the agreement designates the occupancy of the vendee as that of a tenant of the vendor without pay or rent, it is apparent that the contract gave and secured to him more than the rights and interest of a tenant. He was charged with the liabilities of and entitled to enforce the rights of a purchaser in possession and could not be ejected as a tenant regardless of such rights. The possession of the vendee was absolute and exclusive of the vendor so long as he has performed his contract. All the rights of possession of the insured property held and exercised solely and exclusively by Dunne when he obtained the policy of insurance he divested himself of by executing the contract and giving plaintiff possession under it. From the time such possession was taken by plaintiff, Dunne had no possession or right of possession, while the former performed the contract provisions, and the attempted characterization in the contract of

the occupancy of the vendee as that of a tenant did not take from plaintiff its legal rights thereunder as the equitable owner in possession or having the legal effect of reserving to Dunne the sole and exclusive possession he owned and exercised when the contract of insurance was made with the respondent. It may also be observed that by the policy of insurance, which was a personal contract, the respondent undertook to indemnify Dunne against loss or damage by fire to his buildings as long as his ownership, interest, and possession thereof remained exactly the same as they then were and no longer. This obligation cannot be extended beyond a time when Dunne voluntarily gave such right of possession to the appellant and changed his interest and the nature of his title in and to the insured property without the consent of the respondent, who never undertook to insure the buildings for the benefit of the appellant. It follows that the right to enforce the policy of insurance terminated with the execution of the contract and the surrender of possession of the insured buildings without the knowledge or consent of the respondent."

See, also, *Manning v. North British, etc., Co.*, 123 Mo. App. 456, 99 S. W. 1095, a rehearing having been denied by the Supreme Court; *Grunauer v. Westchester, etc., Co.*, 72 N. J. Law, 289, 62 Atl. 418, 3 L. R. A. (N. S.) 107; *Gibb v. Philadelphia, etc., Co.*, 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405; *Skinner, etc., Co. v. Houghton*, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485; *Vancouver Bank v. Law, etc., Co. (C. C.)* 153 Fed. 440; *Finkbohner v. Glenns Falls, etc., Co.*, 6 Cal. App. 379, 92 Pac. 318. In the last-mentioned case an executory agreement of sale of the insured property, similar in all essential particulars to the one here, was entered into by the owner of the property and two other parties; possession being given under said agreement to the vendees. The agreement contained, among other conditions, a provision that the latter would pay all taxes assessed against said property. The change of possession under the agreement was without the knowledge or consent of the appellant. This court, speaking through Justice Burnett, uses the following language, which involves a conclusive reply to counsel for the appellant in the case at bar upon the point he attempts to maintain that whether there was any increase of hazard by reason of the change of possession is a question which can be determined only by the evidence, and that, therefore, the mere change of possession or title, etc., does not raise a presumption of increase of risk: "It is of no importance that the learned trial judge found that there was no increase of the risk from the change of possession. It is obvious that such a finding is material only where possession is held by a tenant of the insured. Assuming as a matter of fact that Martin is

just as careful and conscientious as Finkbohner and that the danger of fire was actually not increased in consequence of Martin's possession of the property, yet the law applies a general standard to all similar cases and constrains us to hold that, the insured having lost his pecuniary interest in the protection of the property, the risk was thereby increased, and under the express terms of the policy the insurer is relieved of liability. To hold otherwise would be for us to declare that the parties are not to be bound by the terms of their agreement. This is not within the province of a judicial tribunal. The insured should have secured the consent of the insurer to the change of title as provided in the policy. He made no attempt to do so, and we are powerless to relieve him of the consequences of his neglect."

The case of *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, cited and relied upon by the appellant, is not in point here for the reason that the facts therein are materially different from those in the case at bar. In that case the contract under which Stewart, the party to whom it was contended the property was sold, took possession of the premises, was a lease, pure and simple. There was, it is true, a provision in the instrument following that demising the property to said Stewart for the term of five years, at a stipulated rent, payable monthly, to the effect that "said party of the second part, may at any time during said term of five years purchase said hotel," etc. But, speaking of the latter clause, the Supreme Court has this to say: "In considering the question before us, we may lay out of view the stipulation giving Stewart the privilege of purchasing, for clearly he was not thereby bound to take the property and pay for it, even if it remained whole and intact." The possession of Stewart was obviously only that of a tenant. It was also held in that case that the possession of the property by Stewart was with the implied consent of the insurer.

The numerous other authorities submitted by appellant in support of his several contentions may, without difficulty, be distinguished from the case at bar. But there is no reason upon principle why this judgment should not be sustained. The contract which the plaintiff made with the defendant was, as before observed, a personal one. It must be assumed that the personal character of a party whose property has been insured and its owner thus, at least in part, indemnified against loss, is an important factor in moving an insurance company to assume the risk. In any event, the company has the right—in fact, it is a duty it owes to its other policy holders—to fortify itself through its agreement against assuming an improvident hazard, or any risk under such

circumstances as would make the hazard an improvident one. The insurance company is entitled to a substantial compliance on the part of the insured with the terms of the contract of insurance. It is well said in *Finkbohner v. Glenns Falls Ins. Co.*, supra: "In the construction of insurance policies great favor is shown to the insured. The rule generally recognized is to construe the covenants strictly against the insurer and liberally in favor of the insured. We need not stop to philosophize as to the reason for this rule. It is sufficient to say that it has been generally indorsed by the higher courts, but, of course, it is not sufficiently indulgent toward the insured as to ignore or nullify his express and unequivocal agreement. It cannot be invoked to change the nature of the contract, but only to resolve an uncertainty or ambiguity in favor of the party who is likely to be misinformed or imposed upon."

For the reasons set forth herein, the judgment appealed from is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

10 Cal. App. 67

PEOPLE v. SYKES. (Cr. 109.)

(Court of Appeal, Second District, California, Feb. 15, 1909. Rehearing Denied by Supreme Court April 14, 1909.)

1. RAPE (§ 20*)—INFORMATION—SUFFICIENCY. An information charging that accused on or about a specified day in a specified county did willfully, unlawfully, and feloniously have sexual intercourse with a specified female child under 16 years old, and not accused's wife, contrary, etc., is sufficient.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 23; Dec. Dig. § 20.*]

2. CRIMINAL LAW (§ 772*)—INSTRUCTIONS—TIME AND PLACE.

In a rape trial, it was not error to instruct that the exact date of the act, if it occurred, was not necessary so long as the act happened within three years before the information was filed, that the people were not bound to prove that the crime was committed exactly on the day specified in the information, but that they could prove that it was committed any time within such period, so long as they proved that the crime was committed by accused at the specified place.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1814; Dec. Dig. § 772.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—ERROR NOT PRESUMED.

Since error will not be presumed on appeal, the fact that the minute order respecting the return of the verdict does not show that the verdict was read to the jury after it was returned, as required by Pen. Code, § 1164, is no ground for reversing a conviction, where the record does not affirmatively show that the verdict was not so read.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3034; Dec. Dig. § 1144.*]

4. CRIMINAL LAW (§ 885*)—VERDICT.

A verdict in a rape trial finding accused "guilty, at the mercy of the court," was not

reversible error; the last six words being properly disregarded as surplusage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2108; Dec. Dig. § 885.*]

5. CRIMINAL LAW (§ 893*)—VERDICT—CONSTRUCTION.

A verdict in a criminal case should be reasonably construed and given effect according to its manifest intention.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2089; Dec. Dig. § 893.*]

6. CRIMINAL LAW (§ 1144*)—APPEAL—REVIEW—PRESUMPTIONS—SENTENCE.

One prematurely sentenced is presumed to have assented to the date, in the absence of objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3035; Dec. Dig. § 1144.*]

7. CRIMINAL LAW (§ 1134*)—APPEAL—REVIEW—SELF-CONDUCTED DEFENSE.

On appeal from a conviction where accused has conducted his own defense, the record must be closely scrutinized to see that his rights in endeavoring to maintain his innocence have been protected.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

William Sykes was convicted of rape, and he appeals. Affirmed.

William Sykes, in pro. per. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The information filed in this case charged defendant with the crime of rape, committed as follows: "That the said W. Sykes on or about the 15th day of March, 1906, at and in the county of Los Angeles, state of California, did willfully, unlawfully and feloniously have sexual intercourse with one [giving name], who was then and there a female child under the age of sixteen years, and was not then the wife of said W. Sykes; contrary," etc. The cause was called for trial on January 8, 1908, and the defendant asked for and obtained leave to dismiss the attorney formerly appearing for him and to conduct his own case. The people elected to prove an act committed in the month of March, 1906, in the house known as No. 918 East Sixth street, in the city of Los Angeles. The minute order in the transcript is as follows: "The evidence being closed, the case was argued and submitted to the jury. The court instructs the jury and the sheriff is sworn to take charge, and the jury retires at 2:22 p. m., returning into court at 5:30 p. m., having agreed upon a verdict. The clerk was then directed to enter the following verdict, to wit (Title of Court and Cause): 'We, the jury in the above-entitled action, find the defendant guilty at the mercy of the court. James Clark, Foreman.' The jury were then discharged and defendant remanded to custody of sheriff. Sentence set for Jan. 10th." It further appears that on the date named for sentence,

upon defendant's application, time for sentence was continued until January 17th. It further appears, however, that on January 15th the defendant was brought before the court, and was duly informed by the court of the nature of the information against him, and of his trial and of the verdict of the jury. He was then asked if he had any legal cause to show why judgment should not be pronounced, to which he replied that he had none; and, no sufficient cause appearing, the court pronounced its judgment, from which this appeal is taken.

It is insisted by appellant that the information does not charge him with the commission of any crime. There is nothing in this point. The information is sufficient.

Error is further claimed by reason of an instruction given by the court to the effect that "the exact date of this occurrence, if you find from the evidence beyond a reasonable doubt that it did occur, is not necessary, so long as the occurrence happened within three years prior to the filing of the information in this case. By this I mean that the people are not obliged to prove that the crime was committed exactly on the 15th day of March, 1906, the day laid in the information, but that they can prove the crime to have been committed at any time within three years prior to the filing of the information, so long as they prove the crime to be the crime alleged to have been committed by the defendant in the house known as No. 918 East Sixth street in the city of Los Angeles, county of Los Angeles, state of California." This charge is almost identical with one given in *People v. Allen*, 144 Cal. 300, 77 Pac. 948, and approved, wherein it is said that, the particular act having been selected with reference to the circumstances rather than the date, it was proper for the court to instruct the jury as it did. In that case, as in this, after the election expressed by the people, the particular place where the offense was committed became the principal circumstance surrounding the transaction, and the act was selected by reference to circumstance rather than to date. It will be observed that the minute order with reference to the return of the verdict does not disclose that the verdict was read to the jury after its return into court. If, as a matter of fact, section 1164, Pen. Code, was disregarded in this respect, it should have been made to appear affirmatively in the record. Error will not be presumed on appeal. All intendments are in favor of the regularity of the action of the trial court. *People v. Douglass*, 100 Cal. 1, 34 Pac. 490; *People v. Holmes*, 118 Cal. 449, 50 Pac. 675.

The form of the verdict is criticised by appellant. This verdict returned clearly expresses the fact that the defendant was found guilty, and the recommendation for mercy implied from the language used in the

verdict may be disregarded as surplusage. "There is no good reason why the verdict of a jury should not have a reasonable construction and be given effect according to its manifest intention." *People v. Holmes*, 118 Cal. 448, 50 Pac. 676. No objection appears to have been made by defendant when he was presented for sentence that the date was premature. In the absence of such objection, he must be held to have assented to the date for passing sentence. *People v. Mess*, 65 Cal. 174, 3 Pac. 670; *People v. Johnson*, 88 Cal. 174, 25 Pac. 1116. While this class of cases demands the closest scrutiny in order to see that defendant has had his full share of legal right in an endeavor to maintain his innocence (*People v. Baldwin*, 117 Cal. 244, 49 Pac. 186), yet, applying that rule in all of its strictness, we are impressed with the conviction that under the evidence the jury could not have found otherwise, and that no prejudicial error is shown warranting a reversal.

The judgment is therefore affirmed.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 97

HOBBS v. HOBBS. (Civ. 568.)

(Court of Appeal, First District, California.
Feb. 18, 1909.)

1. DIVORCE (§ 93*)—IMPOTENCY—PLEADING—ESSENTIALS.

Under Civ. Code, § 82, subd. 6, authorizing a divorce for continued and apparently incurable physical incapacity existing at the marriage, a plaintiff must allege and prove that such incapacity continues and appears to be incurable, though the allegation need not be in the language used in the statute.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 295; Dec. Dig. § 93.*]

2. DIVORCE (§ 109*)—IMPOTENCY—PERMANENCE—PRESUMPTIONS.

There is no presumption that impotency is incurable.

[Ed. Note.—For other cases, see *Divorce*, Dec. Dig. § 109.*]

3. DIVORCE (§ 126*)—IMPOTENCY—DEGREE OF PROOF REQUIRED.

To annul a marriage for impotency existing at the marriage, the proof must clearly show a condition at that time operating a fraud upon the aggrieved party.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 408; Dec. Dig. § 126.*]

Appeal from Superior Court, City and County of San Francisco.

Divorce action by Lotta May Hall Hobbs against Howard S. Hobbs. Judgment for plaintiff, and defendant appeals. Reversed.

W. C. Cavitt, for appellant. William H. Schooler, for respondent.

COOPER, P. J. This appeal is from a judgment of the superior court annulling the marriage of plaintiff and defendant.

The complaint alleges: "That at the time of the marriage as aforesaid, to wit, on the 12th day of September, 1905, the said defendant was incapable of entering into the marriage state by reason of the fact that he was unable to perform his marital duties and have sexual intercourse with the plaintiff; that he has never at any time since said marriage been able to enter the person of plaintiff; that the said defendant has consulted physicians and taken medicine for the purpose of placing himself in a condition to perform his marital duties, but to no avail, and the said defendant has at all times since said marriage been incapable of performing his marital duties, and is now incapable of performing his marital duties, and such incapacity continues." Defendant demurred to the complaint upon the ground that it fails to state facts sufficient to constitute a cause of action. The demurrer was overruled. Defendant thereafter answered, and the case was tried before the court. Findings were filed, upon which judgment was entered annulling the marriage.

Defendant claims that the court erred in overruling the demurrer to the complaint, and that the evidence is insufficient to support the findings and judgment. In our opinion he is correct on both propositions. The action was based upon subdivision 6 of section 82 of the Civil Code, which reads as follows: "A marriage may be annulled for any of the following causes existing at the time of the marriage: * * * (6) That either party was, at the time of marriage, physically incapable of entering the marriage state, and such incapacity continues, and appears to be incurable." It is plain that this subdivision of the section only authorizes the annulment of the marriage where the "physical incapacity continues and appears to be incurable." It is necessary in such cases to allege and prove that the physical incapacity continues and appears to be incurable. It need not be alleged in the very words of the statute; but in case the language of the statute is not followed the facts must be alleged to show that the physical condition is such that the impotence appears to be incurable. We can easily imagine cases in which it would only be necessary to allege the facts, and such facts would show that the physical condition would appear to be incurable. In the complaint there is not even an intimation of any defect, malformation, or want of the usual sexual organs of defendant, but the bare statement that he is and continues to be incapable of performing his marital duties and having sexual intercourse with plaintiff. It is not alleged that plaintiff is normal in her sexual organs, or that it was not her fault. It is not shown as to whether or not the physical incapacity of defendant was the result of disease or physical defect

of the organs. There is no statement that such condition appears to be incurable.

It is said in Bishop on Marriage, Divorce and Separation, vol. 2, § 1281: "As every pleading, to be adequate, must allege all facts necessary to a prima facie case, while yet, with an exception immaterial here, it need not anticipate and answer defenses; and as a sexual impediment to consummation, to be a ground for divorce, must be incurable, or practically so, it follows that the incurable nature of the particular impotence must in some way appear in averment. And so are the approved precedents, nor have we decisions justifying a departure therefrom." And in *Ferris v. Ferris*, 8 Conn. 166, the court said: "We are therefore brought to the single inquiry whether the only ground for a divorce stated in the petition be sufficient to sustain the decree. The averment is this: 'That at the time of their intermarriage, the said Abel was, ever since has been, and now is, laboring under a corporal imbecility.' Does the term 'corporal imbecility,' as here used, *ex vi termini*, import a confirmed and incurable impotency to consummate the marriage? To me it seems not necessarily to import any such thing. This is mentioned by Blackstone as one of the causes, which may be supervenient. 1 Bla. Comm. 440. And Christian, in a note, remarks: 'Corporal imbecility may arise after marriage, which will not then vacate the marriage, because there was no fraud in the original contract.' 1 Bla. Comm. 440, note 12. Here he clearly recognizes this as a cause which may be supervenient, and as clearly rejects the idea that the term 'corporal imbecility' has a precise, technical meaning, and absolutely imports a natural, permanent, and incurable impotency. Such imbecility may be temporary merely, and in such a sense does the term seem to be used in the petition before us. The averment is that the respondent was 'laboring under a corporal imbecility.' There is not only no intimation that the imbecility is permanent and incurable, but the expressions used strongly imply that it is only temporary. Such, in my judgment, is the plain and obvious import of the language, and there surely can be no pretense that this is a cause for divorce."

As to the evidence, it utterly fails to show that the physical incapacity of the defendant, if any, is incurable. Plaintiff and defendant intermarried September 12, 1905. They immediately took the train for Portland, Or., where they remained about a month, at which time they returned to San Francisco. Here they lived together until November 18, 1905, when defendant departed to Portland, Or., where he was called by business. Plaintiff accompanied him to the train, kissed him good-bye, and promised to follow him in about two weeks. He gave her money for such purpose. After defendant left, plaintiff wrote him one or two letters, the contents of which do not appear in evidence. In the

early part of 1906 (the date does not appear), without warning, the plaintiff commenced this action. Her amended complaint was filed August 28, 1906, and the cause was tried April, 1907. The plaintiff testified that at the time of the marriage the defendant was physically incapable and not able to perform sexual intercourse with her, and that during the two months they lived together he never succeeded in having sexual intercourse with her, to her great annoyance, and that it greatly injured her health. The defendant, on the other hand, testified as positively that he had sexual intercourse with her during all the time they lived together; that he never failed to respond; that his physical condition was good, as good as it had ever been in his life. It thus appears that there is a square conflict in the evidence of the only two persons who know the facts as to whether or not defendant was capable of having sexual intercourse.

Conceding that, on this conflict of testimony, the finding of the court is conclusive here, still there is no evidence that such incapacity continued up to the time of the trial, or that it was incurable. No evidence was given as to any defect of the physical person or sexual organs of the defendant. No examination was made of his person, nor does any appear to have been asked for. The incapacity, if any, may have been caused by illness or nervous debility, and may have been temporary only. We know of no presumption that such condition is incurable. The time was short, and the only proof of impotency during such time is the testimony of plaintiff that the defendant did not and could not have sexual intercourse with her. There is a well-known and valuable rule of olden times, often repeated in the decisions and text-books, that impotence shall be presumed after three years of ineffectual cohabitation, and shall not be presumed before. It is sometimes called the rule of triennial cohabitation. At the end of three years, if the marriage remained unconsummated, impotence was presumed. The plaintiff was required to show a triennial cohabitation, or that the defect or cause was obvious to inspection; and in all cases where the condition of the sexual organs was an essential element in the proofs the court ordered an inspection of the person by medical experts. These medical inspectors were usually three in number, and were sworn to perform their duties. In one of the old books of English Practice the form of the oath was as follows: "You are produced as inspectors in a cause. * * * You respectively swear that you will faithfully, to the best of your skill, inspect the parts and organs of generation of each of said A. and B.; make a just and true report in writing to the judge ordinary of this court, whether the said A. is capable of performing the act of generation, and, if incapable, whether such his incapacity can be cured by

art or skill; and also whether the said B. is or is not a virgin; whether she hath or hath not any impediment on her part to prevent the consummation of the marriage, and that one of you will deliver such report under your hands and seals closely sealed up to one of the registrars of Her Majesty's Court of Probate." Brown, Div. Pract. (4th Ed.) 622, 623. These old rules were derived from the Canon Law, and were invariably enforced in the Ecclesiastical Courts. Bishop on Mar., Div. & Sep. vol. 2, §§ 1286 (7), 1307, and cases cited. While in modern times the courts do not adhere to the old rule as to three years' cohabitation in order to raise a presumption of impotence, yet they hold that the contract of marriage is of too solemn a nature and of too much importance to society to be set aside or annulled except upon clear proof of such physical condition of one of the parties at the time of the marriage that it would operate as a fraud upon the other party to compel them to live together as husband and wife in name only, without the comforts of marriage and with no prospect of children. It is therefore in all cases necessary for the plaintiff to establish the impotence at the time of the marriage and its incurable nature. Bishop on Mar., Div. & Sep. vol. 1, § 786; Griffeth v. Griffeth, 162 Ill. 368, 44 N. E. 820; Bascomb v. Bascomb, 25 N. H. 267; Lawrence v. Lawrence, 73 Ill. 577.

The judgment is reversed, and the plaintiff may be allowed to amend her complaint, if so advised.

We concur: KERRIGAN, J.; HALL, J.

10 Cal. App. 113

PREFUMO v. RUSSELL et al. (Civ. 592.)
(Court of Appeal, Second District, California.
Feb. 23, 1909.)

1. APPEAL AND ERROR (§ 1097*)—SUBSEQUENT APPEALS—LAW OF CASE.

Where a decision on a first appeal is based upon facts materially different from those of the second appeal, the first is not the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4361; Dec. Dig. § 1097.*]

2. TRUSTS (§ 35*)—CONSTRUCTION—EVIDENCE.

Where property is conveyed to a grantee by those owning the equitable title, under an agreement that he shall hold the property in trust for certain purposes, and thereafter another agreement is entered into, under which the grantee advances money and receives from the legal owner the legal title and by agreement is to hold the property to secure the money he has advanced until by sales of a part thereof the equitable owners reimburse him and pay for the interest of certain other of the equitable owners, and thereafter the remainder of the property is to be transferred to the equitable owners, the transaction is not a mortgage only, but the title is also held in trust for the equitable owners.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45-50; Dec. Dig. § 35.*]

3. QUIETING TITLE (§ 52*)—PROCEEDINGS AND RELIEF—JUDGMENT.

In an action to quiet title by one who holds the legal title as trustee to be conveyed to defendants on payments by them of an amount for which plaintiff holds the title as security, and who also holds the title as a trustee for defendants, a judgment directing plaintiff to convey to defendants, on payment within a reasonable time of the amount due, is in accordance with the prayer in the answer that plaintiff be decreed to hold the land as trustee for defendants and to convey the same upon payment of the amount of the mortgage.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 52.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Ada S. Prefumo against C. J. Russell and another. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 148 Cal. 451, 83 Pac. 810.

Marcel E. Cerf, for appellants. W. H. Spencer, for respondent.

ALLEN, P. J. Action to determine conflicting claims to real property.

The findings of the court, all of which have support from the evidence, are substantially these: Defendants and certain other persons named were the owners in 1894 of an equitable estate in certain real property acquired through a contract for its purchase. Owning such equitable interest, they at that time executed a deed to one Prefumo, the husband of plaintiff, purporting to convey said premises, in connection with which Prefumo executed to his grantors an instrument in writing certifying that such deed was so executed in trust, and the title to said property was accepted in trust for certain purposes therein declared. Thereafter, in December, 1894, the owners of the legal title insisting upon the payment of the balance of the purchase money due, Prefumo and his former grantors entered into another agreement through which it was agreed: That Prefumo was to advance and pay the owners of the legal title the balance due them, and a deed should be executed to Prefumo conveying the legal title to said property; that thereafter the defendants should sell said property in lots, and from the proceeds Prefumo was to be reimbursed for the amount paid to acquire the legal title, and, in addition, should pay the other co-owners in the equity certain sums of money in lieu of their interest in the premises; that after such payment, if any property remained unsold, the same should be conveyed to defendants; that defendants were to have such interest in said property only in the event they paid to said Prefumo said moneys aforesaid by sale of lots or otherwise. That under this agreement Prefumo accepted the legal title, paid the purchase money, and in 1895 paid to the co-owners the money due them in lieu of their interest. That at the date of the acquirement of the legal title Prefumo took

possession of the premises, and he and the plaintiff have held possession ever since, paying all taxes assessed thereon; that defendants have paid nothing to Prefumo since the conveyance to him of the legal title, and that in April, 1902, Prefumo made a voluntary conveyance of the premises to plaintiff, his wife, who took the same with full knowledge of the facts hereinbefore found. That the amount so paid by Prefumo under said agreement, with interest, amounted at the time of the hearing of the cause to \$2,518.58. The court found as a conclusion of law that plaintiff was the owner of the legal title, subject only to the condition that on payment by defendants within a reasonable time of the amount of \$2,518.58, with interest from the date of the findings, then said property should be conveyed by plaintiff to defendants; and plaintiff's title to the property was quieted and judgment entered accordingly. It further appears in the record that plaintiff upon the trial of the action filed with the clerk of the court a deed conveying the said premises to defendants, to be delivered upon the payment by defendants of the amount so found to be due by the court. The action in which the judgment was rendered was commenced in June, 1902. From this judgment, and an order denying their motion for a new trial, defendants appeal.

It is insisted by appellants that under the facts as found by the court the transaction between the parties amounted only to a mortgage, and that the only remedy available to plaintiff was in foreclosure; and the attention of the court is called to a decision of the Supreme Court upon a former appeal, reported in 83 Pac. 810, in which case it is stated in the opinion that under the facts presented upon that appeal the conveyance to Prefumo was, in effect, only a mortgage, and the only legal method of enforcing their claim thereunder was by foreclosure. That decision, however, was based upon facts materially different and may not therefore be regarded as the law of the case. *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421. The effect therefore of this conveyance to Prefumo being an open question, we are of opinion that under the authority of *Woodard v. Hengen*, 128 Cal. 293, 60 Pac. 769, such title was not vested in Prefumo as security only and therefore but a mortgage. "It was made for the purpose of finally having the title go to defendant, but in the meantime such title was held in trust for defendant and for security." This interpretation is proper when we consider that defendants never held the title, and under their agreement never were to be vested with title until the performance of certain conditions precedent. In fact this appears to be the construction which defendants themselves gave to the transaction, for in their answer setting up their claims to the property they pray "that

plaintiff be decreed to hold said land as trustee for defendants to convey the same to said defendants or their assigns upon payment by them of the amount of said mortgage." The judgment from which this appeal is taken is in strict conformity to such prayer, and we think that the same was eminently proper, for it is the only relief to which defendants would have been entitled had they brought an original action to enforce the trust, even were it conceded that a tender of payment was not a prerequisite were such relief sought.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 38

DUNN et al. v. STEGEMANN et al.
(Civ. 552.)

(Court of Appeal, First District, California.
Feb. 9, 1909. Rehearing Denied by Supreme Court April 8, 1909.)

1. CONTRACTS (§ 136*)—VALIDITY—EFFECT OF ILLEGALITY—RELIEF.

No recovery can be had on a contract having for its object the violation of law, and where the illegality appears the court should sua sponte deny relief to either party.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-684; Dec. Dig. § 136.*]

2. LANDLORD AND TENANT (§ 29*)—LEASES—VALIDITY—LEGALITY OF OBJECT.

A lease made with the knowledge and intention of the lessor that the demised premises are to be used for illegal purposes is unenforceable, and this is so whether the illegality appears on the face of the lease or is proved by evidence aliunde.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 85; Dec. Dig. § 29.*]

3. LANDLORD AND TENANT (§ 29*)—LEASES—VALIDITY—LEGALITY OF OBJECT.

A lease made with the knowledge and intention of the parties that the premises are to be used only as a liquor saloon, a business which could not then be conducted on the premises without violating the charter and ordinances of a city, because within the prohibited distance of a church, is invalid, and cannot be made the basis of a suit for rent or for expenses incurred under it.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 29; * *Intoxicating Liquors*, Cent. Dig. § 473.]

Appeal from Superior Court, City and County of San Francisco; G. A. Sturtevant, Judge.

Action by Frank Dunn and another against Richard Stegemann and others, in which defendants filed a cross-complaint. From a judgment against defendants and an order denying a new trial, they appeal. Reversed and remanded, with directions to enter judgment denying relief to both parties.

Bishop & Hoefler, for appellants. Campbell, Metson, Drew, Oatman & Mackenzie, for respondents.

HALL, J. Appeal from judgment against defendants and order denying defendants' motion for a new trial. The action was brought by plaintiffs, as the lessors, to recover rent for certain premises, situate in the city and county of San Francisco, let to the Stegemanns. The San Francisco Breweries, Limited, guaranteed the payment of the rent and other covenants to be performed by Stegemann Bros. No issue is made in the pleadings as to the execution of the lease, which is set forth in full in the pleadings. The lease contains the following provision: "The said parties of the second part [lessees] agree not to directly or indirectly use, or allow to be used, the said premises for any other purpose than that of saloon and cigar stand without the written consent of the parties of the first part."

In response to certain issues presented by the pleadings, the court found: "That the charter and ordinances of the city and county of San Francisco provide that no person shall engage therein in the sale of liquor as retail liquor dealer or saloon keeper without first securing a permit or license therefor in the said city and county of San Francisco, and that no permit or license shall be granted for such sale in any premises situated within 150 feet of a church. That at all the times mentioned in the said agreement and in the pleadings herein a church stood within 100 feet of the premises described in said agreement," and that this fact was well known to both plaintiffs and defendants. This last finding is in accordance with plaintiffs' answer to defendants' cross-complaint. It thus appears that the saloon business could not be carried on in the demised premises without a violation of law. Under the charter and ordinances of the city and county of San Francisco, such business could not be carried on without a license at any place in the city and county of San Francisco, and no license could be granted to carry on such business in the said premises. The business for which the premises were let could not be carried on in said premises without a violation of the charter and ordinances of the city and county of San Francisco as well as the Penal Code of the state. Pen. Code, § 435; *In re Lawrence*, 69 Cal. 608, 11 Pac. 217; *Ex parte Stephen*, 114 Cal. 278, 46 Pac. 86.

The facts making such business unlawful were well known to the plaintiffs and defendants, and they are chargeable with knowledge of the law. It is well established that no recovery can be had by either party to a contract having for its object the violation of law. The courts refuse to aid either party, not out of regard for his adversary, but because of public policy. Where it appears that a contract has for its object the violation of law, the court should sua sponte deny any relief to either party. *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207; *Chateau v. Singla*, 114 Cal. 91, 45 Pac.

1015, 33 L. R. A. 750, 55 Am. St. Rep. 63; *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708; *Kreamer v. Earl*, 91 Cal. 112, 27 Pac. 735; *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773. "The general rule is that a lease, made with the knowledge and intention of the lessor that the demised premises are to be used for immoral or illegal purposes, is unenforceable and invalid." 24 Cyc. 908, and the many cases there cited from different states. In a few cases it has been held that mere knowledge on the part of the lessor that the lessee intends to use the premises for an illegal purpose will not prevent a recovery of rent; but an examination of the cases shows that they hold without conflict that, where the lease is made with the purpose and intent that an unlawful business shall be carried on therein, no recovery can be had. And this is so whether the illegality appear upon the face of the lease, or is proved by evidence aliunde. Many of the cases arose out of lettings of premises to be used for immoral purposes, but the rule also applies in cases of violations of city ordinances. In *Milne v. Davidson*, 5 Mart. (La.) N. S. 409, 16 Am. Dec. 189, it was held that the lessor could not recover rent of premises let for hospital purposes; there being an ordinance prohibiting private hospitals within the city limits. A lease in violation of a city ordinance prohibiting the occupancy of a part of a sidewalk for private purposes, is invalid, and cannot be made the basis of a suit for the recovery of rent. *Heineck v. Grosse*, 99 Ill. App. 441. To the same effect is *Romano v. Bruck*, 25 Misc. Rep. 406, 54 N. Y. Supp. 935, where it is said that "the inflexible rule is that no remedy can be had in a court of justice on an illegal contract."

We have examined the cases relied upon by the respondent, and do not think any of them are in point, or are opposed to the principles above stated. The cases arising out of the adoption of local option laws subsequent to the execution of the lease have no application to the facts of this case. The lease in this case on its face, in connection with the facts found by the court, provided for the carrying on of a business that could not at that time be possibly carried on without a violation of the law. Neither are the respondents aided by the case of *Shedlinsky v. Budweiser Brewing Co.*, 17 App. Div. 440, 45 N. Y. Supp. 174, where the court held that the evidence did not show that a license could not have been lawfully granted, and for this reason allowed a recovery by the lessor. In this case, however, the court said: "If it were not possible, at the date of this contract, to conduct a liquor saloon lawfully in these premises, then defendant's position is impregnable." In the case at bar it was not possible at the date of the contract, or at any time since, to conduct a liquor saloon lawfully in the demised premises, and the position of defendants as to their nonliabil-

ity for rent is, in the language of the case above cited, impregnable.

Defendants sought by a cross-complaint to recover for moneys spent in fitting up the premises for a saloon, but for the same reasons that plaintiffs cannot recover rent they cannot recover any expenses incurred by them under the lease.

Upon the facts found judgment should have been entered denying both plaintiffs and defendants any relief.

Judgment is therefore reversed, and the court directed to enter judgment upon the findings, denying plaintiffs any relief upon their complaint, and denying defendants any relief upon their cross-complaint.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 53

GISH v. FERREA et al. (Civ. 557.)

(Court of Appeal, Third District, California.
February 10, 1909.)

1. APPEAL AND ERROR (§ 864*)—RECORD—QUESTIONS PRESENTED.

On appeal from the judgment, on the judgment roll alone, the propriety of the action of the trial court on a motion to strike out a cross-complaint, not made a part of the judgment roll, need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3459; Dec. Dig. § 864.*]

2. TRIAL (§ 398*)—INCONSISTENT FINDINGS—SPECIFIC PERFORMANCE.

In an action for specific performance of a contract to transfer land, there is no necessary inconsistency in findings that there was no agreement to sell, and that plaintiff entered into possession of the property and made valuable improvements thereon, as the entry and improvements may have resulted from some other agreement.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 946; Dec. Dig. § 398.*]

3. TRIAL (§ 397*)—FAILURE TO FIND ON PARTICULAR QUESTIONS.

In an action for specific performance of a contract to transfer land, in which the court found that there was no contract, but that defendant believed that her agents had given their consent to the entry on the land by plaintiff, and the making of improvements, it is immaterial that the court fails to find whether such consent was actually given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 944; Dec. Dig. § 397.*]

4. TRIAL (§ 397*)—FAILURE TO FIND ON PARTICULAR QUESTIONS.

In an action for specific performance of a contract to convey land, a failure to find whether one to whom defendant had transferred the land had knowledge of plaintiff's entry and improvements, and a failure to find whether plaintiff was entitled to specific performance after finding that she had "no estate, right, title, or interest in the land" is immaterial; it not being alleged that defendant's grantee had any knowledge of any contract of sale between plaintiff and defendant, and the knowledge of the grantee of the possession of plaintiff and her improvements not being knowledge of any claim of title by plaintiff, and there being no necessity for a finding as to plaintiff's right to specific perform-

ance after a finding that there was no contract to perform.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 940; Dec. Dig. § 397.*]

5. SPECIFIC PERFORMANCE (§ 115*)—CROSS-BILL—CHANGE OF ACTION.

In an action for specific performance of a contract to transfer land brought against the original owner of the land and her grantee, the grantee may by cross-bill ask to have his title to the land quieted, as both the action for specific performance and that to quiet title are equitable, and relate to the same subject-matter.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 373; Dec. Dig. § 115.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Sewell, Judge.

Action by Mary F. Gish against Virginia Ferrea and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Hugo D. Newhouse, for appellant. Berry & Brady, for respondents.

CHIPMAN, P. J. Action to enforce specific performance of an alleged agreement for the sale and purchase of certain real property situated in the city and county of San Francisco. Defendants answered, specifically denying the material allegations of the amended complaint, and defendant Lefevre answered by cross-complaint, alleging title to the said property, and praying that the same be quieted against the claims of plaintiff. The court adjudged that defendant, Lefevre, is the owner of the property, and plaintiff has no interest therein, and gave judgment for defendants with costs.

There is in the record what purports to be a notice of motion to strike the cross-complaint from the files, on the ground that it "is immaterial, irrelevant, and redundant." It does not appear that any motion was made pursuant to the notice, or at all, and the notice fixes no time for the making of such motion. However, we may dismiss the point made that the record fails to show what action the court took on the motion, for the reason that it forms no part of the judgment roll, and the appeal here is from the judgment upon the judgment roll alone.

It is alleged in the complaint that defendant Ferrea, being then the owner of the property in question, in September, 1905, agreed to sell to plaintiff, and plaintiff agreed to purchase the same for the sum of \$300; that immediately thereafter plaintiff entered into possession of the premises, and made valuable improvements thereon, with the knowledge and consent of defendant Ferrea. The usual averments follow of tender of the purchase price, demand for deed, and refusal of Ferrea to accept the tender or make the deed. It is then averred that on February 9, 1906, "by mesne conveyances the said property was sold to one J. P. Lefevre; that said Lefevre purchased said property with

a full knowledge of the fact of the possession of the plaintiff, and the erection of improvements thereon by plaintiff. Tender to Lefevre is averred, and refusal by him to execute a deed to plaintiff. It is also averred that in October, 1905, plaintiff entered into a contract with Thomas O'Donnell and wife to execute, or cause to be executed, a deed to them of the property, and that they executed a mortgage to plaintiff on the said premises to secure the payment of a certain promissory note executed by them to plaintiff, and that plaintiff is prevented from conveying the property to the O'Donnells because of her inability to obtain a deed from Ferrea or Lefevre. The court found that in September, 1905, Ferrea was the owner of the premises, but it is found that Ferrea and plaintiff never at any time entered into any agreement for the sale and purchase of said premises for the sum of \$300, or any other sum, or at all; that without any agreement, and about September, 1905, plaintiff entered upon the premises, "and erected valuable improvements thereon, and thereafter one Thomas O'Donnell and his wife (who are made defendants, but do not answer, and do not appeal, and seem to have dropped out of the case) entered into possession of said property, and have been in possession ever since the 13th day of April, 1906, under an agreement to purchase the same from plaintiff"; "that Ferrea had notice of the entry of plaintiff and the erection of said improvements, but that said Virginia Ferrea believed that her agents, who were employed by her to sell and manage said property, had given their consent to said entry and erection of improvements"; that defendant Lefevre on February 9, 1906, succeeded to the title of Ferrea, and ever since has been, and now is, the owner of the property in fee simple, but the court does not find upon the allegation of plaintiff that Lefevre purchased with knowledge of plaintiff's possession and the erection of said improvements, which, not being denied, is deemed admitted.

It is claimed that the judgment is not supported by the findings because, while it is found that there was no agreement to sell, yet the court finds that plaintiff entered into possession of the property, and made valuable improvements thereon. There is no necessary inconsistency here, for, as there was no contract to sell, the entry and improvements may have come about through some other agreement disclosed by the evidence, which is not now here.

It is next contended that the court, while finding that Ferrea believed that her agents had given their consent to the entry and improvements, did not "find whether or not such or any consent was in fact given." Inasmuch as this is an action to specifically enforce a contract which the court found

never had any existence, the finding of the omitted fact becomes immaterial.

It is next urged as ground for reversal that the court failed to find upon the allegation that defendant Lefevre had knowledge of the entry and improvements by plaintiff, and also failed to find whether or not plaintiff was entitled to specific performance, and only finds that she "had no estate, right, title, or interest in the land." It is not alleged that Lefevre had any knowledge of any contract of sale between plaintiff and Ferrea. His knowledge of the possession of plaintiff and the improvements made by her is not knowledge of any claim of title by plaintiff. It was not necessary for the court to find that plaintiff was or was not entitled to specific performance after having found that there was no contract to perform.

Finally it is objected that Lefevre by his cross-complaint "changed the status of the case from an action for specific performance to a suit to quiet title," which, it is claimed, "obviously cannot be maintained." We are unable to see why not. Both are equitable actions relating to the same subject-matter. Plaintiff is seeking to compel Lefevre to convey his title to plaintiff by asking the court to enforce a contract affecting the title to the property, by which, in some way, Lefevre is sought to be bound. He sets up his title, and to end the litigation and terminate plaintiff's claims he asks to have his title quieted against them. It would be difficult to perceive a more natural and appropriate proceeding.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

10 Cal. App. 42

PEOPLE v. BALDOCCHI. (Cr. 74.)

(Court of Appeal, Third District, California.
Feb. 9, 1909.)

1. HOMICIDE (§ 300*) — SELF-DEFENSE — INSTRUCTIONS.

In a trial for homicide, it appeared that, though deceased had assaulted defendant, the affair had ended, that defendant had ample time to cool off, and that, when killed, deceased was unarmed and indicated no intention to assault defendant. The court instructed that defendant had the right to stand his ground if assaulted or threatened with an assault, etc., even if to do so it became necessary to take his assailant's life; and that if defendant believed that he was in imminent danger of being killed or of suffering great bodily injury, and the circumstances were such as to excite the fears of a reasonable man that to stand his ground would further imperil him, he would have the right to pursue his adversary until he secured himself from danger. Held that, read in connection with such instructions, an instruction that if defendant could with safety to himself have avoided the killing, and knew that he could have so avoided it, etc., he could not justify on the ground of self-defense, stated a sound principle and did not prejudice defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REPETITION.

The court in a criminal case, having instructed fully as to previous good character, was not obliged to repeat the instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. CRIMINAL LAW (§ 381*)—EVIDENCE—GOOD CHARACTER.

Evidence of good character comes to the aid of the presumption of innocence, and may be proven as tending in some degree to establish innocence, and cannot be put aside by the jury in order to ascertain if the other circumstances, considered by themselves, do not establish guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 846; Dec. Dig. § 381.*]

4. CRIMINAL LAW (§ 448*)—HOMICIDE—EVIDENCE—CONCLUSIONS.

In a trial for homicide, the question whether, at the time deceased turned around, he had started back to renew the fight between himself and defendant, was properly excluded as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1036, 1037, 1042; Dec. Dig. § 448.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Americo Baldocchi was convicted of murder, and appeals. Affirmed.

John W. Preston and Ross Campbell, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Asst. Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of murder and sentenced to imprisonment for life. He appeals from the judgment on bill of exceptions.

It is complained that the court erred in giving the following instruction: "If you believe from the evidence that, at the time of the killing, the defendant could with safety to himself have avoided such killing, and that the defendant knew, or as a reasonable man could have known, that he could with perfect safety to himself and his person have avoided such killing, then, if you find all these facts, the defendant cannot justify such killing on the grounds of self-defense." It is necessary to a right understanding and appreciation of the instruction objected to that the facts be stated. Defendant was a boarder in the house of one Gonelli and wife. On the afternoon of the day of the homicide there were also present five other Italians, named Cinquini, Falleri, Bonturi, Pardini, and Del Debbio, all of whom, except Del Debbio and Cinquini, were witnesses at the trial and were assembled in the dining room of Gonelli at the time of the homicide. Defendant was in an adjoining bedroom dressed, but lying on the bed. He called for a glass of water, which was sent to him by a little girl, whom he sent away, saying he wanted a glass of wine, which she took to him, and he then said he wanted to see Mrs. Gonelli. She went to the room, and soon

came out crying, and said defendant had struck her. Cinquini went into the room and struck defendant while lying on the bed, and an altercation ensued. Falleri testified: "They scuffled out through Baldocchi's room into the kitchen where they were separated. I took hold of defendant, and the others took Cinquini and went out through the kitchen on the porch." Defendant drew his revolver in the kitchen and made some threats that he would shoot Falleri if he did not let him loose, which Falleri did, and defendant returned to his room, but in about two or three minutes jumped out through a window to the porch. Witness Falleri testified: "I went from the kitchen out on the porch and warned deceased that Baldocchi was coming with a pistol to shoot him. The defendant came around the corner of the house, begun firing at deceased. Deceased was not doing anything and had his hands by his side. I did not see Cinquini (deceased) have any pistol or knife or weapon of any kind at any time. He did not make any motion to draw any weapon." Pardini and Bonturi testified substantially as did Falleri up to and including the time of the separation of the parties in the kitchen. Both of them testified to the warning given by Falleri to deceased. They testified that deceased was standing between them, that they saw no weapon in his hands, and that he made no motion to draw a weapon. Bonturi testified that his hands were down at his side, and that he did not start toward Baldocchi nor make any motion to draw any weapon. Bonturi testified: "Deceased was standing with his back against the wall. Falleri came running out of the kitchen door and called to Cinquini to look out that Baldocchi was coming with a pistol to shoot him. Cinquini just started to turn around when defendant came around the corner of the house and began shooting. He shot five times. * * * Cinquini fell at the first shot, and Baldocchi kept shooting at him after he was down. He said as he was shooting, 'Take that!' and, 'Are you satisfied?' One shot also struck Del Debbio. Defendant told us all to leave or we would get some too." One shot took effect in the abdomen, another in the breast, and a third in the mouth. Defendant testified to the occurrence on the porch: "I jumped through the window of my room and came right around the porch, and when I got right to the corner I saw Cinquini. * * * I was going around to the corner to wash my face, and when I got to the corner I saw Cinquini. He had his hand in his pocket, and he offered to shoot me, and I shoot him first. * * * At the time I shot Cinquini he was standing between two men and had got his hand in his pocket. I was afraid of all of them. I thought Cinquini was going to shoot me. I saw he had a pistol in the house that day. I saw it in the morning. * * * I

was five or six feet from him when I shot him. Cinquini did not say anything, just dropped dead. I don't know whether he moved after I shot him the first time or not. I hit him in the stomach the first time where I aimed to shoot him. The next shot I shot him in the stomach. The next shot was—he was on the floor. I don't know that I hit him in the mouth. I don't know what became of that bullet that was shot toward the floor."

Appellant's contention is that the instruction complained of "eliminates entirely the right of defendant to stand his ground, and places upon him the duty to flee when attacked." And it is argued that, "in requiring retreat of defendant, the trial court impliedly found as a fact that appellant was the aggressor in the fatal combat, for this court has held that, unless a party be the aggressor, he has the right to stand his ground and need not flee, and even in some cases this right is accorded the aggressor"—citing *People v. Lewis*, 117 Cal. 191, 48 Pac. 1088, 59 Am. St. Rep. 167; *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405; *People v. Maughs*, 149 Cal. 253, 86 Pac. 187.

The cases showing under what circumstances it becomes the duty of the defendant to flee, and when he has the right to stand his ground and even to pursue his aggressor, are not to be misunderstood, for they leave no obscurity as to their meaning. The learned trial judge was not unmindful of these decisions, nor did he deprive the defendant of their benefit, for he gave the following instructions: "I instruct you that the defendant has the right to stand his ground if assaulted, or threatened with an assault which might produce death or great bodily injury, and that he is not required to retreat when so threatened or assaulted, from a place in which he has a right to be, even if such retreat would relieve him from the necessity of acting in self-defense. It is the law of this state that a man has the right to stand his ground if assaulted or pursued by another, even if to do so it becomes necessary to take the life of his assailant." Again, the court told the jury: "I charge you that if the defendant believed that he was in imminent danger of being killed or of suffering great bodily injury, and the circumstances were such as to excite the fears of a reasonable man that to stand his ground would further imperil him, he would have the right to pursue his adversary until he had secured himself from all danger." Read in connection with the foregoing, the instruction complained of is the statement of an obviously sound principle, and could by no possibility have prejudiced the defendant. He had the benefit of the doctrine contended for to the fullest extent. Indeed, it may be doubted whether the facts as they appeared, even giving all reasonable weight to defendant's testimony, would warrant the application of the rule at all. Defendant com-

menced shooting as soon as he saw deceased, following up his brutal assault even after his victim lay prostrate before him. All that even defendant states as justification is that deceased had his hands in his pocket. He made no move to draw a weapon. He did not start towards defendant, nor did he indicate any intention to assault defendant, whose fears seem only to have been based upon his having seen a pistol in the hands of deceased the morning of that day. The killing was a brutal, cold-blooded murder without semblance of justification on the ground of self-defense. To hold that the deceased was in any sense an aggressor would be a gross distortion of the facts. It is true that in the first altercation, when deceased assaulted defendant to avenge the insult to Mrs. Gonelli, deceased was the aggressor; but that affair had ended, deceased was no longer an aggressor, and defendant had ample time to cool his blood. If it can be brought into the question at all, it tends to furnish the probable motive of the killing as having been in retaliation for the assault by deceased, who had ceased to be the aggressor.

Complaint is made that the court refused to give the instruction found at folio 71 of the transcript upon the weight to be given to evidence of previous good character. The court instructed the jury fully and correctly upon the subject and was not called upon to repeat the instruction. Besides, the instruction asked stated: "I further instruct you that the jury have the right to say by their verdict that the defendant's character outweighs the evidence against him, even if the evidence, outside of the evidence of good character, conclusively establishes his guilt." It is difficult to see how such a statement of the law can be upheld. Evidence of good character comes to the aid of the presumption of innocence and is a fact to be proven, as tending in a greater or less degree to establish innocence, and cannot be put aside by the jury in order to ascertain if the other facts and circumstances, considered by themselves, do not establish guilt beyond a reasonable doubt, as the court instructed the jury; but, where guilt is conclusively established, to say that evidence of good character alone will warrant a jury in acquitting the defendant, is to turn the jury loose, without bridle or bit, to follow whatever whim may strike them. However this may be, it is sufficient to say that the jury were fully instructed upon the matter.

Witness Bonturi was asked on cross-examination this question: "At the time Cinquini had turned around, had he started back to renew the fight?" The court sustained an objection made on the ground that it calls for a conclusion of the witness. It would have been proper to ask the witness to state what deceased did when he turned around upon the approach of defendant, and to ask the witness whether he started back; but it

could not be assumed by the witness that it was to renew the fight or for any other purpose. Defendant did not attempt to ascertain further what deceased did at the time.

There are some other rulings objected to, but we find in none of them occasion for further comment.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

10 Cal. App. 75

MERCHANTS' TRUST CO. v. BENTEL et al.
(Civ. 547.)

(Court of Appeal, Second District, California.
Feb. 15, 1907. Rehearing Denied
March 18, 1909.)

1. GUARANTY (§ 36*)—OBLIGATION OF GUARANTORS—SEVERAL LIABILITY.

The obligation of guarantors on a note being joint and several, either of them was liable for the whole amount; the payee being entitled to elect to sue one or more of them.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 33; Dec. Dig. § 36.*]

2. SET-OFF AND COUNTERCLAIM (§ 41*)—SUBJECT-MATTER CLAIMS BETWEEN PARTIES.

Code Civ. Proc. § 438, requiring a counterclaim to be one existing in favor of a defendant and against a plaintiff, was not applicable to an action against guarantors on a note, so as to authorize a cross-complaint for contribution against co-guarantors who were not parties.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 78; Dec. Dig. § 41.*]

3. PARTIES (§ 51*)—BRINGING IN PARTIES—NECESSITY.

Under Code Civ. Proc. § 389, requiring the court to order parties to be brought in and permitting a cross-complaint to be filed for that purpose, when a complete determination of the controversy cannot be had without the presence of such other parties, in an action against guarantors on a note, it was unnecessary to bring in other guarantors to determine the question of contribution between the co-guarantors.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 77; Dec. Dig. § 51.*]

4. PLEADING (§ 149*)—CROSS-COMPLAINT—AGAINST THIRD PARTIES.

Under Code Civ. Proc. § 442, as amended by St. 1907, p. 706, c. 372, authorizing defendant to file a cross-complaint whenever he seeks affirmative relief against any party to the action, giving the Code provisions a liberal construction, so that controversies between the same parties and concerning the same subject-matter may be adjusted in one action, in an action against several guarantors on a note, defendants were not entitled to file a cross-complaint against other guarantors who were not parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 301; Dec. Dig. § 149.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the Merchants' Trust Company against George R. Bentel and others. From a judgment for plaintiff, the defendant named appeals. Affirmed.

H. C. Millsap, for appellant. Patton & Page (Arthur C. Hurt, of counsel), for respondent Merchants' Trust Co. Schweitzer &

Hutton, G. C. De Garmo, and Tanner, Taft & Odell, for other respondents.

TAGGART, J. Action against three of eight guarantors of a promissory note. After the demurrers interposed to the complaint by the several defendants were overruled, the defendants Tonkin and Barlow answered to the complaint and the defendant Bentel, appellant here, filed an answer and also a cross-complaint, which was subsequently amended. In the latter he asked to have the other guarantors brought in and made parties to the action, and for judgment against them, and the two other defendants in his favor for the sum of \$1,000, alleged to have been paid by him on the note sued on. Demurrers to the amended cross-complaint filed by plaintiff, the defendant Tonkin, and the five parties asked to be brought in were sustained without leave to amend, and judgment went for plaintiff on its complaint against the three original defendants for the amount claimed. The defendant George R. Bentel appeals from the judgment and presents as ground for its reversal the erroneous ruling of the trial court in sustaining the demurrers to his amended cross-complaint without leave to amend.

But one question of law is presented: Was appellant entitled to have his co-guarantors made parties and their respective liabilities among themselves to pay any judgment obtained by plaintiff determined in this action? The obligation was joint and several, and either one of the guarantors was liable to the plaintiff for the full amount, so that it might have sued appellant alone. Section 438 of the Code of Civil Procedure and the authorities resting upon it which are cited by respondent have no application here, as it is not contended that the cross-complaint sets up any counterclaim existing in favor of the defendant-appellant against the plaintiff. The cause of action stated in the cross-complaint is one for contribution against the other guarantors on the note, and no allegations are made which can be construed to state a cause of action against plaintiff. The right of action rests upon the liability created by section 1432 of the Civil Code. In the consideration of sections 389 and 442 of the Code of Civil Procedure, we find that under the former the court must order parties brought in and a cross-complaint may be filed for that purpose "when a complete determination of the controversy cannot be had without the presence of (such) other parties." The controversy here was the obligation of the three defendants sued to pay the balance due on the promissory note. There was nothing in connection with that controversy which would justify a holding that the question of contribution among the co-guarantors was necessary to its determination.

Prior to 1907 section 442 read: "Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction, * * * he may * * * file * * * a cross-complaint." In 1907 (St. 1907, p. 706, c. 372) this section was amended to read, "Whenever the defendant seeks affirmative relief against any party to the action, relating to or depending upon," etc., thus limiting the application of the section to parties to the action. Accepting the rule to be, as claimed by appellant, that the code provisions are to receive a liberal construction to the end that controversies between the same parties and concerning the same subject-matter may be adjusted in one proceeding, and conceding for the sake of argument that section 442, prior to the amendment in 1907, authorized the bringing in of these new parties, and that the cases in this state cited by appellant support this view, we must consider the fact that all these cases were determined prior to the amendment of the section; the latest case cited being *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767, decided in February, 1904. It is apparent, then, that the amendment was intended to remove all doubt as to the practice in just such cases as the one at bar. The plaintiff was entitled to elect whether it would sue one or more of the defendants, leaving them to determine their respective liabilities in a controversy among themselves if they wished. This right of election would be of little avail if, even in a case in which there was no defense to the cause of action sued on, a plaintiff could be denied his remedy until contesting persons whom he had not made defendants to the action could be brought in by those whom he had made defendants and their controversies among themselves fought out on a cross-complaint filed in his action. If such were the proper construction of section 442 before its amendment, there can be no question that the cross-complaint which may now be filed by virtue of the provisions of the section is limited to affirmative relief against "parties to the action." The right to have new parties brought in under section 389 still exists, and this may be done whenever the court finds it necessary for a proper determination of the controversy before it; but this right is subject to the power of the court to determine the controversy before it without bringing in new parties "when this can be done without prejudice to the rights of others, or by a saving of their rights."

The trial court's ruling on the demurrers to the cross-complaint was correct, and should be sustained.

Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 79

DEL VECCHIO v. SAVELLI. (Civ. 543.)

(Court of Appeal, First District, California. Feb. 16, 1909. Rehearing Denied March 18, 1909; Denied by Supreme Court April 16, 1909.)

1. FRAUD (§ 50*)—ACTIONS—BURDEN OF PROOF—NEGATIVE AVERMENTS.

In an action for fraudulent representations as to the profits of a business by which plaintiff was induced to purchase an interest therein, where plaintiff based his case on negative averments that the profits since the purchase had not been equal to the representations, the burden was upon him to show that the averments were at least prima facie true.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 47; Dec. Dig. § 50.*]

2. FRAUD (§ 58*)—ACTIONS—EVIDENCE.

In an action for fraudulent representations as to the profits of a business by which plaintiff was induced to purchase an interest therein, evidence that for no week since plaintiff purchased the interest had the profits amounted to half what they were represented to have been before the purchase was sufficient to support an inference that the representations were false, where defendant managed the business, and had kept no books of account, so that additional evidence could not be reasonably expected of plaintiff.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

3. FRAUD (§ 58*)—PROOF—INFERENCES FROM FACTS.

Fraud is generally proved by inferences from facts and circumstances, and not by direct and positive proof, and a negative allegation does not require the same degree of proof to sustain it as does an affirmative allegation.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

4. FRAUD (§ 9*)—FRAUDULENT REPRESENTATIONS—SINGLE MATERIAL MISSTATEMENTS.

A single material misstatement knowingly made with intent to influence another to enter into a contract will, if relied upon by the other, afford as complete ground for relief as if it had been accompanied by a multitude of other false representations.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8; Dec. Dig. § 9.*]

5. FRAUD (§ 35*)—FRAUDULENT REPRESENTATIONS—AFFIRMANCE OF CONTRACT—WAIVER OF FRAUD.

Where a person having purchased an interest in a business did not rescind the contract after being satisfied that he had been deceived, but affirmed it, he did not waive the fraud merely by remaining in the business.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 30; Dec. Dig. § 35.*]

6. FRAUD (§ 23*)—FRAUDULENT REPRESENTATIONS—PERSONS ENTITLED TO RELY ON REPRESENTATIONS—MEANS OF KNOWLEDGE.

Representations as to past profits from a business by the owner to a prospective purchaser are as to a fact peculiarly within the knowledge of the person making them, so that they may be relied upon, and, if they are false and known to be false, they constitute fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 20; Dec. Dig. § 23.*]

7. ELECTION OF REMEDIES (§ 7*)—ACTS CONSTITUTING.

A purchaser of an interest in a business upon discovering that he has been defrauded may elect to rescind the sale and return the in-

terest or retain it and sue for damages, and the fact that he gave notice of rescission, but did not adopt that remedy would not preclude his suit for damages.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 12; Dec. Dig. § 7.*]

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by E. Del Vecchio against P. Savelli. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert H. Countryman, for appellant.
Devoto & Richardson, for respondent.

KERRIGAN, J. This action was brought to recover damages for alleged false and fraudulent representations made by defendant to plaintiff, with respect to two barber shops in San Francisco, in the course of negotiations resulting in a sale of an interest therein by defendant to plaintiff. The cause was tried before a jury, which returned a verdict in favor of the plaintiff, and assessed the damages at the sum of \$450. Judgment was entered accordingly, and this appeal is taken by defendant within 60 days thereafter.

The facts of the case briefly told are these: The plaintiff, who was himself not a barber, and wholly unfamiliar with that business, was sought by defendant, and urged by him to buy a half interest in the two shops, including their furniture and fixtures, good will, and a lease of property on which one of the shops stood, the defendant representing that the net profits of the shops from the beginning of the business down to that time amounted to \$100 per week. The plaintiff, relying implicitly upon these representations, on September 18, 1906, agreed to the purchase, and received a transfer of the one-half interest, since which time there has not been realized from the business during any week a profit of more than \$40, and many weeks the profit was very much less.

At the conclusion of the plaintiff's case, the defendant made a motion for a nonsuit, which was denied. Appellant claims that this motion should have been granted. It is true that no direct evidence was introduced to show that the profits of the shops prior to the sale of the half interest to plaintiff had not been the sum of \$100 per week; but the evidence did show that the profits of both shops for the first week thereafter were not \$100, but \$39, and that for no week during the months that the parties hereto were associated in business did they exceed \$40, and for many weeks they were much less. The averment of the complaint as to the profits of the shops was negative in character; but, as the plaintiff made it the basis of his suit, the burden was upon him to show that it was at least *prima facie* true

(U. S. v. Southern Colorado Coal, etc., Co. [C. C.] 18 Fed. 273), and this we think he did. Although plaintiff became a partner of appellant, no apparent change was made in the management of the business. Appellant had kept no books of account; and it seems to us that respondent introduced all the evidence on this point that could be reasonably expected of him. With these features of the case it must be remembered that fraud is generally proved by inferences from facts and circumstances, and not by direct and positive proof (14 Am. & Eng. Ency. of Law [2d Ed.] 195, 196), and that under circumstances like those here a negative allegation does not require the same degree of proof to sustain it as does an affirmative allegation (Kelley v. Owens [Cal.] 30 Pac. 596; 6 Ency. of Ev. 10, and note 12). We think that the circumstances of this case afforded a satisfactory inference that the representations as to the profits of the shops were false and fraudulent. It therefore follows that the court committed no error in denying the motion for nonsuit. A single material misstatement, knowingly made with intent to influence another to enter into a contract, will, if believed and relied on by that other, afford as complete ground for relief as if it had been accompanied by a multitude of other false representations. *Davis v. Butler* (Cal.) 98 Pac. 1047.

Appellant asserts that respondent by his conduct waived the alleged fraud, and that he is therefore precluded from maintaining this action. To be sure, respondent remained in the business after being satisfied that he had been deceived; but as respondent did not rescind the contract but, instead, confirmed it, he had the right to remain in the business. Aside from the circumstance that he did not begin this suit earlier, there is nothing in the record that at all tends to show waiver; and, as to this delay respondent explained it, and would no doubt have made a fuller explanation if the court had not, upon objection of appellant, excluded testimony offered for that purpose. It is conclusive, however, of the point to say that there was sufficient evidence to warrant the jury in believing—as it must have—that there was no waiver of the fraud by respondent. The appellant, as we have seen, made positive statements as to a material matter, namely, the profits of the shops, and under the law and the attending circumstances of this case respondent was entitled to act upon these statements and representations; and having done so, and in consequence suffered damage, he is entitled to relief. Representations as to the past profits realized from a business may be considered as a fact lying peculiarly within the knowledge of the party making them, so that they may be relied upon; and, if they are false

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and known to be false, they may amount to fraud. 14 Am. & Eng. Ency. of Law (2d Ed.) 126, and note.

In *Markel v. Moudy*, 11 Neb. 213, 7 N. W. 853, it was held that an action of deceit could be maintained for false statements as to the amount of business done and profits realized by the sellers while they were keeping the house. And in the case of *Messer v. Smyth*, 59 N. H. 41, it was held that misrepresentations by the vendor of land as to the quantity of hay that had been cut by him thereon, the quantity and quality of fruit that he had raised, the amount of pasturage it had furnished, the expenses of carrying it on, and the income of it were all statements of fact peculiarly within his knowledge, and upon which the purchaser had a right to rely, and that an action for damages could be maintained for the deceit. To the same effect are *Coon v. Atwell*, 46 N. H. 510; *Griffing v. Diller et al.*, 66 Hun, 633, 21 N. Y. Sup. 407. See, also, 1 *Bigelow on Fraud*, p. 533; *Dwight v. Chase*, 3 Ill. App. 67; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549.

We do not understand that appellant claims that respondent, upon the discovery of the fraud, should have taken steps to rescind the sale to maintain this action, for he certainly had his election to rescind the sale and return the property, or to retain the property and prosecute his claim for damages for false and fraudulent representations. He does, however, seem to claim that, as respondent did give notice of rescission (although subsequently he concluded that too much time had elapsed to make rescission effective), he was bound to pursue that remedy, and that, therefore, he could not maintain this suit for damages. No authorities are cited to support this theory, and comment is unnecessary.

We have examined all the points made on the rulings of the court as to the admission of testimony, and in reference thereto we find that no error was committed.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 83

DOLLAR v. INTERNATIONAL BANKING CORPORATION. (Civ. 577.)

(Court of Appeal, Second District, California. Feb. 16, 1909.)

1. CONTRACTS (§ 161*)—CONSTRUCTION—LIMITING ONE CLAUSE BY OTHERS.

In construing a contract, one clause, apparently conclusive as to a particular thing, may be enlarged or limited by other provisions of the instrument upon the same subject.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 743; Dec. Dig. § 161.*]

2. CONTRACTS (§ 162*)—CONSTRUCTION—DOUBTFUL OR CONFLICTING CLAIMS—PRESUMPTIONS.

In construing a contract, doubtful or conflicting claims should be construed against the party responsible for the ambiguity, and under the express provisions of Civ. Code, § 1654, the promisor is presumed to be such party.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 744; Dec. Dig. § 162.*]

3. CONTRACTS (§ 152*)—CONSTRUCTION—PREVENTING ALIENATION.

Where one construction of a contract involves the absolute destruction of the property right of alienation, and another sustains that right, and at the same time protects all parties from loss or injury, that construction should be given which will not forfeit property or property rights, and a provision involving a total forfeiture should yield to a provision involving only a partial forfeiture.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 152.*]

4. CONTRACTS (§ 170*)—CONSTRUCTION—ACTS OF PARTIES UNDER CONTRACT.

When the meaning of the language of a contract is doubtful, the acts of the parties done under it afford one of the most reliable clues to the intention of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.*]

5. BANKS AND BANKING (§ 152*)—NEGOTIABILITY—CERTIFICATES OF DEPOSIT—NOT TRANSFERABLE.

At the head of a certificate of deposit appeared the words "Not transferable." The certificate also provided that the "sum cannot be drawn unless this receipt is returned signed by the depositors," thus making it payable upon presentation by any one after having procured the signature of the depositor. Held, that the words "Not transferable" were only intended as notice that the instrument was not issued or received as a negotiable instrument under the law merchant, and was not intended to make it nonassignable.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 152.*]

6. APPEARANCE (§ 18*)—JURISDICTION—PLACE WHERE PARTIES APPEAR.

Where a certificate of deposit was payable in Hongkong, and after maturity demand was made there for payment, which was refused, suit could be brought thereon in California, where the parties appeared and questioned only the sufficiency of the pleading as stating a cause of action.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 76-78; Dec. Dig. § 18.*]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Robert Dollar against the International Banking Corporation. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed and remanded.

J. Wade McDonald, for appellant. Lloyd M. Robbins, for respondent.

ALLEN, P. J. The complaint filed in this action alleges that defendant is a corporation organized for the transaction of a general banking business in every and any place that it shall find convenient, and at all times mentioned was so engaged in such business at San Francisco, Cal., Hongkong and Shang-

hai in China; that in due course of business a corporation known as the American Commercial Company deposited in Hongkong with defendant 2,000 Mexican dollars, and that defendant promised to return the same, together with interest thereon at the rate of 5 per cent. per annum, one year thereafter, and thereupon executed and delivered to said depositor a written certificate of deposit in the words and figures following: "Notice of withdrawal given 26 November, 1904, due 26 November, 1905. International Banking Corporation. Deposit Receipt. Not transferable. 2,000 Locally. Hongkong, 26 November, 1904. Received from Messrs. The American Commercial Company, Dollars Two Thousand Locally as a deposit repayable here, bearing interest at the rate of five per cent. per annum, to remain until twelve months notice on either side expires. No. 2/124. For the International Banking Corporation. L. L. Fespner, Accountant. Chas. C. R. Scott, Manager." And on the back of said receipt the following words in print: "The within sum cannot be drawn, unless this receipt is returned, signed by the depositors; nor can the amount be drawn against in separate sums by cheque or draft. The interest will cease at the expiration of notice of withdrawal." It is further averred that the words "Not transferable" appearing at the top of said receipt were not intended by the parties to restrict its assignability, or to impair the right of the depositor to transfer the same and the obligation to repay, but that the sole purpose was to render the same nonnegotiable; that the effect of such words under the laws, usages, and customs in such matters at Hongkong on the date of said receipt was to destroy the negotiability of an instrument otherwise negotiable; that on November 1, 1905, the depositor, through its manager, assigned said certificate to E. H. Lamme, who on November 26, 1905, demanded payment of defendant, which was refused solely upon the ground that the defendant was not satisfied that the manager of the assignor had authority to execute such assignment. It is averred, however, that before such presentation a court of competent jurisdiction, in an action pending before it wherein the depositor was a party, had adjudged and determined that said manager had authority so to assign the certificate, and of all of which the defendant had notice; that thereafter Lamme assigned said certificate to plaintiff, who again made demand upon defendant at its banking house in San Francisco, which was refused. Non-payment is alleged, as is the value of said Mexican money in United States gold coin, and judgment is prayed for the equivalent in value in such United States gold coin. To this complaint defendant interposed a general demurrer, upon the sustaining of which, and plaintiff not desiring to amend

the complaint, judgment went for defendant, from which judgment plaintiff appeals.

The primary question, therefore, is as to the assignability of this certificate, having in view all of its terms. It will be observed that the words "Not transferable" appearing at the top are followed by a subsequent stipulation that "the sum cannot be drawn unless this receipt is returned signed by the depositors," not returned by the depositors and signed, but returned by any person with such signatures thereon. These apparently contradictory stipulations render the instrument somewhat uncertain in its terms, and it requires a construction as to what was the intent of the parties at the time. Without referring to the admitted allegation in the complaint as to what the true intent of the parties was in the use of the words "Not transferable," the character of the instrument, the circumstances surrounding its execution, as appears from the complaint, would indicate that the words "Not transferable" were used in a manner otherwise than as restricting the right of transfer, which is the essential element of ownership, and that the use thereof was only intended as a notice that the instrument was not issued or received as a negotiable instrument under the law merchant. It is said by our Supreme Court in *San Diego v. Granniss*, 77 Cal. 514, 19 Pac. 876, that "one clause of a contract, apparently conclusive as to a particular thing, may be enlarged or limited by other provisions of the instrument upon the same subject." Again, it is a cardinal rule of construction that doubtful or conflicting claims in an agreement should be construed against the party responsible for the ambiguity. The promisor is presumed to be such party. Section 1654, Civ. Code; *Rankin v. Amazon Insurance Co.*, 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460. Where one construction involves the absolute destruction of the property right of alienation and another sustains such right and at the same time protects all parties from loss or injury, that construction should be given which would not forfeit property or property rights. A provision involving a total forfeiture should yield to a provision involving only a partial forfeiture. *Madison v. Northwestern, etc., Ins. Co.*, 141 Cal. 484, 75 Pac. 113. Applying these rules and giving full effect to that provision of the contract which made it payable upon presentation by any one after having procured the signature of the depositor thereto, we are impressed with the conviction that it was not intended by the use of the words "Not transferable" to destroy the assignable character of the instrument. This construction is in harmony with the intent of the parties as evidenced from their subsequent acts. It is admitted by the demurrer that, when the instrument as assigned, and after maturity was presented for payment, that defendant made no objection to the fact of the

assignment, nor raised any point as to the nonassignable character of the instrument, but simply objected to the sufficiency of the assignment in the manner made. "When the meaning of the language of a contract is doubtful, the acts of the parties done under it afford one of the most reliable clues to the intention of the parties." *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406. Further than this, it is admitted by the demurrer that the intent of the parties was that the instrument should have the effect given by the construction hereinbefore suggested, and that by the laws, customs, and usages of the place of the contract the effect of such language was not to establish its nonassignable character. We think, then, that a proper construction of this instrument is to say that it was intended to be issued and was issued as an assignable instrument, but not negotiable in the sense where the term "negotiable" is applied to commercial paper.

Entertaining these views, we deem it unnecessary to pass upon the other question presented by appellant, which relates to the policy of the law in disregarding stipulations of nonassignability where the nature of the thing contracted for, or the circumstances of the case do not show that the skill, credit, or other personal quality or circumstance of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract.

The instrument was made payable at Hongkong, and, if assignable, demand was made after maturity at the place stipulated for payment, and which payment was refused. No reason suggests itself why thereafter suit might not be brought thereon in the courts of this state, where the parties enter an appearance and question only the sufficiency of the pleading as stating a cause of action.

We think the court erred in sustaining the demurrer to the complaint, and the judgment is reversed and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 57

CASEY v. RICHARDS. (Civ. 553.)

(Court of Appeal, Second District, California. Feb. 12, 1909.)

1. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

The weight of the testimony, the credibility of the witnesses, and the inferences to be drawn from the evidence are for the trial court, and its findings supported by an inference reasonably drawn from the evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

2. BROKERS (§ 49*)—EMPLOYMENT—COMPENSATION—WHEN EARNED.

Where a broker, under contract to procure a purchaser of real estate, employed a third

person to assist in procuring a purchaser for a share of commissions, and the third person showed another how he could make money by purchasing the property and the broker sold the property to him, the right of the third person to recover his share of the commissions was established.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 70; Dec. Dig. § 49.*]

3. APPEAL AND ERROR (§ 1047*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

A party objecting to proper evidence admitted by the court is not prejudiced by the act of the court in reserving the ruling on the objection and in subsequently failing to dispose thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4147; Dec. Dig. § 1047.*]

4. EVIDENCE (§ 442*)—PAROL EVIDENCE—ADMISSIBILITY.

A written agreement, whereby a broker, under contract to procure a purchaser of real estate, employed a third person to procure a purchaser for a specified share of the commissions, provided the terms were complied with, unaccompanied by any other written instrument expressing the terms which were to be complied with, is incomplete, and parol evidence of the terms is admissible in an action wherein the written agreement is pleaded as but a memorandum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1884; Dec. Dig. § 442.*]

5. BROKERS (§ 85*)—ACTION FOR COMMISSION—EVIDENCE—ADMISSIBILITY.

In an action by one employed by a broker under contract to procure a purchaser of real estate to assist in procuring a purchaser, the testimony of plaintiff and a third person as to the sale and purchase of the property was properly received in evidence in support of the complaint alleging negotiations by which plaintiff induced one to purchase the property, and to show that the purchase was the result of plaintiff's labors.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 106; Dec. Dig. § 85.*]

6. APPEAL AND ERROR (§ 970*)—DISCRETION OF TRIAL COURT—REOPENING CASE—REVIEW.

The reopening of a case to permit further testimony on behalf of a party who had rested being within the discretion of the trial court, its action will not be disturbed unless abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3851; Dec. Dig. § 970.*]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by E. T. Casey against I. N. Richards. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Stephens & Stephens, for appellant. Edward L. Payne, for respondent.

TAGGART, J. Action on a contract to recover share of commissions for sale of real estate by one real estate agent from another. Judgment was for plaintiff, and defendant appeals from the judgment and from an order denying his motion for a new trial.

Defendant was the agent of the owner of an 80-acre tract of land lying near the city of Los Angeles, for the sale of which he was to receive a commission. Plaintiff un-

dertook to procure a purchaser for the land, and as evidence of the compensation agreed to be paid for such services to be rendered by him defendant executed and delivered to plaintiff a writing as follows: "If the 80 acres is sold at \$1,650, amounting to \$132,000, and the terms is complied to and the \$44,000 paid you are to have \$1,650.00 commission out of the deal. I. N. Richards. Jan. 5, 1905." The terms to be complied with in earning the commission required the payment of \$10,000 cash and \$34,000 within 90 days. The complaint alleges that plaintiff procured a purchaser for the property according to agreement, and sets out in detail certain negotiations had by him with the officers of the McCarthy Company, the purchaser, which were instrumental in making the sale. The answer admits the employment of plaintiff by defendant on the terms mentioned and the sale of the property by the owner to the McCarthy Company on February 19, 1906, through the agency of defendant, for the sum named, \$132,000 on substantially the terms alleged by plaintiff, but denies that plaintiff was in any way instrumental in securing the McCarthy Company as a purchaser for the tract, and denies the performance by plaintiff of the acts alleged by him to have been done in inducing the McCarthy Company to buy said lands. Defendant alleges that the written promise of defendant to pay the \$1,650 was procured by plaintiff by fraud, and that the contract created thereby was rescinded on January 8, 1906, and also that it was without consideration. All the allegations of the complaint are found by the court to be true, except in respect to a mere clerical error in a date; and the allegations of fraud in the making of the contract and the rescission thereof by defendant, as well as the want of consideration, are negatived, as are practically all of defendant's allegations as to the details of the negotiations leading up to the sale of the property to the McCarthy Company. There is an express finding that the McCarthy Company was induced to make the purchase through the representations and negotiations with plaintiff, and that the latter performed all the acts required of him to fully complete his services under the contract, and was entitled to judgment for the \$1,650 and costs.

The principal reason urged for a reversal of the judgment is that the evidence is insufficient to sustain the findings and decision. The 22 specifications of insufficiency assign *seriatim* each of the findings as "contrary to the evidence," beginning with the general finding, that all the allegations of the complaint are true, and concluding with the finding that no part of the \$1,650 has been paid. A sufficient reply to this is that in the testimony of the plaintiff and his witnesses, particularly that of the two McCarthys, there is evidence to sustain all these findings. The testimony of the plaintiff and defendant was

in conflict as to most of the details of the transaction, and in that of the former there are some inconsistencies, but the trial court accepted as true such portions as it believed entitled to credit and based its findings on these. The cross-examination of the plaintiff discloses that his hearing was imperfect, and the trial court may have attributed any differences in his testimony to this. The case is a forceful illustration of the wisdom of the rule which leaves to the trial court all questions as to the credibility of witnesses, the weight of their testimony, and the determination of which inference of fact, if more than one can be reasonably drawn from the evidence, shall be made the basis of the judgment in the case. It would be impossible for an appellate court to determine whether the cross-examination of the plaintiff, where the discrepancies appear, was so conducted as to elicit the plaintiff's views as he intended to express them or not. The record discloses that during a portion of the time at least the minds of counsel for defendant and that of plaintiff did not meet. So long as the findings of the trial court are supported by an inference which may be reasonably drawn from the evidence, it is of no avail to an appellant to present for the consideration of this court some other inference of fact which may also be deduced therefrom. It matters not that it may be made to appear to this court that the better reason supports the inference of appellant.

It does not defeat the right of plaintiff to recover because his services were limited to inducing the McCarthy Company to purchase by showing to its members how the investment would prove profitable, while the direct negotiations were left to the defendant. In the language of plaintiff quoted in appellant's brief appears a complete statement of the division of labor between Richards and plaintiff in making the sale: "I was to show McCarthy Company how they were to make a quarter of a million dollars out of the property. And Richards was to sell the property to McCarthy. He was to negotiate with the McCarthy Company." Under such an agreement, it was not necessary that plaintiff should either bring Richards and McCarthy together, or that he should have anything to do with the direct negotiations between seller and buyer in order to earn his commissions. He induced McCarthy to make the purchase, the court so finds, and the evidence sustains the finding.

Errors of law occurring during the trial are also made a ground of the motion for a new trial. The objections to the testimony of plaintiff in explanation of the meaning of the clause, "if the terms is complied to," were properly overruled. It is not clear from the record whether two of the three rulings of the trial court upon the objections of defendant to this testimony were made or reserved. Error is assigned in both

ways—in overruling the objection, and by way of irregularity of the court in reserving the ruling and not subsequently disposing of the objection. It is apparent that no injury was done appellant by reserving the ruling and failing to act upon it, if the evidence was admissible. According to plaintiff's testimony, which was not contradicted, there was no other writing, or written contract, expressing in detail the terms which were required to be complied with. That there were terms to be complied with which did not appear in the memorandum pleaded is expressly stated by that writing, and it was proper to show the parol terms to which the language referred. This was not incompetent upon the ground that it was not in writing, as the contract of employment itself is not one required to be in writing. *Gorham v. Heiman*, 90 Cal. 346, 27 Pac. 289. The writing introduced does not purport to be anything but a memorandum and is only pleaded as such, and the terms of the contract rest in parol. In the case of *Aldis v. Schleicher*, 99 Pac. 526, cited by appellant, the complaint was held to be insufficient because it did not allege that the employing real estate agent, who was defendant in the action, either had received, or was entitled to recover from the seller, the commission, for a share of which the plaintiff was suing. The relations between the defendant and the seller in that case were executory, and there was no allegation that the defendant had received his commission from the owner, and there had been no payment of the commission to the defendant, as in the case at bar. It was there held that in the absence of any allegation of written authority to sell, or any other form of enforceable obligation upon the part of the owner to pay a commission to the defendant, the plaintiff was not entitled to recover. In other words, that until it was shown either that the defendant had received a commission, or was legally entitled to recover one from the owner, there was no commission in which the plaintiff could share.

The testimony of plaintiff and J. P. McCarthy in regard to the sale and purchase of lots by plaintiff was properly admitted in support of the allegation of the complaint as to the negotiations by which plaintiff induced the McCarthy Company to purchase the land from the defendant, and to establish that the purchase was the result of plaintiff's labors. The reopening of the case to allow further testimony on behalf of the plaintiff rested in the discretion of the trial court. It is not made to appear that this discretion was abused. We find no prejudicial error in the record.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 89

D. I. NOFZIGER LUMBER CO. v. WATERS
et al. (Civ. 606.)

(Court of Appeal, Second District, California.
Feb. 16, 1909.)

1. MECHANICS' LIENS (§ 136*)—PROCEEDINGS TO PERFECT NOTICE OF LIEN—IDENTIFICATION OF PROPERTY.

Under Code Civ. Proc. § 1187, requiring the notice of lien to describe the property to be charged sufficiently for identification where the contract erroneously described the property as lot 18, block 5, of a certain tract, instead of block 4, and the notice of lien followed the description in the contract, the lien could not be enforced against lot 18, block 4.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 213-224; Dec. Dig. § 136.*]

2. APPEAL AND ERROR (§ 1107*)—DETERMINATION—CHANGE OF LAW—STATUTE—RETROACTIVE OPERATION.

Code Civ. Proc. § 1203a (St. 1907, p. 858, c. 474), providing that certain mistakes or errors in the statement in mechanic's lien proceedings shall not invalidate the lien, unless fraudulently made, etc., being enacted after all the proceedings were taken herein, its effect upon errors in the notice of claim in such proceedings will not be determined.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4399; Dec. Dig. § 1107.*]

3. MECHANICS' LIENS (§ 164*)—LIENS OF MATERIALMEN—EXTENT.

Under Code Civ. Proc. § 1183, providing that unless contracts between the owner and contractor are in writing and give the names of the parties, a description of the property, etc., they shall be void, and the labor and materials furnished by all persons except the contractor shall be deemed furnished at the instance of the owner, and they shall have a lien for the value thereof, the effect of a failure to set out the matter specified is the same as if there was no contract, and in either case, if there is a valid lien, the owner is liable for the full value of the materials.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 289; Dec. Dig. § 164.*]

4. MECHANICS' LIENS (§ 136*)—PROCEEDINGS TO PERFECT—EFFECT OF DEFECTS IN NOTICE OF CLAIM.

The owner's failure to comply with Code Civ. Proc. § 1183, making him liable for the value of materials, etc., furnished, unless the contract contains the matters specified therein, would not relieve a materialman from complying with section 1187, requiring the notice of lien to contain a description of the property sufficient for identification, or estop the owner from denying the validity of the lien because of the claimant's failure to comply with that section.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 136.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the D. I. Nofziger Lumber Company against Martha B. Waters and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Scarborough & Bowen, for appellant. E. R. Bohan, for respondents.

SHAW, J. Plaintiff sues to foreclose two liens (one claimed in its own right and the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other as assignee) for materials furnished and used in the construction of a building for defendant Waters. Judgment went for Waters, and plaintiff appeals therefrom on the judgment roll.

Waters entered into a written contract with one Watkins, a contractor, whereby the latter agreed for the consideration specified in said contract, to be paid in installments as therein provided, to construct for Waters a building upon lot 18 in block 5 of the Hutchinson tract, in the city of Los Angeles, Cal., the cost of which building was upwards of \$1,000. This contract was duly filed with the county recorder. In form it complied with the provisions of section 1183, Code Civ. Proc., but through inadvertence and mistake, as found by the court, the description of the property to be affected thereby was erroneously inserted as being lot 18 in block 5, whereas the property owned by Waters so affected, and upon which the building was constructed, was lot 18 in block 4 of said tract. Plaintiff and its assignor furnished materials to the contractor to be used, and which were used, in constructing the building. These materials were not paid for; and thereupon plaintiff and its assignor filed their notices of liens, wherein, in describing the property, they copied the erroneous description contained in said contract and designated the property as being lot 18 in block 5 of said Hutchinson tract.

The court found, among other things, that plaintiff and its assignor, before filing said notices of liens, examined the contract under which the building was constructed, and thereby ascertained that such contract described the lot upon which the building was to be constructed as lot 18 in block 5 of said Hutchinson tract; that, in response to an inquiry as to the correctness of this description, the architect who prepared the plans for and superintended the erection of the building informed them that such description was correct; that such erroneous description was inserted in said contract and such information given by the said architect through inadvertence and mistake, and not for the purpose of deceiving or defrauding any one; that in said Hutchinson tract there was at the time a lot numbered 18 and a block numbered 5, also a lot numbered 18 and a block numbered 4, the last-named lot being the sole and only one then owned by defendant Waters, and upon which said building was erected. As a conclusion of law the court found that the notices of said liens which it was sought to foreclose did not contain a description of the property to be charged with the liens sufficient for identification, and that the erroneous description in the contract and information regarding the description given by said architect did not estop defendant Waters from disputing the validity of the liens.

The questions involved are (1) the sufficiency of the description under section 1187,

Code Civ. Proc.; and (2) whether the facts found estop defendant Waters from questioning the sufficiency of the description.

Regarding the first point, section 1187 of the Code of Civil Procedure provides that the notice of lien shall, among other things, contain a description of the property to be charged with the lien sufficient for identification. Neither plaintiff nor its assignor seeks to identify the property by describing the building and its general location, but they resort to a description by lot and block according to the plat or map, which is not only certain but constitutes the usual means of identifying urban property. While the description, "lot 18, block 5, of the Hutchinson tract" (giving book and page where official map thereof is recorded in the proper office), affords a ready means for locating such lot, it in no wise identifies lot 18, block 4, against which it is sought to enforce the liens. Indeed, the accurate and certain description in the notice of lien upon lot 18 in block 5 necessarily precludes the idea that such description could have reference to or afford any means for identifying property in some other block in said tract. *Willamette, etc., Co. v. Kremer*, 94 Cal. 205, 29 Pac. 633; *Fernandez v. Burleson*, 110 Cal. 166, 42 Pac. 566, 52 Am. St. Rep. 75; *Goodrich Lumber Co. v. Davie et al.*, 13 Mont. 76, 32 Pac. 282. The liens cannot be enforced against the property described as lot 18 in block 4 of said tract, for the reason that no claim of lien was filed containing a description whereby said property could be identified. We forbear any discussion of the effect which section 1203a (St. 1907, p. 858, c. 474) might have upon the case, for the reason that all proceedings in the action were had prior to the enactment of said section.

Appellant's second point is likewise without merit. Under the constitutional direction (section 15, art. 20, Const. Cal.) the Legislature has enacted sections 1183, 1187, Code Civ. Proc. By complying with the provisions of the former section the owner may limit the amount to which his property may be subjected to the enforcement of liens for materials furnished at the instance of the contractor. Failing to do so, the materials are deemed to be furnished at the personal instance of the owner, and the party so furnishing the same has a lien for the entire value thereof (*Southern Cal. L. Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516), provided he complies with the provisions of said section 1187 in filing the demand containing, among other things, a description of the property sufficient for the identification thereof. The fact that the owner neglects to avail himself of the means afforded by section 1183 for limiting the amount of liens which may be enforced against his property cannot relieve the materialman from complying with the provision of section 1187 thereby made a condition, without regard to the validity of the contract, of enforcing a lien for mate-

rials furnished. The effect of a failure to set forth in a contract or memorandum filed in lieu thereof all matters specified in section 1183, so far as regards the rights of one furnishing material, is identically the same as though there had been no attempt to make a contract. In either case, such failure, if there be a valid lien, subjects the owner to the penalty of paying the full value of the materials furnished. *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150. But it does not estop the owner from controverting the validity of a lien upon the ground that the claimant has neglected to comply with any requirement prescribed by section 1187 as a condition of enforcing his lien.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 63

McDONELL v. McDONELL. (Civ. 539.)

(Court of Appeal, First District, California.
Feb. 15, 1909.)

1. DEEDS (§ 211*)—VALIDITY—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to quiet title held to show that the defendant in deeding his property to plaintiff without consideration understood the nature of the act, and that it was not done through the influence of the donee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 641; Dec. Dig. § 211.*]

2. DEEDS (§ 15*)—REQUISITES AND VALIDITY—NECESSITY FOR CONSIDERATION.

That a conveyance is without consideration is in itself not sufficient to avoid the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 23; Dec. Dig. § 15.*]

3. DEEDS (§ 203*)—EVIDENCE—VALIDITY—CONSIDERATION.

That a deed was without consideration is a circumstance that may be considered on the question of fraud and undue influence in executing the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 605, 609; Dec. Dig. § 203.*]

4. NEW TRIAL (§ 64*)—GROUNDS—INCORRECT FINDING ON IMMATERIAL ISSUE.

An incorrect finding on an immaterial issue is not ground for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 129; Dec. Dig. § 64.*]

5. APPEAL AND ERROR (§ 528*)—BILL OF EXCEPTIONS—AFFIDAVITS—QUESTIONS CONSIDERED.

Affidavits as to newly discovered evidence that are not contained in the bill of exceptions or in any way authenticated cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2374; Dec. Dig. § 528.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by E. R. McDonell against P. A. McDonell. Judgment for plaintiff, and defendant appeals. Affirmed.

A. F. St. Sure and Geo. W. Reed (Earl H. Webb, of counsel), for appellant. R. B. Tappan and Chas. L. Colvin, for respondent.

HALL, J. This is an appeal from a judgment against defendant and the order of the court denying his motion for a new trial. Since the action was brought defendant died, and in due time an order was made substituting as defendants his executors, and later, it appearing that before his death defendant had by deed conveyed the subject of the action to A. F. St. Sure, an order was made substituting him as defendant. In this opinion, however, whenever we refer to the defendant we mean the original defendant. The action was brought to quiet the title of plaintiff to a piece of real estate situate in Alameda county against the claim of defendant thereto. The complaint is substantially in the usual form of an action to quiet title, except that it appears therefrom that plaintiff deraigned his title from defendant through a deed of gift executed and delivered by defendant to plaintiff on the 10th day of December, 1903. A copy of the deed is attached to the complaint and made a part thereof. Upon the trial of the issues presented by the pleadings the court found the facts in favor of plaintiff, and rendered judgment accordingly.

It is not pretended that defendant did not execute the deed set forth in plaintiff's complaint, but the defense is made that he was procured to sign the same through the fraud and undue influence of plaintiff, while mentally incapacitated by illness, and in the belief that he was making a testamentary disposition of his property to his four nephews and two nieces share and share alike. The case hinges upon the question as to whether or not the findings against defendant upon these contentions are sustained by the evidence.

Plaintiff is a nephew of defendant, and had lived with him for many years. Plaintiff's late wife (deceased before this transaction) had also lived with defendant for 15 years before her marriage to plaintiff. Defendant was 77 years of age and ill, and doubtless expected to die of such illness, though he in fact recovered. The deed was without consideration other than love and affection. Conceding to the fullest extent that this is a case for the application of the rule stated by appellant, "that where a person, enfeebled in mind by disease or old age, is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee," such proof was furnished. The most that can be said in favor of the contention of appellant is that there is a conflict in the evidence. There is evidence to the effect that the first suggestion that defendant should do anything

about his property or his affairs came from his physician, who told defendant that he might die shortly, and should attend to any business that he desired to do right away. Plaintiff testified that, after the doctor had gone, defendant stated his purpose to give the property to plaintiff, that defendant said: "Now, there is only you and your baby left, and you go over and get Billy Simpson to come over, and I will give you a deed." Defendant got a deed from a tin box containing a description of the property so plaintiff could take it over to Mr. Simpson in order that he could make out the deed at his office. Plaintiff took this deed to Mr. Simpson, who is an attorney at law and a notary public, and he prepared a gift deed from defendant to plaintiff of the property in suit. Later in the day Mr. Simpson with plaintiff brought the deed to defendant, and both testified that Mr. Simpson explained to him that it was a gift deed of the property from defendant to plaintiff. The testimony of these two witnesses is clearly to the effect that defendant was informed that he was deeding the property to plaintiff, and that he understood what he was doing, and expressly stated that he wanted the property to go to plaintiff, and assigned as a reason for the execution of a deed that he wanted to avoid any probate. After signing the deed, defendant directed Mr. Simpson to hand it to plaintiff, which was then done. If the court believed this testimony, it is apparent that the proposition to deed the property to plaintiff came from defendant, and that the deed was prepared by an attorney of his own selection, and executed by defendant freely, voluntarily, with full knowledge of its effect. As opposed to this, defendant introduced testimony from his physician as to his mental condition, to the effect that he was not clear in his mind. But appellant is obliged to concede that the testimony of this witness upon cross-examination was not altogether consistent with his direct evidence. The testimony of the defendant himself is to the effect that the document he signed was not explained to him, and that, when he signed it, he believed it to be a will. In his own testimony, given about 18 months after the transaction, he does not attempt to make it appear that his mind was not clear at the time he signed the document, but, on the contrary, is very clear and positive in his statements of what occurred at that time. His testimony simply raised a conflict between himself and plaintiff and Mr. Simpson.

The fact that the conveyance was without consideration is in itself not sufficient to avoid the deed. It is a circumstance to be considered by the court upon the question of fraud and undue influence. "To hold that gifts voluntarily made, and with full knowledge of all the facts, and of the nature and

effect of the transfer, should be set aside because the donor had divested himself of his property, would be to establish a rule that no man can make a voluntary disposition of his estate except by will." *Soberanes v. Soberanes*, 97 Cal. 145, 31 Pac. 910. See, also, *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599; *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17. The court having found against the contention of defendants as to fraud, undue influence, and want of capacity, any finding upon the question of want of consideration became immaterial.

Want of consideration was not pleaded in connection with the defense of fraud and undue influence, but was pleaded as a separate and distinct defense, and as so pleaded it constituted no defense at all, and no finding on it was required; and, although the court incorrectly in point of fact found against the issue of no consideration, such finding was on an immaterial issue, and does not require a new trial.

There are printed in the transcript certain affidavits upon the question of newly discovered evidence, but, as they are not contained in the bill of exceptions or in any way authenticated, they cannot be considered by this court. *Supreme Court Rule 29* (78 Pac. xii); *People v. Wrin*, 143 Cal. 12, 76 Pac. 646; *Esert v. Glock*, 137 Cal. 533, 70 Pac. 479; *People v. Gay*, 141 Cal. 42, 74 Pac. 443.

The judgment and order must be affirmed; and it is so ordered.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 70

WAECHTER v. ATCHISON, T. & S. F. RY. CO. (Civ. 572.)

(Court of Appeal, Second District, California. Feb. 15, 1909.)

1. RAILROADS (§ 33*)—MUNICIPAL CORPORATIONS—ACTIONS—VENUE.

Civ. Code, § 407, conferring on foreign railroad companies the same rights and powers as to the construction of roads and the exercise of eminent domain as are conferred on domestic companies, does not make applicable to foreign companies the provisions of Const. art. 12, § 16, fixing the venue of actions against domestic companies. Hence a foreign railroad company need not be sued for the loss of a passenger's baggage in the county wherein its principal office in the state is situated.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 33.*]

2. CORPORATIONS (§ 666*)—FOREIGN CORPORATIONS—ACTIONS—VENUE.

In the absence of any statutory provision fixing the place for trial of actions against a foreign corporation, such corporation is not entitled to have the venue of an action against it changed to the county wherein its principal business office in the state is situated.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 666.*]

3. CORPORATIONS (§ 666*)—FOREIGN CORPORATIONS—ACTIONS—CHANGE OF VENUE.

The mere allegation, in the affidavit for change of venue, made by a foreign corporation that defendant's principal place of business in the state is in a specified county is neither evidence that it has acquired such a principal place of business in the state by complying with Civ. Code, § 408, requiring foreign corporations to file a copy of their charter or articles of incorporation with the Secretary of State, and also with the county clerk of the county where the principal place of business in the state is situated, nor sufficient to show that it bases its demand for change of venue to that county on a residence so acquired.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 666.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Terez Waechter against the Atchison, Topeka & Santa Fé Railway Company. From the order denying a change of venue, defendant appeals. Affirmed.

E. W. Camp, U. T. Clotfelter, A. H. Van Cott, and M. W. Reed, for appellant. G. H. Gould, for respondent.

TAGGART, J. Appeal from an order denying defendant's motion for change of place of trial. Action to recover the value of a trunk lost by plaintiff while traveling as a passenger on defendant's railway.

Plaintiff's ticket was for a round trip from Norfolk, Va., to San Francisco, Cal., and return, with stop-over privileges. The trunk was checked at Santa Barbara for Norfolk, Va., on the return trip, and, as alleged by the complaint, was transported by the Southern Pacific Company to Los Angeles, where it was delivered to defendant, and by the latter negligently lost and destroyed in transit. The complaint alleges defendant to be a corporation organized and existing under the laws of the state of Kansas, and operating a line of railroad from Los Angeles, Cal., to Chicago, Ill. The affidavit of the general manager of the defendant, filed with the demand for change of place of trial, admits the residence of the defendant to be Kansas, but avers that its principal place of business in the state of California is, and, for a long time prior to the commencement of this action has been, in the city of Los Angeles, county of Los Angeles, state of California; that it is not now, and never has been, in Santa Barbara county, and that no part of its railway lies in that county. Upon this showing the defendant demanded that the place of trial of the action be changed from Santa Barbara county, which was designated by the plaintiff in her complaint, to Los Angeles county.

Defendant's contention is that it has a right to have the motion granted by virtue of section 16, of art. 12 of the Constitution of the state, which is as follows: "A corporation or association may be sued in the county

where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." It is contended that this section is made to apply alike to foreign and domestic corporations by virtue of the provisions of section 407 of the Civil Code, and that it follows, from the absence of allegation in the complaint that the contract was made, or to be performed, or that the obligation or liability arose, or the breach occurred, in Santa Barbara county, and it being made to appear by the affidavit of defendant's general manager that its principal place of business in the state of California is situated in Los Angeles county, that defendant is entitled to have the action tried in the latter county. No case has been cited which sustains this view. That such a right of change exists as to domestic corporations is clearly established. This is based upon the principle that a corporation, like a natural person, has a place of residence, and that such residence is at the place where, by its articles of incorporation, it has its principal place of business. This is the general rule applied in determining the residence of a corporation under section 395 of the Code of Civil Procedure. *Jenkins v. California Stage Co.*, 22 Cal. 538; *Cohn v. Central Pacific R. Co.*, 71 Cal. 488, 12 Pac. 498; *McSherry v. Penn. Co.*, 97 Cal. 643, 32 Pac. 711; *Trezevant v. Strong Co.*, 102 Cal. 48, 36 Pac. 395; *Buck v. Eureka*, 97 Cal. 139, 140, 31 Pac. 845, 846. In the latter case it is said: "It is * * * settled law of this state that a domestic trading corporation resides, within the meaning of section 395 of the Code of Civil Procedure, in the county where its principal place of business is."

The rights of foreign corporations, in respect to change of place of trial of an action begun under section 395, has been clearly declared in *Thomas v. Placerville G. Q. M. Co.*, 65 Cal. 600, 4 Pac. 641. On page 603 of 65 Cal., and page 643 of 4 Pac., appears the following language: "To summarize: A foreign corporation exists in and by virtue of the law of a foreign country, and no statute of this state has ever given a local [county] residence to such a corporation, where alone it can be sued. Its liability to be sued in the courts of this state no more confers a county residence upon it, than does the comity which permits it to apply to our courts for the enforcement of a contract or the redress of a wrong." Our attention has not been called to any case in which this rule has been modified in this state. The principle of comity upon which the right rests has been recently reasserted in the case of *Anglo-Cal. Bank v. Field*, 146

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Cal. 644, 650, 80 Pac. 1080. In Idaho the statute corresponding with section 395 of our Code of Civil Procedure is in practically the same language, and in applying that statute the Supreme Court of that state says: "In the absence of any statutory provision fixing the place of trial, in actions against foreign corporations, in any particular county we see no reason why such actions should not be brought and maintained in any county in this state." An order of the trial court denying a motion for change of place of trial was affirmed. This rule was adopted by the Idaho court from Thompson's Commentaries on the Law of Corporations (volume 6, § 7426). *Boyer v. Northern Pac. Ry. Co.*, 8 Idaho, 74, 66 Pac. 826, 70 L. R. A. 691. See, also, *Olson v. Osborne*, 30 Minn. 444, 15 N. W. 876.

We do not regard section 407 of the Civil Code as having the bearing upon this question which appellant contends. Neither is it a new law calling for construction and consideration, as, prior to its becoming a part of the Code by amendment in 1905, it was in force as a general statute from the time of its enactment in 1880. St. 1880, p. 21, c. 28. Its primary purpose was apparently to place foreign railway and transportation companies upon an equal standing in this state with domestic corporations, in respect to building railways and exercising the right of eminent domain, and the rights and privileges incident thereto. To construe it as taking such companies out of the operation of the provisions of the general section relating to the place of trial of actions would be to create a specially privileged class of nonresident corporations who would be favored above, not only nonresident natural persons, but all other foreign corporations that might be doing business in the state. This would not only result in creating a special class of corporate defendants in civil actions, but would also arbitrarily discriminate in favor of corporations against natural persons who were nonresidents. An application of the section which would have this result would render it obnoxious to the provisions of the Constitution prohibiting special legislation, and is clearly untenable.

It is not urged that the defendant established a principal place of residence in this state by complying with the provisions of section 408 of the Civil Code, so that the question of the residence in the state which defendant would acquire by a compliance with that section is not before us. But if this were shown to have been done, the defendant would not thereby have become a domestic corporation. *St. Louis & S. F. Ry. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802. Organized and existing under the laws of Kansas, it was a resident of that state, and foreign to this, and its principal

place of business for the purpose of establishing its residence was in that state. *Beale on Foreign Corporations*, §§ 73, 74; *Blumenthal v. Hudson Boot Co.*, 60 Hun, 586, 15 N. Y. Supp. 628; *Standard Oil Co. v. Commonwealth*, 110 Ky. 821, 62 S. W. 897, 898. The mere naked averment in the affidavit of its general manager that defendant's principal place of business in the state of California was in the county of Los Angeles was neither evidence that it had acquired such a principal place of business in the state by complying with the law, nor sufficient to show to the trial court that it predicated its demand for a removal of the cause to Los Angeles county upon a residence so acquired. A principal place of business in the state not expressly authorized by law, and the location of which is evidenced only by the affidavit of an officer of the foreign corporation, without sanction of the statute for such a proceeding, cannot be held to admit such a corporation to the constitutional rights and privileges of a domestic corporation.

No error appearing in the ruling of the trial court, its order denying the motion for change of place of trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 48

BAUMGARTEN v. MITCHELL et al.

(Civ. 560.)

(Court of Appeal, First District, California.)

Feb. 10, 1909.)

1. MORTGAGES (§ 587*) — FORECLOSURE — AFFECT ON OUTSTANDING LIEN.

The lien of a defendant in mortgage foreclosure who was served with process, and, after his demurrer to the complaint was overruled, made default, is extinguished by decree and sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1685; Dec. Dig. § 587.*]

2. JUDGMENT (§ 619*)—RES JUDICATA—DEFENSES CONCLUDED.

A defense which might have been, but was not, interposed to an action, is concluded by the judgment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1132; Dec. Dig. § 619.*]

3. MORTGAGES (§ 143*)—TITLE TO SUPPORT—TITLE OF MORTGAGOR.

The possession of property by the mortgagor is not adverse to the mortgagee or the purchaser at foreclosure sale until the expiration of the time allowed by law for redemption.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 281; Dec. Dig. § 143.*]

4. TENANCY IN COMMON (§ 15*)—RIGHTS OF CO-TENANTS—ADVERSE POSSESSION.

A tenant in common cannot be deprived of his property by the adverse possession of a co-tenant unless he is notified of the hostile and adverse claim of such co-tenant.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42–62; Dec. Dig. § 15.*]

5. ESTOPPEL (§ 32*)—EFFECT OF DEED.

After conveying land by deed pursuant to a decree of court, the grantor will not be allowed to claim that, when he made the deed, he was

not the owner of the land and to hold the land by adverse possession.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 81; Dec. Dig. § 32.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Solomon Baumgarten against David Mitchell, J. F. Baumgarten, and Henry Decker. From a judgment for defendant Decker, plaintiff and defendant Baumgarten appeal. Affirmed.

G. W. Langan, for appellant Solomon Baumgarten. Asa V. Mendenhall, for appellant J. F. Baumgarten. Aldrich & Gentry and B. McFadden, for respondent.

COOPER, P. J. This action was brought to quiet plaintiff's alleged title to lot No. 11 in block 30 in the city of Oakland. The defendant Decker filed a cross-complaint, alleging that he is the owner and seised in fee of the premises described in the complaint, and asking to have his title quieted thereto. The defendant J. F. Baumgarten filed an answer and cross-complaint, claiming that he is the owner of an undivided one-half of the premises, and praying that his title be quieted to such undivided half. The other defendants disclaimed any title or interest in the lot, and hence they are out of the controversy. The case was tried before the court, findings filed, and judgment entered in accordance therewith in favor of respondent Henry Decker, and against the Baumgartens, who are appellants.

The court finds that neither the plaintiff nor defendant J. F. Baumgarten is the owner or seised in fee or entitled to the possession of the said premises, but that defendant Decker is the owner in fee and entitled to the possession of the same, and to have his title quieted as against the plaintiff and as against defendant J. F. Baumgarten. The plaintiff and defendant J. F. Baumgarten, who is a son of plaintiff, have each appealed from the judgment.

As to appellant J. F. Baumgarten, in his brief he states as follows: "The evidence is insufficient to justify the findings and decision of the court in the following particulars: (1) The evidence is insufficient to justify the finding of the court that defendant J. F. Baumgarten has no interest, right, or title or estate whatsoever in or to said property; (2) the evidence is insufficient to justify the finding and decision of the court that defendant and cross-complainant Henry Decker is now, and ever since the 24th day of December, 1905, and prior to the commencement of this action, has been, the owner in fee and entitled to the possession of all said property, with the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof." After the above and other specifications of like im-

port the brief contains a copy of the complaint, a copy of the answer, and of the cross-complaint of defendant J. F. Baumgarten, a copy of the findings, conclusions of law and decree, a copy of a deed from plaintiff to defendant J. F. Baumgarten dated August 15, 1895, a copy of the notice of appeal, and nothing more. No argument is made in the brief as to why the evidence is insufficient, and no summary of the evidence is given.

It is stated that the deed from the plaintiff to said J. F. Baumgarten conveyed the title to the property to said J. F. Baumgarten; but the evidence is not pointed out to show that the finding of the court that said J. F. Baumgarten has "no interest, right, or estate" in said lot is not supported by the evidence. However, an examination of the evidence shows that in February, 1896, the plaintiff mortgaged the said lot to one Huttrell, which mortgage described the said lot as described in the complaint. This mortgage was foreclosed by the assignee of Huttrell, and in the foreclosure proceedings J. F. Baumgarten was made a party defendant. A decree was entered and the property sold to one Thorne. The title of Thorne thereafter passed by regular conveyances to defendant Decker. No suggestion is made that this foreclosure proceeding was not regular in all respects, nor is any claim made as to any irregularity in the deeds to Decker. The said J. F. Baumgarten only claimed, and now only claims, title to an undivided one-half of said property through the conveyance by plaintiff to him. We find, however, that by a judgment duly given and made by the superior court of Alameda county, in an action brought by the present plaintiff against the present defendant J. F. Baumgarten, it was adjudged and decreed that the said J. F. Baumgarten held the legal title to said undivided one-half in trust for plaintiff, and that, upon the payment by plaintiff to said J. F. Baumgarten of the sum of \$127.50, said J. F. Baumgarten execute and deliver a deed to plaintiff for said undivided one-half of said premises. This decree was made and entered in February, 1898, long after the mortgage to Huttrell. If the claim of said J. F. Baumgarten be conceded, that, by the terms of said decree, he was entitled to a lien on the premises so held by him in trust, the lien arose long after the mortgage was so made to Huttrell. The decree having established the fact that the legal title to the property was in plaintiff, and that there was due to J. F. Baumgarten the sum of \$127.50, it was incumbent upon said J. F. Baumgarten to set up said lien in the foreclosure proceedings, but he did not do so. After being served with process, and filing a demurrer, which was overruled, he made default. The decree was duly entered, and he did not appeal from it, and he cannot now be heard to claim that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he has a lien, and had a lien at the time of the foreclosure of said mortgage, which he did not in any way assert. What has been said as to the title passing by foreclosure proceedings to defendant Decker applies equally to plaintiff, as he was the mortgagor, a party defendant, and made default in the foreclosure proceedings.

The principal point relied upon by plaintiff is the claim that he acquired title to the property by adverse possession between May, 1897, and May, 1902. The evidence does not clearly show that during such period the plaintiff paid all the taxes, state, county and municipal, which were levied or assessed upon the said lot, but we need not place our decision upon that ground. The mortgage executed by plaintiff in February, 1896, was outstanding and in existence the greater portion of the time during which it is claimed the statute of limitations was running in favor of plaintiff. The sale under the decree of foreclosure conveyed the title to the plaintiff; and, as he was a party, the purchaser at such sale not only acquired his title, but he also acquired the right to be let into possession of the property at the expiration of the time allowed by law for redemption. To allow a mortgagor in possession of the mortgaged property continuously for five years to set up the statute of limitations against the mortgagee, or the purchaser at a foreclosure sale under a mortgage which was in existence during the time of such claim of adverse possession, would be something new in the law. It would upset and disturb many titles obtained through foreclosure sale, and enable the mortgagor to get the value of his land from the mortgagee, and then to keep the land because the mortgagee did not foreclose before the end of five years. We apprehend that this is the first time such a claim has been advocated in a court of justice.

Another complete answer to plaintiff's contention as to title by adverse possession is that during the time he claims to have held by adverse possession he held the title to the property as tenant in common with others, and did not notify such others of any hostile claim. The principle is well settled that the possession of one co-tenant is the possession of all, and the mere possession of one co-tenant has in it no element of hostility to his co-tenant. The co-tenant cannot be deprived of his property by the adverse possession of a co-tenant unless he is notified of the hostile and adverse claim of such co-tenant. In the record we find that in June, 1897, the plaintiff conveyed an undivided one-fourth interest in the property to one Aldrich. This title remained in Aldrich until June 13, 1902, when he conveyed to one Thorne, and the title thereafter passed through conveyances to defendant Decker. In May, 1897, a conveyance was made, through a decree of

court, in an action by Sarah Baumgarten, the wife of plaintiff, against plaintiff, whereby, under said decree and a deed made in pursuance thereof, an undivided one-half of the property passed to Sarah Baumgarten. This title thereafter remained of record in Sarah Baumgarten and her subsequent grantees until it passed by and through deeds or execution sales to defendant Decker. No attempt was made to prove notice of any adverse claim to the successive owners of the undivided one-half interest. The plaintiff will not be allowed to now claim that at the time he made these conveyances he was not the owner of the property which he purported to convey by the deeds which he executed and delivered. He will not be allowed to claim, after the execution of a note secured by mortgage upon the said premises, and the foreclosure of the said mortgage, that because he enjoyed the said premises during all of said time he may still enjoy them through a claim of adverse possession.

We conclude that the findings are supported by the evidence, and that the judgment of the lower court is correct.

The judgment is affirmed.

We concur: HALL, J.; KERRIGAN, J.

155 Cal. 402

LONG et al. v. CRAMER MEAT & PACKING CO. (Sac. 1514.)

(Supreme Court of California. March 26, 1909.)

1. APPEAL AND ERROR (§ 356*)—REVIEW OF EVIDENCE—TIME FOR APPEAL.

A review of the evidence cannot be had where the appeal is not taken within the time limited by the Code, for that purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1926; Dec. Dig. § 356.*]

2. COVENANTS (§ 58*)—COVENANTS RUNNING WITH THE LAND — COVENANT AS PART OF CONVEYANCE.

Under Civ. Code, § 1460, providing that certain covenants in grants of real property are appurtenant to the estates created, and pass with them, and section 1461, providing that the only covenants which run with the land are those specified and those incidental thereto, and section 1462, providing that every covenant in a grant of real property for its benefit runs with the land, an agreement by a person joining as a tenant in common with others in the purchase of lands not to herd or graze sheep thereon, not contained in a grant or in any other writing, but resting wholly in parol, is not a covenant running with the land.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 55; Dec. Dig. § 58.*]

3. COVENANTS (§ 69*)—COVENANTS RUNNING WITH THE LAND — COVENANTS CONFERRING BENEFITS.

Under Civ. Code, § 1460, providing that certain covenants in grants of real property are appurtenant to the estates created, and pass with them, and section 1461, providing that the only covenants which run with land are those specified and those incidental thereto, and section 1462, providing that every covenant in a grant of real property made for its benefit runs with the land, an agreement by a person joining as a tenant in common with others in the purchase of lands not to herd or graze sheep thereon, not being for the benefit of the property, but a restriction and limitation on its use, does not conform to the law as to the purpose for which a covenant running with the land may be created.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 67, 68; Dec. Dig. § 69.*]

4. COVENANTS (§ 84*)—PERSONAL COVENANTS — ENFORCEMENT IN EQUITY.

Though in a proper case equity will enforce a personal covenant imposing a restriction upon the use of land contained in a grant thereof against covenantor's grantee, it will not enforce a mere parol agreement by a person joining as a tenant in common with others in the purchase of lands not to herd or graze sheep thereon against his grantee.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 91; Dec. Dig. § 84.*]

5. EASEMENTS (§ 21*)—CREATION BY PAROL.

A mere parol agreement by a person joining as a tenant in common with others in the purchase of lands not to herd or graze sheep thereon cannot be held to impose a servitude upon the land enforceable against such person's grantee.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 59; Dec. Dig. § 21.*]

6. FRAUDS, STATUTE OF (§ 44*)—AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR.

An agreement between persons joining as tenants in common in the purchase of lands not to herd or graze sheep thereon is from its nature not to be performed within a year, and,

resting wholly in parol void under the statute of frauds (Civ. Code, § 1624, subd. 1).

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 66; Dec. Dig. § 44.*]

In Bank. Appeal from Superior Court, Lassen County; F. A. Kelley, Judge.

Action by John T. Long and others against the Cramer Meat & Packing Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Pardee & Pardee and Park Henshaw, for appellant. N. J. Barry, for respondents.

HENSHAW, J. This appeal is from the judgment. A review of the evidence is sought, but such review cannot be had, as the appeal was not taken within the time limited by the Code, for such purpose. *Wood v. Etiwanda Water Co.*, 122 Cal. 152, 54 Pac. 726. The right of appellant, therefore, is limited to a review of the rulings of the court and to a consideration of the question whether the judgment is supported by the findings.

The action was for an injunction and for damages ancillary thereto. The court decreed to plaintiffs an injunction and damages in the sum of \$350. The litigation arose out of the following matters, as disclosed by the pleadings and findings: The predecessors in interest in the plaintiffs and the predecessor in interest of the defendant joined as tenants in common in the purchase of certain detached parcels of land in the county of Lassen. It is found that "Charles Cramer [predecessor in interest of defendant] represented to said parties and to each of them [the predecessors in interest of the plaintiffs] that by purchasing said lands they could control the waters thereon, and thereby protect and secure for themselves the use and benefit of the surrounding ranges for their own herds of horses and cattle, and particularly that they could thereby prevent sheep from grazing upon said ranges, and that the said Charles Cramer then and there agreed to and with said parties and promised that if they would assist in the purchase of said lands, and would purchase the same in common with himself, that the same should and would always be used for the purpose of grazing, ranging, and pasturing and watering the horses and cattle of the respective parties, and their successors, and for no other purpose, and that under no circumstances would any sheep ever be allowed to range, graze, pasture, or water upon said lands or any part thereof so far as the same could be prevented by said Charles Cramer." It is found "that said purchase was made by said parties solely upon the aforesaid inducements, solicitations, representations, and promises of the said Charles Cramer and for no other reason or purpose, and said parties would not have advanced money to make

such purchases and would not have purchased said lands in common with said Charles Cramer, but for such solicitations, representations, inducements, and promises of said Charles Cramer; and except for the belief that they could thereby control the waters of said springs and streams and could thereby secure the surrounding ranges for the use and benefit of their own horses and cattle and could thereby protect said ranges from and keep out sheep, and except for the earnest belief that the said Charles Cramer would, so far as lay within his power, honestly and conscientiously assist said parties and their successors in interest in keeping out sheep and in securing the use and benefit of said ranges solely for the horses and cattle of said parties and their successors in interest." Then follow findings in accordance with the allegations of the complaint that the defendant acquired title to its lands with notice and knowledge of these "facts, circumstances, representations, promises, and agreements surrounding and connected with the original purchase of the lands"; that plaintiffs leased their holdings from the original tenants in common "with knowledge of and reliance upon the aforesaid agreements and promises of said Charles Cramer"; that defendant is ranging, herding, and grazing sheep upon the lands in violation of the promise and agreement of Cramer, and to plaintiffs' injury in the sum of \$350, and defendant threatens to continue so to range, raise, herd, and water its sheep.

In support of this judgment, we are asked to hold that the agreement found by the court in the language above expressed is a covenant running with the land, or is a personal covenant affecting the land, made by Charles Cramer, and enforceable by the lessees of the covenantees against the grantee of the covenantor, or that by the agreement some servitude was imposed upon the land for the plaintiffs' benefit, which they may enforce. In this connection it is said that, if a grant or deed be necessary to the establishment of any of these theories, the findings to support the judgment will be construed as declaring the creation of the right under such a written instrument.

Touching upon the last proposition first, the insuperable objection to it is found in the fact that all of the evidence tending to establish the promise and agreement shows that such agreement rested wholly in parol, and antedated the acquisition of the title by the original tenants in common. If, therefore, a writing was necessary to the establishment of these covenants, real or personal, or to the creation of the servitude, the evidence was inadmissible, and the judgment must therefore be reversed. Respondents must rest therefore upon the facts as unquestionably they exist, namely, that the predecessors in interest of plaintiffs and defendant, before they acquired their lands, had a parol understanding and agreement amongst

themselves that they would not herd or graze sheep thereon. No writing evidenced this agreement, nor was it limited in the period of its operation to one year. In the language of respondents' brief, "the agreement was to go right along indefinitely. No time was fixed for its termination."

That the agreement thus found may not for a moment be considered as a covenant running with the land is too plain to call for extended discussion. The obligation was not contained in a grant of an estate, nor in any other writing. It was not for the direct benefit of the property, but was a restriction and limitation upon its use. Therefore neither in its creation nor in its purpose does it conform to the law. Civ. Code, §§ 1460, 1461, 1462. As insuperable are the objections to considering the agreement a personal covenant binding upon the grantee. While attempting to impose a restriction upon the use of land, it is not created by deed, and, if it were, it does not by its language attempt to bind the assigns or grantees of the covenantor. While it is true that, in a proper case, equity will enforce against the covenantor's grantee a personal covenant imposing restrictions upon the use of land contained in the grant thereof (Los Angeles Co. v. S. P. R. R. Co., 136 Cal. 36, 68 Pac. 308; Cyc. p. 1078), yet equity will do so only in a proper case, and would certainly withhold its hand where such a restriction is not imposed by grant, but is sought to be created by parol. The same is true of the attempt to erect out of this agreement some servitude.

It is manifest, therefore, that the agreement, while pertaining to the use of land, could not, from its nature, bind the land. It was a parol understanding by which the tenants in common agreed that they would not use their lands for the grazing and watering of sheep. From its nature it was not to be performed within a year, and, resting wholly in parol, did violence to the statute of frauds, and would not have been specifically enforceable even against the original parties to it. Civ. Code, § 1624, subd. 1; McKeany v. Black, 117 Cal. 587, 49 Pac. 710. But, aside from the consideration of the redress which one co-tenant might have against another original party to the agreement, it is beyond peradventure that the restriction upon the use of the land, under the circumstances above set forth, may not be enforced against the grantee of such original cotenant.

The court erred, therefore, in admitting evidence which established that the agreement rested wholly in parol, and, as its findings and judgment are necessarily based upon this evidence, the judgment is reversed and the cause remanded.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.

155 Cal. 459

LIVER v. MILLS et al. (L. A. 2,282.)

(Supreme Court of California. April 1, 1909.)

1. SALES (§ 473*)—CONDITIONAL SALE—VALIDITY—RIGHTS OF BONA FIDE PURCHASER FROM BUYER.

In California even bona fide purchasers from the person to whom personal property is delivered under a contract of conditional sale get no valid claim to the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377-1390; Dec. Dig. § 473.*]

2. SALES (§ 479*)—CONDITIONAL SALES—REMEDIES OF SELLER—BREACH OF CONDITION BY BUYER.

Where an automobile was sold on condition that the buyers were to have possession, but that title was to remain in the sellers until the full purchase price was paid, and the buyers, after paying part of the price, sold the automobile to another, he acquired only the rights which the original buyers had under their contract, and on default of payment as required by the contract the original sellers could retake possession.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

3. REPLEVIN (§ 1*)—NATURE OF ACTION—POSSESSION.

An action of claim and delivery determines only the right of possession.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. SALES (§ 479*)—CONDITIONAL SALES—RE-TAKING OF POSSESSION UPON DEFAULT OF BUYER—RIGHT OF BUYER TO COMPLETE PURCHASE.

The rule that, where the seller on condition retakes possession under the contract, the defaulting buyer may still perfect his right to the property by paying the balance due, upon the theory that a mere delay in payment is ordinarily capable of compensation, and will not, under the express provisions of Civ. Code, § 1492, unless time was expressly made of the essence of the obligation, bar the right of the defaulting party to tender payment, with interest, at a later date and demand performance, does not apply where the buyer's assignee, who occupies no better position than the buyer, repudiates the contract, denies the seller's title, and refuses to pay the balance due, or to return the goods, as such conduct relieves the seller from all obligation to perform, under Civ. Code, § 1485, providing that an obligation is extinguished by an offer of performance made in conformity with rules prescribed in the chapter and with intent to extinguish the obligation.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

5. SALES (§ 479*)—CONDITIONAL SALES—RE-TAKING PROPERTY FOR DEFAULT OF BUYER.

Where the assignee of a buyer under a contract of conditional sale repudiated the contract and refused to return the property or pay the balance due thereon, the sellers were not bound to rescind, and did not, by retaking the property, waive their right to treat the contract as ended by reason of its repudiation.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 479.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by James J. Liver against H. H. Mills and another. From a judgment for plaintiff, and an order denying a new trial,

defendants appeal. Reversed, and remanded for a new trial.

Stephens & Stephens, for appellants. M. C. Hester and H. H. Roser, for respondent.

SLOSS, J. On May 7, 1906, the appellants, who were the owners of a certain automobile, made a contract of conditional sale thereof to S. A. Thompson and J. S. Miller, whereby said vendees were to have possession of the automobile, but title thereto was to remain vested in appellants until the full purchase price was paid. Thompson and Miller paid all of the purchase price, except the sum of \$132, which was due on May 27, 1906. On June 23, 1906, they sold and delivered the automobile to James J. Liver, respondent herein. On June 26, 1906, Mills and Price, the appellants, instituted an action of claim and delivery against Liver for the recovery of the possession of the automobile. Pending the action, the automobile was, by virtue of a writ, taken from Liver and delivered to Mills and Price, who, on September 17, 1906, recovered judgment declaring that they were entitled to possession. Thereafter, on September 27, 1906, Liver tendered to Mills and Price the balance of \$132, which had fallen due May 27, 1906, with interest, and demanded redelivery of the automobile. Compliance with his demand being refused, he commenced this action to recover \$450, the value of said machine, and judgment was entered in his favor for such amount, less the \$132 (with interest) due under the contract of conditional sale. The defendants appeal from the judgment and from an order denying their motion for a new trial.

The facts as above stated are taken from the findings of the court. So far as we have set them forth, it is not questioned that such findings are in accordance with the testimony. It is, however, claimed by the appellants that the court failed to find upon certain material issues raised by their answer. The answer alleged that prior to the commencement of the action of claim and delivery the defendants herein demanded of Liver that he pay to them the balance of \$132 then due, or deliver to them the possession of the automobile, but that said plaintiff refused to do either of these things. It is further alleged that said plaintiff repudiated the terms of the conditional sale, asserted absolute ownership in and right to the possession of the automobile, and denied that said defendants had any right, title or interest therein. There was evidence in support of these allegations. We think it clear that findings in favor of defendants upon the issues so raised would have required a judgment that the plaintiff take nothing by the action.

The validity of conditional sales is fully recognized in this state (Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597; Sere v. Mc-

Govern, 65 Cal. 244, 3 Pac. 859; Lowe v. Woods, 100 Cal. 408, 34 Pac. 959, 38 Am. St. Rep. 301), and it is well settled that "even bona fide purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property" (Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339; Palmer v. Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60). The plaintiff did not, by his purchase from Thompson and Miller, who were not the owners of the automobile, but only of a contract enabling them to acquire it upon a compliance with certain conditions, get any rights superior to those held by his grantors. Whether the property was in his hands, or remained in the possession of Thompson and Miller, the vendors were, on default in payment authorized to retake possession. The contract, as found by the court, does not contain the provision, usually expressed in such contracts, that on default by the vendees the vendors might retake possession. But, inasmuch as the vendors never parted with the title, such title carried with it the right of possession in the event of default by the vendees. The purchasers had no right of possession, except that given them by the contract, which must be construed as authorizing them to retain possession only so long as they should comply with the conditions required to be performed by them.

It has been held in this state that where the vendor, in case of a conditional sale, retakes possession pursuant to the terms of the contract, the defaulting vendee may still complete the purchase and perfect his right to receive the property by paying the balance due. *Miller v. Steen*, 30 Cal. 407, 89 Am. Dec. 124. This is upon the theory that a mere delay in the payment of money is ordinarily "capable of exact and entire compensation," and will not, unless time has expressly been made of the essence of the obligation, bar the right of the party in default to tender payment, with interest, at a later date, and demand performance of whatever obligation was due him upon such payment. Civ. Code, § 1492. The retaking of the property is a right conferred upon the vendor by the contract of sale, and its exercise does not, in and of itself, terminate the life of the contract. The same reasoning may, perhaps, be applicable where the vendor has obtained the possession of his goods by means of an action of claim and delivery. Such action determines only the right of possession (*Ricciotto v. Clement*, 94 Cal. 107, 29 Pac. 414), and if, as was held in *Miller v. Steen*, supra, possession by way of security may be resumed by the vendor without destroying the vendee's right to still complete the contract, it would seem to be immaterial whether the vendor took such possession peaceably or regained it by action.

But it certainly cannot be the law that a vendee, under a contract of conditional sale

(or his assignee, who occupies no better position), may, denying the vendor's title, refuse to pay the balance due or to return the goods, and finally, after the vendor has established his right in an action at law, come in and demand the fulfillment of the very contract which up to that time he has repudiated. A very different case from that of mere delay in performance is presented where a party to a contract distinctly and unequivocally declares that he is not bound by the contract and will not perform the obligations imposed by it upon him. Such declaration and refusal will relieve the other party from all obligation to perform on his part. Page on Contracts, § 1442; Civ. Code, § 1485; *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266; *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666; *Alderson v. Houston* (Cal.) 96 Pac. 884. The vendors did not, by retaking the automobile, waive their right to treat the contract as ended by reason of its repudiation by respondent. As owners of the property, they were entitled to its possession. In the face of a repudiation of the contract by respondent, they were not bound to rescind, but were at liberty to treat the right of purchase as ended and to retake the property. *Rayfield v. Van Meter*, supra.

Under these views the appellants were entitled to findings on the issues raised by their averments that the plaintiff had denied their title and refused to recognize the obligation of the contract under which his immediate transferrors held possession.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

BEATTY, C. J. I dissent, upon the grounds stated by the judge of the superior court in an opinion filed by him at the time of giving his judgment in favor of the plaintiff. Said opinion is printed as an appendix to respondent's petition for a transfer of the cause to this court, as follows:

"The defendants in this case sold an automobile to Miller and Taylor, who in turn sold the property to the plaintiff. After the latter sale the defendants made demand upon the plaintiff for the possession of the automobile or the payment of the sum of \$132, balance owing and due on the purchase price of the sale to Miller and Taylor, claiming that the original sale was conditional; title remaining in the defendants until the purchase price was fully paid. The demand of the defendants not being complied with, they brought an action of claim and delivery against the plaintiff for the automobile in which they had judgment. The original contract of sale rested in parol, under which the final payment was due the 27th day of May, 1906. Within 10 days after the rendi-

tion of the judgment awarding possession of the automobile to the defendants, the plaintiff tendered to the defendants the sum of \$132 and interest, and demanded of defendants the possession of the automobile, which tender was not accepted and which demand was refused. Plaintiff brings this action in conversion, and asks judgment for the value of the automobile alleged to be \$450. The answer of defendants represents that it was a provision of the original contract of sale that, if Thompson and Miller failed to pay the balance on or before the 27th day of May, 1906, the defendants here 'would have the right to retake the same [automobile], and that said Thompson and Miller should forfeit all sums of money theretofore paid upon the said purchase price.' The evidence entirely fails to show that there was any agreement of forfeiture.

"The main defense contended for here is that the action of the plaintiff in refusing to deliver the automobile when demand was made upon him after he purchased the same from defendants' vendees, and in contesting the action which they brought for possession thereof, amounted to a repudiation of the contract between defendants and Miller and Taylor; that the plaintiff here stands in the shoes of Miller and Taylor, and has no rights, except what they had under the original contract of sale. Defendants argue that plaintiff has repudiated the contract, and that it is a well-known principle of law that, where one party to a contract repudiates it, the other party is no longer bound by it, and cites specially the case of *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666, as applicable here. In that case it appears that the defendant purchased of the plaintiff furniture under a conditional contract of sale, the purchase price being payable in installments; that the defendant was in default for a period in about two years; that plaintiff then brought an action for the recovery of possession, and the defendant repudiated his contract, and claimed that he had been defrauded by misrepresentation at the time of the purchase of the property, and that nothing further was owing to plaintiff on account of the purchase price. This defense was disallowed by the court. Pending the action the plaintiff resold the property, and it was claimed by defendant that this resale should be construed as a termination of the contract by the plaintiff, and defendant sought judgment for the return of the amount of the purchase price which he had paid. The question whether or not defendant was entitled to the return of the purchase price because plaintiff had disposed of the property was the only one passed upon by the court. It was decided that defendant was not entitled to the return of the purchase price, for the reason that he had repudiated the contract and absolutely refused to pay anything further thereon, and that plaintiff was then justified

in selling the property, and not liable to account to defendant for the purchase price paid by him. The defendant in that case was himself in default, not the plaintiff. That case, and also the case of *Glock v. H. & W. C. Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, cited by defendants, are authorities for the proposition that, where the vendor is not in default and the vendee is, the latter may not recover purchase money paid.

"It is doubtful if either of the cases is authority here, for the question in issue is quite different. There is a distinction between repudiation of a contract between parties and a denial of the existence of a contract between one of the parties thereto and a third person, who has succeeded to the interest of the other in ignorance thereof. In the one case there is bad faith, and a denial of obligations on the one part and of rights on the other. Here, so far as the evidence discloses, there is, and has been, no bad faith on the part of the plaintiff, and the defendants were not justified in considering that he had repudiated the contract. As to him it had not been established until the decision of the court in the replevin case. It rested wholly in parol. No writing evidenced it. It is not surprising that, having purchased the automobile from the original vendees, without knowledge of the fact that a condition of the sale had been agreed upon between the parties whereby the title was to remain in the vendor till full payment of purchase price, the plaintiff should refuse the demand of the defendants. Plaintiff was justified in believing that Miller and Taylor had title to the automobile, for possession of personal property is the highest evidence of title. It is not conclusive, and the defendants here had a right to rebut the presumption of title arising out of the possession, and to bring the replevin action, which they did. Until the plaintiff here had repudiated the contract after it had been established, as between him and the defendants, the latter were not justified in treating it as repudiated by the former, and the rules invoked by the defendants are not applicable. It must appear that there has been a willful, intentional renunciation of an admitted or established contract. To apply the principles contended for by defendants to this case would be going too far. It would not be just or reasonable. In some jurisdictions conditional contracts of sale are in decided disfavor with the courts, and it has been held in some states, where a third party, without knowledge of the fact that the contract is conditional, has purchased the property, his title and possession will not be disturbed by proof that there has been a secret condition of the sale that the title should not pass to the original vendee. A different rule obtains in this state; but the courts should not apply the rule further than is necessary for the pro-

tection of the interests of all parties who have acted in good faith. Time was not the essence of the agreement, and in any event, according to all the decisions to which attention has been called, the vendee or his successor in interest should be allowed, within a reasonable time after the retaking of the property by the vendor, to recover the possession, with full title, by payment of the balance of the purchase price. Under all the circumstances of the case as presented here, the plaintiff's tender of the balance of the purchase price and interest, made within a few days after the judgment in the replevin case, must be held to have been made within a reasonable time, and a refusal of the defendants to accept the tender and deliver possession of the automobile was conversion. If the contract had been made between the defendant and the plaintiff here, a different conclusion might be reached; but in view of the fact that the plaintiff was ignorant of the terms of the contract, which he did not make, and knew nothing of except as asserted by the defendants, it would seem unreasonable that the plaintiff was guilty of laches in tendering the balance of the purchase price.

"In the replevin case the defendants here, being plaintiffs there, alleged the value of the automobile to be \$450, and the court so found; and from the evidence presented upon the trial of this case I think the court's conclusion should again be that the value of the automobile at the time of the commencement of this action was \$450, for which amount, less the balance of the purchase price, which was tendered, to wit, \$135.50, the plaintiff shall have judgment, and an order will be entered to that effect."

155 Cal. 415

UNITED STATES FIDELITY & GUARANTY CO. v. MORE. (L. A. 2,166.)

(Supreme Court of California. March 29, 1909. Rehearing Denied April 28, 1909.)

1. REPLEVIN (§ 116*)—APPEAL—SUPERSEDEAS BOND—AMOUNT.

Under Code Civ. Proc. § 943, providing that the execution of a judgment in replevin shall not be stayed by appeal unless appellant give an undertaking with sufficient surety and in such amount as the court or a judge thereof may direct to obey the order of the appellate court, it is essential to the efficacy of the undertaking to stay execution of the judgment that the amount thereof be fixed by the court or a judge thereof.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 116.*]

2. PRINCIPAL AND SURETY (§ 187*)—REMEDIES OF SURETY—CONCLUSIVENESS OF ADJUDICATION AGAINST SURETY.

As a bond to stay the execution of a judgment in replevin, pending appeal, is only required, under Code Civ. Proc. § 943, to be conditioned that appellant will obey the order of the appellate court, there was no consideration for an added condition authorizing the taking

of a judgment against the surety on motion, without notice, if appellant did not pay within a fixed time after the filing of the remittitur, and a judgment so taken was void, and the satisfaction of it by the surety insufficient to give it a cause of action on a contract of indemnity executed to it by appellant.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 187.*]

3. PRINCIPAL AND SURETY (§ 175*)—CONTRACTS FOR INDEMNITY—LIABILITIES COVERED.

Under Civ. Code, § 2778, providing that on an indemnity against liability the person indemnified is entitled to recover on becoming liable, there is no right of recovery, on a contract to indemnify against any loss incurred in consequence of the execution by indemnitee of a bond to stay the execution of a judgment, for anything less than a legal liability incurred by indemnitee.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 175.*]

Department 2. Appeal from Superior Court, Santa Barbara County; S. F. Crow, Judge.

Action by the United States Fidelity & Guaranty Company against John F. More. Judgment for defendant, and plaintiff appeals. Affirmed.

James Gooden and Henley C. Booth, for appellant. Wm. G. Griffith (R. B. Canfield, of counsel), for respondent.

HENSHAW, J. By this action plaintiff seeks to recover of the defendant the sum of \$1,964.41, with interest, damages, and counsel fees, alleged to be due on an indemnity contract given by defendant to plaintiff in consideration of the execution by plaintiff of a stay bond on appeal in the replevin suit of Churchill v. More (Cal. App.) 88 Pac. 290. For the facts of the litigation, reference may be had to Churchill v. More, supra, Churchill v. More (Cal. App.) 96 Pac. 108, and More v. Churchill et al. (L. A. 2,204, decided March 23, 1909), 101 Pac. 9. A general demurrer was sustained to plaintiff's complaint, and from the judgment which followed plaintiff appeals.

The judgment against the surety company in the action of Churchill v. More was given on motion of the plaintiff Churchill without notice and was based upon the undertaking on appeal executed by the surety company, purporting to authorize the taking of such judgment "if the appellant does not make such payment within 30 days after the filing of the remittitur of the Supreme Court in the court from which the appeal is taken." The judgment in the case of Churchill v. More being in the ordinary form of a judgment upon claim and delivery (Code Civ. Proc. § 667), the only bond required to stay execution upon appeal is the statutory bond prescribed by section 943, Code Civ. Proc. The condition of such an undertaking is not that judgment may be taken on motion. Such requirement is exacted only on the bond pre-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

scribed by section 942, Code Civ. Proc., from "a judgment or order directing the payment of money." The judgment in *Churchill v. More*, it is unquestioned, was not such a judgment. It was a judgment for the recovery of personal property, with the alternative of a recovery of an amount of money named as the value of that property, in the event that a recovery of the property should not be had. Code Civ. Proc. § 667. The terms and conditions of an undertaking to stay execution upon appeal from such a judgment are, of course, those prescribed by section 943, namely, that an undertaking be entered into on the part of the appellant, with sufficient surety, "and in such amount as the court or a judge thereof may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."

In support of the judgment here appealed from, respondent urges two propositions, both of which we think are sound and fully support the judgment: First, the amount of the undertaking in this case was not fixed by the court or by a judge thereof. This is a requirement of the statute and is essential to the efficacy of the undertaking for the single purpose for which it is given, namely, the staying of execution; for if the requirement that the amount be fixed by the court be considered nonessential, it would necessarily follow that, regardless of the value of the property involved, a bond in any amount which the appellant might elect to give would be sufficient. As the amount of the undertaking was therefore not fixed by the court, the undertaking itself failed to effectuate a stay of execution proceedings, and from this point of view there was no consideration whatsoever to support the surety's promise that judgment might be taken against it on motion.

Again, assuming for the purposes of the present discussion that the undertaking did effectually secure a stay of proceedings, it has been pointed out that when the undertaking bound the surety, as it did, to hold itself responsible for the obedience by the appellant of such order as the appellate court might render upon the appeal, it complied fully with the statutory requirement. In obligating itself in the penal sum named to secure obedience by the appellant of any order made upon appeal, the surety did all that the law required. No consideration moved to it or to any other person, for the added proviso that the surety would permit a judgment to be taken against it on motion. The bond was given on behalf of More. He was not a party to it. The added condition was not one which the respondent had the right to insist upon or exact, and was manifestly not to the benefit of the surety's principal. To the contrary, it was greatly to his injury,

as, if enforced, it would permit against him, and against his protest, the conversion of a judgment for the delivery of personal property into a judgment for the direct payment of money. The records of the former appeals may be drawn upon in illustration of this fact. The judgment was for the return of certain personal property. Upon the going down of the remittitur, the appellant in *Churchill v. More* (respondent here) contends that he made good and sufficient tender of the personal property, and if he did so he was of course released from the liability of any enforcement of the alternative money judgment. Yet, without his knowledge and against his consent, his judgment creditor obtains, upon ex parte application and motion, a judgment against his surety for the full amount. It is satisfied by the surety, who in turn seeks to enforce the collection against the judgment debtor, who all the time is contending, and still contends, that he had made tender in due form of the personal property, and who protests that, while having kept the tender alive and thus having exonerated himself from any liability, he should not be called upon to pay a money judgment. We have not overlooked the authorities cited respectively by appellant and respondent, but we do not consider a review of them necessary or profitable upon a proposition so plain.

Appellant further contends that, even if the judgment rendered against it on motion, to which it submitted and which it paid, is void, nevertheless, under the contract of indemnity given to it by respondent, it is entitled to a recovery. The language of the indemnity contract is "to indemnify and keep the said guaranty company indemnified from and against any and all loss, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature which said guaranty company shall or may, for any cause, at any time, sustain or incur or be put to for or by reason or in consequence of said guaranty company's having executed said bond." Clearly, this language does not import a right of recovery upon the part of a surety company for anything less than a legal liability which it may have incurred. Section 2778 of the Civil Code furnishes the rule for interpreting such a contract: "Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable." Here, as has been said, the surety company had not become liable and was a mere volunteer.

The judgment appealed from is therefore affirmed.

We concur: MELVIN, J.; ANGELLOTTI, J.

155 Cal. 395

LEVERONE v. WEAKLEY. (Sac. 1,479.)

(Supreme Court of California. March 25, 1909.)

1. PLEADING (§ 8*)—CONCLUSIONS.

In a complaint for the obstruction of a public highway, an allegation that the land had been for many years a public highway alleges the ultimate fact of public highway, and is sufficient without alleging how it became a highway.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 30; Dec. Dig. § 8.*]

2. HIGHWAYS (§ 160*)—ACTION FOR OBSTRUCTION—SUFFICIENCY OF COMPLAINT.

A complaint for the obstruction of a public highway, alleging simply a public highway, is not subject to demurrer for uncertainty because it fails to show whether it was "laid out, described, or opened by" any legally constituted authority.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 436; Dec. Dig. § 160.*]

3. EASEMENTS (§ 61*)—ACTION TO ESTABLISH—NECESSITY OF EXACT DESCRIPTION IN PLEADING.

Where it is sought to have it decreed that a person's realty is subject to a use or easement in favor of another, it must be described in the pleadings with such certainty as to enable defendant to definitely know exactly what portion is so claimed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 141; Dec. Dig. § 61.*]

4. EASEMENTS (§ 61*)—JUDGMENT ESTABLISHING CLAIM—NECESSITY OF BEING DEFINITE AND CERTAIN AS TO PROPERTY.

The judgment establishing the validity of a claim to a use or easement in land must be definite and certain as to the property affected.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 148; Dec. Dig. § 61.*]

5. HIGHWAYS (§ 160*)—COMPLAINT FOR OBSTRUCTION—UNCERTAINTY IN DESCRIPTION.

It appeared, in a complaint for the obstruction of a public highway and to establish in plaintiff a private right of way thereover, that plaintiff owned the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 29, township 10 S., range 20 E., and that the alleged road or highway ran southerly therefrom through a portion of section 29, owned by defendant's testator, to the H. road, and the description of the road in the complaint was "A strip of land forty feet wide, traversing the southerly section line of section twenty," township 10, range 20 E., "in the southwest quarter of the southeast quarter of said section, and running thence southerly a distance of about three-eighths of a mile across the northeast quarter of section twenty-nine in said township and range," to what is known as the H. road. Held, that the complaint was demurrable for uncertainty in the description.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 436; Dec. Dig. § 160.*]

6. HIGHWAYS (§ 160*)—ACTION FOR OBSTRUCTION—INSUFFICIENCY OF DESCRIPTION IN JUDGMENT.

In an action for the obstruction of a public highway and to establish in plaintiff a private right of way thereover, the judgment for plaintiff described it as "A strip of land sufficient in width for the convenient travel and use of the public, with teams, wagons and agricultural implements, traversing the southerly line of section 20, * * * in the southwest quarter of the southeast quarter of said section, and running thence southerly, in practically a straight line, a distance of about three-eighths of a mile across the northeast quarter of section twenty-nine in said township and range,

and which said roads join and intersect with the highway known as the H. road." Held, that the description was insufficient.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 436; Dec. Dig. § 160.*]

7. ESTOPPEL (§ 24*)—BY AGREEMENT—OBJECTION TO INSUFFICIENCY OF DESCRIPTION IN JUDGMENT.

In an action for the obstruction of a public highway and to establish in plaintiff a private right of way thereover, there was no estoppel of defendant to urge uncertainty of the description in the judgment by reason of an alleged agreement set forth in the answer, claimed to show an acknowledgment by defendant's testator of an existing private way coinciding with the road or highway adjudged, where the private way there referred to was described as one "commencing on the south section line of section 20, * * * in the southeast corner thereof," i. e., the southeast corner of section 20, while the highway adjudged is one commencing on the southerly line of the "southwest quarter of the southeast quarter of section 20."

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 24.*]

8. TRIAL (§ 396*)—FINDINGS OF COURT—CONFORMITY TO ISSUES.

In an action for obstruction of a public highway and to establish in plaintiff a private right of way thereover, findings by the court of specific probative facts sufficient to establish a public highway by such user as conclusively implies a dedication were within the general issue of public highway.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 935; Dec. Dig. § 396.*]

9. DEDICATION (§ 41*)—PRESUMPTIONS—ADVERSE USE.

The rule as to the conclusive presumption of dedication of a highway by the owner from long-continued adverse use by the public is not opposed to Pol. Code, § 2621, providing that no route of travel used by one or more persons over another's land shall thereafter become a public road or highway by use till so declared by a board of supervisors or dedication by the owner.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 80; Dec. Dig. § 41.*]

10. HIGHWAYS (§ 160*)—ACTION FOR OBSTRUCTION—CONSTRUCTION OF FINDINGS.

A finding, in an action against an administratrix for an obstruction of a highway, that adverse use of the land by the public "was made without the license or permission of defendant's testator," etc., is not in conflict with the theory that the use thereof was sufficiently long continued to raise a conclusive presumption of dedication.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 436; Dec. Dig. § 160.*]

11. EXECUTORS AND ADMINISTRATORS (§ 211*)—OBSTRUCTION OF HIGHWAY BY DECEDENT—EXTENT OF LIABILITY.

For the obstruction of a highway by decedent, his estate is liable for such special injury as is caused thereby up to the time of his death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 746; Dec. Dig. § 211.*]

12. EXECUTORS AND ADMINISTRATORS (§ 431*)—ACTION FOR DAMAGES AGAINST ESTATE—PRESENTATION OF CLAIM AS CONDITION PRECEDENT.

A claim against a decedent's estate for damages for the obstruction of a highway, not being one arising on contract, was not required to be presented to his executrix prior to suing there-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for, as required by Code Civ. Proc. § 1493, for claims arising on contracts.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1679; Dec. Dig. § 431.*]

In Bank. Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by William Leverone against Rachael S. Weakley, executrix of Wilson Weakley, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

Robert L. Hargrave, for appellant. Raleigh E. Rhodes and George W. Mordecial, Jr., for respondent.

ANGELLOTTI, J. This is an appeal by defendant on the judgment roll from a judgment decreeing that a road traversing the land of defendant's testator for about three-eighths of a mile, running from plaintiff's land on the north to a public highway known as the "Hildreth road" on the south, is a public highway, and that plaintiff also has a private right of way thereover, and enjoining defendant from maintaining any fence or other obstruction thereon, and awarding plaintiff \$280 damages caused by an obstruction maintained thereon by defendant's testator, and by her after his death.

The complaint contained two counts; the first being based on the theory that the road was a public highway, and that a fence maintained by defendant's testator and herself across the same constituted a public nuisance causing special injury to plaintiff, and the second being based on the theory that the road is a private road over which plaintiff, prior to the construction and maintenance of said fence, had acquired by adverse use a right of way from the Hildreth road to his lands. Defendant demurred to each count on the general ground of want of facts, and the further ground of uncertainty, in that it cannot be ascertained whether the alleged highway was duly laid out, described, or opened by the board of supervisors, or any other legally constituted authority, and also in that said alleged highway is not sufficiently described in the complaint. The demurrer was overruled, and this ruling is here alleged to have been erroneous.

The complaint sufficiently stated a cause of action in each count, good as against the general demurrer for want of facts. It is not essential to the statement of a cause of action based on the theory of a public highway that the manner in which the land became a public highway should be alleged. What was in effect an allegation that the land attempted to be described in the complaint was, and had been for many years, a public highway, was an allegation of the ultimate fact of public highway, just as an allegation that one is the owner of land is treated as an allegation of fact in certain cases, beyond which it was not necessary to

go. *People v. McCue*, 150 Cal. 195, 197, 88 Pac. 899. See, also, *Bequette v. Patterson*, 104 Cal. 282, 285, 37 Pac. 917. While it was incidentally said in *Schwerdtle v. County of Placer*, 108 Cal. 589, 41 Pac. 448, that such an allegation is a conclusion of law, it was nevertheless held sufficient to make an issue after judgment on the merits, for the judgment in favor of the county was sustained on the ground that the facts found showed a public highway. Nor do we think that the complaint alleging simply a public highway is subject to demurrer for uncertainty because it fails to show whether the same was "laid out, described, or opened by" any legally constituted authority.

We are of the opinion that the complaint was uncertain in the matter of the description of the alleged highway, and that the demurrer on that ground should have been sustained. Plaintiff sought by this action not only the abatement of a particular alleged obstruction erected by defendant's testator and compensation for injury caused thereby, but also a decree establishing between the parties the fact that certain of defendant's property, consisting of a strip of land three-eighths of a mile long, was subject to plaintiff's use as a public highway or as a private right of way, and enjoining defendant from maintaining any obstruction on any part thereof. The decree grants this relief as to the whole strip of land. It goes without saying that, where it is sought to have it decreed that real property of a person is subject to a use or easement in favor of another, the property affected must be described in the pleadings with such certainty as to enable the party against whom the claim is made to definitely know exactly what portion of his property is so claimed, and the judgment establishing the validity of the claim must be definite and certain as to the property affected.

It appears in the complaint that the plaintiff owned the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 20, township 10 S., range 20 E., Mt. D. B. & M., and that the alleged road or highway ran southerly therefrom through a portion of section 29, owned by defendant's testator, to the Hildreth road. The only description thereof in the first count of the complaint was as follows: "A strip of land forty-five feet wide traversing the southerly section line of section twenty," township 10, range 20 E., Mt. D. B. & M., "in the southwest quarter of the southeast quarter of said section, and running thence southerly a distance of about three-eighths of a mile across the northeast quarter of section twenty-nine in said township and range," to what is known as the "Hildreth road." The description in the second count is practically the same. There is nothing in this to enable one to definitely locate on the ground the particular strip claimed to constitute the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

alleged road or highway. It entirely fails to locate the point of commencement other than to place it on the southerly line of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 20, a line one-quarter of a mile long. There is nothing to indicate that the way is so marked on the ground that the description given will identify it. If it could be held that the description was of a road actually marked out and constructed on the lands of defendant's testator, it might be definite enough; but such is not the effect of the language used.

When we come to the judgment, we find the land of defendant's testator which is adjudged a public highway, and on which defendant is enjoined from maintaining any obstruction, described as follows: "A strip of land sufficient in width for the convenient travel and use of the public, with teams, wagons, and agricultural implements, traversing the southerly line of section 20 * * * in the southwest quarter of the southeast quarter of said section, and running thence southerly, in practically a straight line, a distance of about three-eighths of a mile across the northeast quarter of section twenty-nine in said township and range, and which said road joins and intersects with the highway known as the Hildreth road." This is manifestly insufficient as a description in such a judgment. As was said by the District Court of Appeal in deciding this case: "This strip of land or road should be definitely described at least so that with the description in hand it could be readily located and could not be shifted at the will of the public. Its northern initial point should be fixed, and the course of the road from its initial point over defendant's land made definite, and the point established at which it intersects the so-called Hildreth road. The width of the road should be made clear. It is not sufficiently definite to describe it as 'sufficient in width for the convenient travel and use by the public with teams, wagons and agricultural implements.'"

We find no sufficient answer in the briefs of plaintiff's counsel to these objections. As we have already said, the action is not one simply to abate and enjoin some particular obstruction, but the complaint sought, and the court awarded, a decree establishing plaintiff's right to use land of defendant's testator for highway purposes, and enjoining any obstruction of plaintiff's rights in that regard. It is no answer to these objections to say that, where the right of the public or the plaintiff is acquired by user, the boundaries of the road are generally ascertained by reference to the user. That is a rule applicable in determining the boundaries, which, however, must be definitely located by a judgment of the character of the one before us. We find nothing in the findings of the court warranting us in assuming that there was a road so marked on the ground that the description given would identify it. The alleged agreement set forth in

the answer, claimed to constitute an estoppel on defendant to urge uncertainty of description, does not show an acknowledgment by defendant's testator of any existing private way that could coincide with the road or highway here adjudged, for the private way there referred to was described as one "commencing on the south section line of section 20 * * * in the S. E. corner thereof," i. e., the southeast corner of section 20, while the highway adjudged in this action is one commencing on the southerly line of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 20.

For the purposes of a new trial it is proper to notice some of the other objections of defendant. The findings on the first count are not without the issues. The complaint alleged, as we have seen, the ultimate fact of public highway. The court found the specific probative facts sufficient to establish a public highway by such a user as is held to conclusively imply a dedication. *Schwerdtle v. County of Placer*, 108 Cal. 589, 41 Pac. 448; *Hartley v. Vermillion*, 141 Cal. 339, 348, 349, 74 Pac. 987. Such findings of probative facts were within the general issue of public highway. These findings showed a continuous adverse use of the highway by the public for a period of more than 15 years immediately preceding the erection of the particular obstruction complained of. The rule applicable was declared in *Schwerdtle v. County of Placer*, supra, where the matter is most exhaustively discussed, as follows: "But where the claim of the public rests upon long-continued adverse use, that use establishes against the owner, the conclusive presumption of consent, and so of dedication. It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license." And in *Hartley v. Vermillion*, supra, as follows: "When, as in this case, the public, or such portion of the public as had occasion to use the road, traveled over the same, with full knowledge of the landowner interested, without asking or receiving any permission and without objection from any one, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication." This view is not opposed to anything contained in section 2621 of the Political Code. The finding that such use "was made without the license or permission of defendant's testator," etc., is not in conflict with this theory. This finding but negatives the idea of license or permission, the presence of which would prevent the acquirement of the right by the public under the rule discussed.

Regarding the road as a public highway, and the obstruction therein therefore a public nuisance, we think that the complaint sufficiently alleged facts showing such special injury to plaintiff in the matter of comfortable use and enjoyment of his property

as authorized the maintenance by him of an action for relief therefrom, including the recovery of damage caused thereby. See *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 121, 92 Pac. 70.

Upon the facts found, the estate of the deceased was liable for such special injury as was caused plaintiff by the obstruction up to the time of the death of defendant's testator. His death occurred very shortly before the commencement of this action, and the question whether the estate is liable for such damage as was caused after his death by the further maintenance of the obstruction by defendant does not appear to be of importance on this appeal, and is not discussed at length by counsel. We express no opinion thereon. This claim for damages, not being one arising upon a contract, was not required to be presented to the executrix prior to the bringing of suit. *Hardin v. Sinclair*, 115 Cal. 460, 463, 47 Pac. 363; section 1493, Code Civ. Proc. There is nothing necessarily inconsistent in the two findings dealing respectively with the use of this way by the public and this plaintiff, and, as we understand the judgment in so far as plaintiff's right to a private way is concerned, it does no more than to declare him entitled, as owner of property to which said way extends, to such private rights therein as are said by our decisions to belong to the owner of a lot abutting on a public street or highway. See *Cushing-Wetmore Co. v. Gray*, 152 Cal. 122, 92 Pac. 70, and cases there cited.

It does not appear necessary for the purposes of further proceedings to discuss any of the other points made.

The judgment is reversed, and the cause remanded, with leave to the plaintiff to serve and file an amended complaint within such time as may be prescribed by the trial court.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(155 Cal. 411)

STOCKTON LUMBER CO. v. SCHULER et al. (Sac. 1,620.)

(Supreme Court of California. March 26, 1909.)

1. DEPOSITS IN COURT (§ 9*)—DISCHARGE OF MECHANICS' LIENS—RIGHTS OF PARTIES.

Under Code Civ. Proc. § 1183, giving a lien on property on which labor is bestowed or for which materials are furnished and providing that the lien extends to the contract price, the lien attaches to money paid into court by the owner, so as to entitle lienholders to a priority over claimants failing to establish a lien, as, where the owner releases the land by paying the amount due, the money so paid takes the place of the land, and is to be distributed among the parties entitled thereto.

[Ed. Note.—For other cases, see *Deposits in Court*, Cent. Dig. § 10; Dec. Dig. § 9.*]

2. MECHANICS' LIENS (§ 157*)—STATEMENT—EFFECT OF ERRORS—EXCESSIVE CLAIM.

A mechanic's lien was not invalidated, though the lien claimants failed to give credit for a payment made them, where the error in

the amount claimed was the result of an inadvertence, and not of an intent to defraud.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 270; Dec. Dig. § 157.*]

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Actions by the Stockton Lumber Company against William C. Schuler and others. From the judgment and from an order denying its motion for new trial, plaintiff appeals. Affirmed. Case transferred from the District Court of Appeal to the Supreme Court in 94 Pac. 399.

Budd & Thompson, for appellant. Nicol & Orr and R. C. Minor, for respondents.

SLOSS, J. Five actions for the foreclosure of mechanics' liens were consolidated for trial. The building affected by the proceedings was one erected by the defendant Brown, as contractor, upon property owned by the defendant Schuler, pursuant to a contract entered into between them. The plaintiff in each of the five actions proceeded upon the theory that the contract was void. The owner asserted the validity of the contract, and the court found in his favor on this point. As to all the lien claimants except one, a nonsuit was granted on motion of the owner, on the ground that they had failed to prove their right to a lien. The fifth, the Stockton Planing Mills (Buell and Thomas), was found to have a valid lien to the amount of \$266.65.

The total contract price agreed to be paid by the owner to the contractor was \$2,387, 25 per cent. of which was by the terms of the contract made payable 35 days after completion. In his answer, the owner offers to pay this 25 per cent. into court for the benefit of the parties who may be found entitled to receive it, and it was so paid by him. The court, finding that all other payments due from the owner to the contractor had been made, ordered judgment whereby the claim of Buell and Thomas, the only plaintiffs who had succeeded in establishing their right to a lien, was directed to be first paid out of the sum paid into court by the owner. The balance of said sum (which was not sufficient to pay off the other claimants in full) was ordered to be applied pro rata to the satisfaction of the amounts found to be due such other claimants from the contractor. The Stockton Lumber Company, plaintiff in one of the consolidated actions, appeals from this judgment, and from an order denying its motion for a new trial.

But two points are made. In the first place, it is urged that, conceding the correctness of the finding that Buell and Thomas were entitled to a lien, yet that lien could not attach to the money paid into court by the owner, so as to entitle the lienholders to a priority over claimants who had failed to establish a lien. The argument seems

to be that, because the Code (Code Civ. Proc. § 1183) gives a lien upon the "property" upon which labor is bestowed or materials furnished, the benefit of such lien can be had only by a sale of the property, and is lost when the owner releases his property by paying into court the amount for which it is liable. But by the terms of the same section the lien, in the case of a valid contract, extends to the contract price, and such contract price is the limit of the liability which may be imposed upon the owner or his property. *Kellogg v. Howes*, 81 Cal. 175, 22 Pac. 509, 6 L. R. A. 588; *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815; *Stimson Mill Co. v. Braun*, 136 Cal. 122, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116. The unpaid balance of such contract price is a fund set apart for the satisfaction of lien claimants, and a charge upon the land to secure the payment of this balance to them is created for their benefit. No unsecured creditor of the contractor, such as the materialman or mechanic failing to establish a lien, has any claim whatever against the owner or his property. *So. Cal. Lum. Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516. Nor can he have as against holders of valid liens, any claim upon the fund set apart by law for lienors. That this is a correct definition of the rights of the parties would not, if we understand appellant's position, be disputed if, instead of the money having been voluntarily paid into court, the decree had directed a sale of the premises. In that event, the proceeds of such sale to the extent of the unpaid portion of the contract price, would have been applicable, in the first instance, to the payment of those plaintiffs who had been adjudged to have liens. The situation is not changed where the owner, instead of permitting his property to be sold, pays into court the amount for which the property is held. The lien, as has been said, is a mere charge upon the land to secure this amount, and, where the owner releases the land from this charge by paying the sum due, the money so paid takes the place of the land, and is to be distributed among the parties entitled according to their respective priorities and equities. That the owner may, in an action of this kind, properly pay the money into court in order to save his property from sale, has been declared by this court on several occasions (*De Camp Lumber Co. v. Tolhurst*, 99 Cal. 631, 34 Pac. 438; *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008), and no sufficient reason is suggested for deciding that this act of the owner to which the lienholder is not a party can operate to deprive the latter of the rights conferred on him by the Constitution and the Code. In New York, where the statute authorizes the owner to discharge liens by depositing in court the amount claimed, it

is thoroughly settled that, upon such deposit being made, the lien is shifted from the land to the fund in court, and that no lien claimant who fails to establish his right to a lien is entitled to share in such fund. *Ward v. Kilpatrick*, 85 N. Y. 413, 39 Am. Rep. 674; *Dunning v. Clark*, 2 E. D. Smith (N. Y.) 535; *People v. Butler*, 61 How. Prac. (N. Y.) 274; *Raven v. Smith*, 76 Hun, 60, 27 N. Y. Supp. 611; *In re Dean*, 83 Hun, 413, 31 N. Y. Supp. 959; *Schillinger, etc., Co. v. Arnott*, 86 Hun, 182, 33 N. Y. Supp. 343, affirmed 152 N. Y. 584, 46 N. E. 956. We have no doubt that this rule is equally applicable under our statutes and the practice established in this state. Accordingly the appellant, failing to perfect a lien, was entitled to no part of the surplus, even after payment in full of the valid lien (*Kennedy Shaw Lumber Co. v. Priet*, 115 Cal. 98, 46 Pac. 903), but, as neither the owner nor the contractor raises any objection to this disposition of the balance of the fund, the most that can be said is that the judgment is too favorable to appellant (*Kennedy Shaw Lumber Co. v. Priet*, 113 Cal. 291, 45 Pac. 336).

It is further urged by appellant that the court erred in finding that the respondents Buell and Thomas were entitled to a lien. Waiving the question whether a claimant who has no lien is in a position to attack the decision giving a lien to another (see *Kennedy Shaw Lumber Co. v. Priet*, 113 Cal. 291, 45 Pac. 336, *Id.* 115 Cal. 98, 46 Pac. 903), there is no merit in the appellant's contention. The point made is that Buell and Thomas filed a claim of lien in which they failed to give credit for a payment which had been made to them. But, on the evidence, the court was fully justified in concluding that the error in the amount claimed was the result of an inadvertence, and not of an intent to defraud. Under these circumstances the mistake did not invalidate the lien. *Snell v. Payne*, 115 Cal. 218, 46 Pac. 1069; *Continental B. & L. Ass'n v. Hutton*, 144 Cal. 609, 78 Pac. 21.

The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; HENSHAW, J.

155 Cal. 419

CITY STREET IMPROVEMENT CO. v.

CITY OF MARYSVILLE. (Sac. 1,519.)

(Supreme Court of California. March 31, 1909.

Rehearing Denied April 29, 1909.)

1. MUNICIPAL CORPORATIONS (§ 339*)—PUBLIC IMPROVEMENTS—CONTRACTS—APPROVAL OF ENGINEER.

A stipulation in a contract between a city and a contractor for a public work that the work should be done under the supervision and to the satisfaction of an engineer in charge,

whose decision as to the construction of specifications and whose estimates should be final, is valid and binding.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 868; Dec. Dig. § 339.*]

2. MUNICIPAL CORPORATIONS (§ 358*)—PUBLIC IMPROVEMENTS—CONTRACTS—PERFORMANCE BY CONTRACTOR—ESTOPPEL OF CITY.

Where a contract between a city and a contractor for the construction of a sewer provided that the work should be done under the constant immediate supervision and direction of an engineer in charge and his subordinates, and inspected and rejected or approved as it progressed and before the trenches were refilled, and the engineer and his representatives approved the work, allowed the trenches to be filled, and the engineer issued certificates from month to month to the common council, stating the amount of work done and the amount due therefor, including a final certificate showing all the agreed work to be completed, necessarily to the approval and satisfaction of the engineer, which were considered by the board of public works and the amounts paid, the city was estopped to claim that the contractor had not performed its contract upon it subsequently appearing that the joints of the sewer pipe had not been properly cemented and that water in the trenches had injured the cement before it could set, in the absence of fraud of the contractor, the defects not being such as were not discoverable by a reasonable inspection.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 890; Dec. Dig. § 358.*]

3. MUNICIPAL CORPORATIONS (§ 358*)—PUBLIC IMPROVEMENTS—CONTRACTS—PERFORMANCE—WAIVER OF DEFECTS.

The question whether the work was in accord with the contract was finally determined, so far as defects were concerned, when the engineer approved it and permitted the trench to be filled, in the absence of bad faith of the contractor, and the contractor could not be held responsible for mere negligence or mistake of the engineer in approving defective work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 890; Dec. Dig. § 358.*]

4. MUNICIPAL CORPORATIONS (§ 374*)—PUBLIC IMPROVEMENTS—CONTRACTS—ACTIONS—PLEADING—CONDITIONS PRECEDENT.

In an action against a city for money due on a contract for constructing a sewer, under which a condition precedent to demand by and payment to plaintiff of progress and final installments of the contract price was the approval of an engineer, it was not necessary to specially plead the certificates of the engineer approving the work, which were merely evidence of performance, though, in the absence of fraud, conclusive as to that fact, but an averment of performance under the contract was sufficient, Code Civ. Proc. § 457, providing that in pleading the performance of conditions precedent in a contract it is not necessary to state the facts showing performance, but it may be stated generally that the party performed all the conditions on his part, and, if such allegations be controverted, the pleader must establish on the trial the facts showing performance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 910; Dec. Dig. § 374.*]

Beatty, C. J., and Angellotti and Shaw, JJ., dissenting.

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.
Action by the City Street Improvement

Company against the City of Marysville. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Reversed, and remanded for a new trial.

Bishop, Wheeler & Hoefler, William Rix, and Richard Belcher, for appellant. A. H. Redington, W. H. Carlin, and Waldo S. Johnson, City Atty., for respondent.

PER CURIAM. This action was brought to recover the sum of \$4,000.07, the balance alleged to be due plaintiff from defendant for labor done and materials furnished in the construction of a portion of a sewer system for the city, under a written contract, a portion of the demand being for extra work. The total contract price, including extra work amounting to \$2,940.16, was \$33,731.29, of which defendant had paid plaintiff \$29,731.22. Defendant claimed that plaintiff had not performed and had refused to perform the contract according to its terms, and on this ground resisted payment of the alleged balance, and by counterclaim sought to recover the amount alleged to be necessary to complete the work. The trial court sustained this contention of defendant, finding that defendant had already necessarily expended \$10,452.69 in completing certain portions of the work according to the contract, and would be required to expend the further sum of \$21,525 to fully complete the same, making in all \$31,977.69 so to be expended by the city in completing the work. It, therefore, gave judgment in favor of defendant against plaintiff for the difference between said \$31,977.69 and the balance due on the contract, \$4,000.07, viz., \$27,977.62. From this judgment and from an order denying its motion for a new trial, the plaintiff appeals.

The sewer system contemplated was to consist of sewers laid in the city, a receiving reservoir or sump, an outfall sewer extending from the sump to and beyond the corporate limits of the city, a pumping plant to pump the sewage from the sump to the place of outfall, an irrigation farm on which to discharge the sewage, and flush tanks. The undertaking of plaintiff was to furnish all the labor and material necessary to construct all of the work on such sewage system as was specified in "Division A" of the specifications, in strict compliance with the specifications therefor, which were attached to and made a part of the contract. The work specified in that division was the furnishing and laying of some 42,000 feet of sewer pipe (8-inch, 10-inch, 12-inch, and 15-inch) at a specified price per lineal foot according to the size of pipe, and the furnishing of materials and labor in constructing 29 flush tanks, 109 manholes, and 1 overflow, at a specified price for each. Much of the sewer pipe was to be laid several

feet below the water level, and it was important that it should be laid so as to prevent, so far as practicable, leakage or seepage from the ground into the pipe. The specifications provided for the best quality of vitrified, salt-glazed, ironstone pipe, which, so far as appears, was in fact used. They further provided that the contractor shall pump out or otherwise remove any water or sewage which may be found or may tend to accumulate in the trench, "and the trench is to be kept entirely clear of water until all the mortar is set." They also provided that special care must be taken to properly fill with cement mortar the annular space at the bottom and sides as well as the top of the joints, a neat finish to be given to the joints by a further application of similar mortar to the face of the hub, so as to form a continuous and even-beveled surface from the exterior of said hub to the exterior of the spigot all around. Other provisions as to the manner of laying need not be mentioned, as they are not material here.

The work was to be done, according to the contract, "in obedience to such directions as may from time to time be given by the engineer in charge appointed by the said city of Marysville or his authorized agent or agents." It was provided in the specifications that, after the sewers and their appurtenances "have been properly constructed and inspected," clay or fine earth shall be carefully deposited in the trench so as not to disturb the work, and the trench then refilled; that, in case of doubt as to the correct interpretation of the specifications, the matter may be submitted to the engineer in charge, whose decision shall be final; that all materials for work must be satisfactory to the engineer in charge, "and all work, and the order and methods of work, will be under the direction and must be to the satisfaction of the engineer in charge"; that the representatives of the engineer in charge are to be given all desired facilities for the inspection of materials and processes used or to be used in connection with the work; that all rejected material is to be removed from the work at once; that any workman or tools that shall not meet the approval of the engineer in charge shall be ordered from the work at the request of said engineer, and such workmen and tools as shall meet the approval of such engineer in charge must be immediately substituted. They further provided: "Progress payments will be made upon estimates of the value of work done during each month to the extent of seventy-five (75) per cent. of the work done during such month. These payments will be made by warrants on the city treasurer, as provided by law. The estimates to be made by the engineer in charge. Final payment, including deferred payments, will be made in the same manner upon the completion

of the work to the satisfaction and approval of the engineer in charge."

Plaintiff commenced work under the contract in September, 1903, and proceeded steadily therewith, making the necessary excavations, laying the pipe and doing the other work, and refilling the trenches, until April, 1904, when the work was apparently supposed by all parties to be completed. Mr. Marsden Manson was the engineer in charge, and had furnished the specifications. He was assisted by Mr. Edward F. Haas, his associate. The work was done under the more immediate supervision of a superintendent for the city, employed by the city at the suggestion of Mr. Manson, one Cyrus Dam, who had under him four inspectors appointed by the city, there being at all times an inspector for the city supervising each gang of plaintiff's men employed on the work. There was also an engineer employed by the city at the suggestion of Manson to give the lines and grades, one H. G. Butler. No complaint was made as to the manner of work or kind of materials during the progress of the work, except in one or two instances, where the matter was at once remedied, and the work progressed to completion to the apparent satisfaction and approval of everybody engaged in supervising the work.

Each month a progress estimate was furnished by the engineer to the common council, certifying the amount and value of the work done up to the 1st day of the month, with a statement of the amount due the plaintiff. These were similar in form, that of December 4, 1903, which may be taken as a sample, being as follows:

"San Francisco, Cal., Dec. 4, 1903.

"To the Mayor and Common Council of the City of Marysville—Gentlemen: This is to certify that the following work has been done up to December 1, 1903, by the various contractors for sewer work now under construction in the city of Marysville, and that an estimate of the reasonable value of said work in accordance with the various contracts is as follows:

"City Street Improvement Co.

[Here follows itemized statement of number of feet of pipe laid and other work.]

Total	\$13,603 57
Less 25 per cent.	3,400 89
75 per cent. of total.....	\$10,202 68
Amount due on main contract (\$7,399.28 having already been paid)	2,803 40
Extra work ordered and completed..	58 75
Total amount due.....	\$ 2,862 15

"Respectfully submitted.

"Edw. F. Haas,

"Associate Engineer,

"Approved: Marsden Manson."

On receipt of each of these certificates the amount stated therein to be due was paid to plaintiff.

On March 31, 1904, a certificate signed by Mr. Haas, and approved by Mr. Manson, was presented to the common council, which covered all the work done by plaintiff. It stated that all the work specified therein, valued at \$32,064.29, had been done, that 75 per cent. of the total thereof was \$24,798.22, of which \$22,951.46 had been paid, and that there was due on the main contract \$1,846.76. It further stated that extras ordered and completed were of the value of \$630, of which \$225.50 had been paid, leaving \$404.50 due. Mr. Manson was present at this meeting, and orally reported that the work was practically completed, all in fact except three joints of pipe and one manhole, which were not laid and completed by reason of the request of the city to defer the work, and that he thought the plaintiff might be safely paid all but about \$1,000 of the amount. Thereupon the city paid the amount certified as due, together with \$4,266 of the 25 per cent. deferred payments, leaving \$4,007 unpaid. The unfinished work was completed within a few days thereafter.

Almost immediately thereafter, the sewers having been connected, the engineer and his associate caused a test to be made to ascertain the amount of leakage of water into the pipes laid by plaintiff. It was found that from the whole system there was flowing through the main pipe leading to the sump 1,100 gallons of water a minute, which reached that point and could only reach it by reason of leakage into the sewer pipe laid by plaintiff. This flow was three-fourths of the carrying capacity of the pipe. The test was also made by districts, and it was found that the leakage into the pipes was not confined to any particular section, but existed all over that portion of the system laid under the water level. It had been estimated by the engineers that, with the sewer laid in strict accord with the plans and specifications, the total flow from leakage would be approximately only 45 gallons a minute, and their testimony, with that of Mr. Connick, sufficiently supported the conclusion that such would have been the case. The test made it evident that somebody had blundered. Mr. Manson thereupon on April 23, 1904, notified the common council that the seepage was far in excess of any reasonable amount, and that it would be necessary radically to correct the work before any use could be made of the sewer system. He stated that it was not possible to determine the exact cause of this without a critical examination of the joints, but that from what had been brought to his notice he was satisfied that most of it was due, either to the washing out of the mortar before it had had time to set, or to the fact that the joints were not adequately filled with mortar. Three sections were specified as espe-

cially defective, and it was recommended that these sections, an aggregate of 13 blocks, be uncovered, and the leakage remedied. The common council notified plaintiff in writing of this recommendation, and directed it to proceed to comply therewith. Plaintiff claimed it had completed its contract, and did nothing. A subsequent general notice to complete its contract was ordered on May 13, 1904, and was sent to the president and secretary of plaintiff by registered mail. The common council thereupon advertised for bids for doing said work of uncovering, cleaning, and remortaring the joints and refilling the trenches on the 13 blocks, and received no bids, whereupon they resolved that the city should do the work. They proceeded with such work by day labor under superintendents for the city, and at the time of the trial had expended \$10,452.69 in doing such work on some of the blocks specified, as well as on other blocks not specified. The evidence was sufficient to support the conclusion that for the work done the amount expended was not unreasonable. The evidence is also sufficient to support the conclusion that the pipes and the cement thereon were not materially disturbed by the work of uncovering. After the first portion of the work had been uncovered, which was where the most leakage had been apparent, and the pipes and joints washed off, a careful inspection thereof was made, and it was found that on by far the greater portion of the joints there was either no cement at all on the lower half, or there were holes therein, while the cement on the upper half was all right. The same thing appeared in the other sections of pipe subsequently uncovered by the city for the purpose of repair. There was evidence sufficient to support the conclusion that the work of repairing these joints was substantially in accord with the original specifications, and, where this work has been done, the leakage has been so far reduced as to come within the original estimate of the engineers. The inference is irresistible that the trouble was due to a failure on the part of the employes of the contractor to conform to the specifications, either in failing to properly apply the cement on the lower half of the joints, or in failing to keep the trenches free from water during the laying of the pipe and until the cement mortar was set. The latter was apparently the principal cause. The testimony shows that, owing to heavy rains and the ordinary seepage of water in the ground, it was an exceedingly difficult matter to keep the trenches free of water, but that it was possible. Plaintiff used a pump for this purpose, and when in operation this pump ordinarily sufficed. When the work of repair was done it was found possible by the employes of the city to keep the water away from the joints for the requisite time. There was much testimony as to the original work, which showed

a constant and reckless disregard by plaintiff's employés of the requirement as to water in the trenches, and that this was so was practically demonstrated by the condition in which the joints were found on being uncovered. Not only was there much evidence to show that much of the pipe was laid by the employés when there was water in the trenches to such an extent that the lower portions of the pipe and joints were in the water, but it also appeared that it was of frequent occurrence for the pump to break down or for the man operating it to stop work during the night, with the result that water would rise in the trenches and reach the newly laid pipe, much of which had been partially covered with earth. As we have said, the condition of the work when uncovered was such as to practically demonstrate that there had been almost uniform disregard by plaintiff's employés of this important provision of the specifications. Mr. Manson and his associate, Mr. Haas, saw the work only occasionally, and had no knowledge of any failure on the part of the contractor in regard to this matter, no information being given them by the contractor or by any person engaged in superintending or inspecting the work.

The estimate as to necessary future work is based upon the fact of excessive leakage still apparent in various sections, where the old work has not as yet been uncovered, and the cost thereof estimated by experts who calculated in the light of the knowledge afforded by the cost of the work already done.

The trial court held that plaintiff did not perform, and has not performed, all or any of the terms or conditions of its contract on its part provided to be done and performed; "that, among other material matters in which it failed and neglected to perform the contract, it did not lay and cement the joints of the pipe therein referred to, according to said contract and specifications." It is contended by plaintiff that these findings are unsupported by the evidence, and this contention presents the real question in the case. For the purpose of considering it, we have made a statement of the evidence that we deem material.

It is earnestly contended that the city is estopped to deny the completion of the work by reason of its failure to object as the work progressed, and by reason of the signing of certificates by the engineer from month to month, and upon the supposed completion of the work, evidencing his approval thereof. Contracts of the kind here considered are not new to the law. The stipulation in such contracts that the engineers' estimate should be final has been held valid and binding by the courts of England, by those of the various state of the Union, and by the federal tribunals. The superior court of Missouri has this to say of such stipulations: "By such a stipulation, the parties

constitute the engineer an arbitrator, and the provision is held, if anything, more binding than an ordinary submission, for the reason that it enters into and becomes a part of the consideration of the contract, without which it would not, in all probability, have been made. It has its origin in contracts for the building of important and extensive government works, and was designed to avoid harassing litigation over questions that can only be determined honestly by those possessed of scientific knowledge." *Williams v. Chicago, S. F. & C. Ry. Co.*, 112 Mo. 487, 20 S. W. 631, 34 Am. St. Rep. 403.

It would be difficult to find a case where the contract more clearly contemplated that the work of plaintiff should be done under the constant immediate supervision and direction of the engineer in charge and his subordinates, and inspected and rejected or approved as it progressed and before the trenches were refilled with earth. This, we think, is amply evident from the contract itself, which includes the specifications, and was certainly the practical construction given it by the parties throughout. As we have seen, the work was all done under the supervision of the subordinates appointed by the city at the engineer's request, and who were his representatives upon the ground, and were there for no other purpose than to see that the materials furnished and the work done by plaintiff's employés were in all respects as required by the contract, and to require compliance with the contract as the work progressed, whenever any departure therefrom was observed. The defects now alleged in regard to the work, viz., that water was allowed to be in the trenches to such an extent as to injure the cement before it had set, and the failure on the part of workmen properly to apply the cement to the lower half of many of the joints, were matters which, assuming that they did occur, should have been observed by the engineer, through his representatives, at the time the work was being done, and when they could have easily been remedied. No portion of the work could be properly covered with earth until it had been inspected and found in proper shape, and there is no pretense that any of it was so covered prior to such inspection as was desired or requested by the inspectors. When it was allowed to be so covered, there was a practical approval and acceptance of the work by the engineer, through his representatives, and this acceptance was affirmed and approved from month to month by his own certificates to the common council of the city, stating the amount of work done by plaintiff to the first of the current month and the amount due therefor. These certificates necessarily implied that the work so certified was done according to the specifications and to his approval. The final certificate showed all the agreed work to be done, necessarily to the approval and satisfaction of the engi-

neer, and this certificate was re-enforced by the oral statement of the engineer to the same effect, made to the council at the meeting at which it was received, except that it appeared from such oral statement that a few joints of pipe and a manhole certified completed had not been completed because of a request of the city that they should be deferred for a few days. Under these circumstances, we think that the city is clearly estoppel to urge that plaintiff has not performed its contract.

Authorities upon this point are not wanting. It must be borne in mind that we are speaking of a case where there was no fraud on the part of the contractor operating to prevent a discovery of any imperfection, for there was not the slightest basis in the evidence for a conclusion to that effect. The most that could be contended is that there was evidence tending to show lack of care on the part of certain employés of plaintiff to comply fully at all times with the specifications in doing the work, and such a lack of care as should have been observed and remedied before the work was finally covered. In the case of *Schliess v. City of Grand Rapids*, 131 Mich. 52, 90 N. W. 700, the Supreme Court of Michigan said: "The conduct of the defendant, through its inspector and architect and board of public works, estops it from now claiming that the contract was not fulfilled. Its authorized agents were there during the entire progress of the work, charged with the duty to see that it was properly done. The city, through its board of public works, acted weekly on the reports made, and paid the amounts due for the estimates. The law would not permit defendant to see this work go on, to ratify it day after day and week by week, to see plaintiff putting in stone not in exact accord with the contract, and then say, when the work is done, 'You have not complied with the contract.' Its time to accept or reject was when the work was being done. It could not lull the plaintiff into the belief that the work was satisfactory, and, when completed, reject it."

In *Willey v. Fractional School District*, 25 Mich. 419, the work was to be done under the direction of the architect and to his entire satisfaction, and an overseer was to supervise the work for the district. The court said: "Whatever passed under his (the owner's) inspection as the work progressed, and was, in good faith, approved by him, expressly or by implication, was not open to objection on the part of the defendant afterward."

In *Laycock v. Moon*, 97 Wis. 59, 72 N. W. 372, the action was for the balance alleged to be due for the stone and brick work of a barn, and the defense was that the work had not been fully performed, in that the walls had not been slushed or pointed with mortar, and improper stones had been used. The contract provided that the plaintiff

should make a complete and workmanlike job to the entire satisfaction of the proprietor and architect, the whole of the work to be inspected as it went on. It was held that the defendant and his architect were bound to make inspection of the work and materials as the work progressed, that the contract implied that the work and materials were to be accepted or rejected at the time of inspection, and during the progress of the work, and that, as the alleged defects were obvious to the stipulated inspection, they could not avail defendant after the completion of the work.

In *Ashland, etc., Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136, where the contract provided that a building should be constructed according to certain plans and specifications, to the satisfaction of the architect, "who shall inspect all material and work as the building is constructed," and who was invested with power to reject any material or work not deemed by him to be in compliance with the contract, it was held that the manifest intent was that unsatisfactory material or construction should be promptly rejected, that the architect should not by silence allow unsatisfactory construction to proceed to a point where its removal from the building would be attended with serious loss to the builder, and that a failure to reject seasonably operated as a waiver.

See, also, *Beswick v. Platt*, 140 Pa. 28, 21 Atl. 306; *Board of Commissioners v. O'Connor*, 137 Ind. 622, 35 N. E. 1006, 1012, 37 N. E. 16; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 330, 331; *Potomac Steamboat Co. v. Harlan, etc., Co.*, 66 Md. 42, 4 Atl. 903; *Lamson v. City of Marshall*, 133 Mich. 250, 95 N. W. 78; *Standard, etc., Co. v. Hemminghaus*, 157 Mo. 23, 57 S. W. 746.

In *Ashland, etc., Co. v. Shores*, supra, this rule was declared to state a reasonable and just doctrine in cases of this nature. The court, through Marshall, J., said that where the owner stipulated for inspection and approval as the building is constructed, and for a representative of his own to compel compliance with the contract at every step, if such representative failed to perform his duty the loss should fall on the owner, and not be shifted to the builder, who may have been lured into the belief that his work and material were satisfactory till too late to remedy defects therein without serious loss, that the owner should look to his architects; that he should be and is bound the same as if he were upon the ground himself, charged with the duty of accepting or rejecting material or construction as soon as there is a reasonable opportunity for the inspection of it. It was said that this is but an application of the elementary principle that, where property is delivered by one person to another, as fulfilling an executory contract between them requiring such delivery, and the latter neglects to notify the former that the property is not accepted as complying with

the contract within a reasonable time after a fair opportunity to inspect it, an acceptance will be inferred, and that "any considerable delay in that regard must operate, by all equitable considerations, as an acceptance, except as to defects not discoverable by reasonable attention to the duties of inspection."

There is no basis in the record for the conclusion that the alleged defects were such as were not discoverable by reasonable attention to the duties of inspection. So far as the water being at times in the trenches before the mortar had time to set is concerned, that fact and the resultant damage, if any, to the cement, were as discoverable by a reasonable inspection prior to the filling in of the trenches as they ever could be. The same is true as to any carelessness of the workmen employed in putting cement on the lower portion of the joints.

It is urged that to allow the acceptance by the engineer and his subordinates thus to operate as an estoppel on the city would be to allow them to vary plain and unambiguous terms of the contract between plaintiff and defendant to the detriment of defendant. But, as was said in *Standard Stamping Co. v. Hemminghaus*, supra, where a similar contract was made, it was entirely competent for the city, through its engineer and his subordinates, to determine that the sewer as laid in the open trench and ready to be covered with earth was just what the contract required. Having seen it, and having had the fullest opportunity of inspecting it, all of those defects which were visible, or could have been ascertained by a reasonable inspection, were waived. In other words, the question whether the work was in accord with the contract was thus finally determined so far as such defects were concerned, in the absence of bad faith or fraud on the part of the contractor. The contractor could not be held responsible for any mere negligence or mistake on the part of the city's agent in the matter of such inspection.

The cases cited by learned counsel for defendant on this point, other than *Lamson v. City of Marshall*, 133 Mich. 250, 95 N. W. 78, and *Burke v. Kansas City*, 34 Mo. App. 570, do not appear applicable under the facts of this case. *Lamson v. City of Marshall*, supra, has already been cited herein as supporting the views we have stated. If there is anything in *Burke v. Kansas City*, supra, a decision of the Court of Appeal for Kansas City, in conflict with that view, it must be disregarded in view of the later decision of the Supreme Court of Missouri in *Standard Stamping Co. v. Hemminghaus*, supra. The case of *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790, a case much relied on by counsel, was one where the evidence showed that the contractor deliberately planned to escape the responsibilities of his contract by furnishing inferior materials and inferior workmen to place the materials on

the ground, and tried over and over to secretly work in rejected material, to such an extent that the city refused to allow him to finish the work and the engineer refused to give any certificate as to the work done. It was held that he had been guilty of such fraud that he could not recover in any form of action.

As we have said, there was nothing here to indicate any lack of good faith on the part of the contractor, or the slightest indisposition to conform to any direction of the engineer and his subordinates—nothing to serve as a basis for the conclusion that there was any fraud. Nor was there anything to indicate any effort by it or any of its employes to hamper or restrict the engineer or any of his subordinates in the matter of inspection.

Respondent's counsel contend that the plaintiff should not be permitted to show anything indicating an estoppel, because the certificates of the engineer were not set forth, either in substance or otherwise, in the complaint. We do not think it was necessary to plead the certificates specially. Section 457 of the Code of Civil Procedure is as follows: "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance." The complaint did plead the contract in terms. Under that contract, one of the conditions precedent to demand by and payment to plaintiff of progress and final installments of the contract price was the approval of the engineer. Under the statute just quoted, this condition precedent was not necessarily the subject of a special plea. The ultimate fact to be alleged was the performance of the work under the contract. The certificates, although, in the absence of fraud, conclusive as to that fact, are nevertheless but evidence of it.

There are no other alleged errors requiring special notice.

The judgment is reversed, and the cause remanded for new trial in accordance with the suggestions set forth above.

ANGELLOTTI, J. I dissent. It is not possible under the evidence to escape the conclusion that the plaintiff did not substantially perform the terms of its contract. The evidence shows an almost uniform and utter disregard by plaintiff's employes of one or the other of two plain and unambiguous provisions of the contract, absolutely essential to protection against excessive leakage of sewer pipe laid below the water level, and inserted for the purpose of such protection, the result being that the work, as turned over to defendant, could not have served the purpose for which it was intended.

So far as the claim that the certificates of the engineer constituted an estoppel is concerned, the question presented is a simple one. It may be assumed, as was held by the trial court and the District Court of Appeal, that the engineer was by the terms of the contract made the arbiter whose decision upon the question of performance should bind the respective parties. But it is recognized by all the authorities, and is admitted by learned counsel for plaintiff, that such a decision is conclusive only in the absence of a showing of fraud, collusion, or mistake of fact. Where it is shown that the decision was obtained through fraud, collusion, or such mistake of fact as is ground for relief in equity, the effect of the approval is overcome. 3 Page on Contracts, § 1469. The trial court was amply warranted in concluding that Mr. Manson had given these certificates in absolute ignorance of the manner in which the work certified had been done, a matter as to which plaintiff must be held to have had full knowledge, and upon the assumption, warranted under the circumstances, that plaintiff had in doing it complied with these all-important provisions in the specifications.

As to the claim that the city is estopped from denying that the work was performed in accordance with the contract by reason of the fact that it was done under the supervision of a superintendent, an assistant engineer to give the lines and grades, and inspectors, all appointed by it for the purpose, who failed to make objection thereto, and allowed plaintiff by their silence to believe that it was satisfactory until it was too late to remedy it except at great expense, there is a line of authorities holding that where it is the evident intention of the contract that the work shall be inspected as it progresses, and unsatisfactory material or labor rejected at once, and the owner has a representative on the ground to oversee the work as it is done and to guard against defective material or labor, defects which were observed by the owner's representative, or which would have been discovered by him by reasonable inspection, are waived by the owner, in the absence of fraud on the part of the contractor. See *Schliess v. Grand Rapids*, 131 Mich. 52, 90 N. W. 700; *Wilsey v. Fractional School District*, 25 Mich. 419; *Laycock v. Moon*, 97 Wis. 59, 72 N. W. 372; *Ashland, etc., Co. v. Shores*, 105 Wis. 122, 81 N. W. 136. It has been said that it is a reasonable and just doctrine that in such cases the loss should fall on the owner, and not be shifted to the builder, who may have been lured into the belief that his work and material were satisfactory until too late to remedy defects therein without serious loss, and that any considerable delay in manifesting disapproval will operate, by equitable considerations, as an acceptance, except as to defects not discoverable by reasonable attention to the duties of inspection. *Ashland, etc., Co. v. Shores*, *supra*. The rule is, of course,

based entirely on equitable considerations, and we have not found any case where it has been applied to such a substantial departure by the contractor from plain and unambiguous terms of his contract as is found to exist here, a departure which must be held to have been knowingly made, and which, as the contractor must have known, would necessarily have the effect of materially impairing the efficacy of the new sewer system, of which its work was an essential and important part. In the case at bar, it was, of course, the duty of the superintendent and inspectors employed by the city to notice such failure to comply with the specifications on the part of the contractor as were obvious, or could be ascertained by the exercise of reasonable care on their part, and to require such compliance, or, at least, to bring the matter to the attention of the engineer, Mr. Manson. But if, through ignorance or carelessness, they failed to perform their duty in this regard, plaintiff would not be warranted in assuming from their silence that the city was willing to waive a plain requirement so important to the success of the work. It knew that the inspectors were there simply for the purpose of requiring conformity on its part to the terms of the contract, and were without authority to waive any material provisions thereof; it knew that it was essential to the protection of the pipe against excessive leakage that the cement mortar put on the joints should be protected against water until it had time to set; and it knew that for this purpose the contract imposed upon it the obligation of keeping the trenches entirely clear of water until the mortar on the pipes therein had set. Unless we are to hold that the knowledge of its representatives in charge of the work as to the manner in which the work was being done was not the knowledge of plaintiff itself, which, of course, cannot be held, the evidence was sufficient to support the conclusion that plaintiff knew that this substantial provision as to water in the trenches was being almost constantly disregarded by its agents, and that the work being done could not be satisfactory to the engineer in charge when ultimately put to a proper test, and the failure to comply actually discovered by him. As to such a failure under such circumstances, no equitable consideration exists in favor of the contractor which will serve as the basis for an application of the doctrine as to waiver and estoppel. See, generally, *Wait, Engineering & Arch. Jurisprudence*, §§ 388, 446, 467, 468.

It should be stated in this connection that there was sufficient support in the evidence for the conclusion that the inspectors and superintendent for the city, actually supervising the doing of the work, could not, by the exercise of all reasonable care, have known of the extent to which the provision of the specifications as to keeping the trenches clear of water was violated, inasmuch as the evidence tended to show that the failure

to operate the pump, and the consequent flooding of the trenches, generally occurred during the night hours, when they were off duty, the result being that new work on which the mortar had not set, and which had in some cases been already partially covered with earth, was washed to such an extent as to remove the cement therefrom.

BEATTY, C. J. I dissent. In addition to what is said by Justice ANGELLOTTI, I desire to emphasize the point that the condition of the sewer pipe when uncovered shows conclusively that many of the joints had never been cemented on the lower half, or that the water had been allowed to rise in the trenches where they were laid before the cement had time to set. If this fact could have been known by the inspectors appointed by the city to watch the work as it progressed, it must have been known by the representatives of the contractor in charge of the work. They must have known, in other words, that the contract was being violated, and that the sewer as constructed would be practically valueless when turned over to the city. They must have known that the reports of the city's inspectors, to the effect that the work was being done according to the contract, were false and deceptive. This knowledge on the part of its agents in charge of the work, knowledge which must be imputed to the plaintiff, deprives it of any claim to the estoppel upon which it relies.

SHAW, J. I concur in both of the foregoing dissenting opinions.

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In re CRITES' ESTATE.

KANE v. GRAHAM. (S. F. 5,155.)

(Supreme Court of California. March 25, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 17*)— PERSONS ENTITLED TO ADMINISTRATION.

Code Civ. Proc. § 1350, amended by St. 1907, p. 313, c. 248, §§ 2, 3, provides that, if the executors named in a will fail to qualify, letters of administration must be issued as in case of intestacy. Section 1365, after specifying the order of preference in granting letters of administration, as, first, to surviving wife or husband, and, second, to children, provides that relatives of deceased are entitled to administer only when they succeed to some portion of the estate. Held that, where the executors named in a will fail to qualify, a child of the testator who takes under the will has preference to letters of administration over the widow, who takes nothing under the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 47; Dec. Dig. § 17.*]

Department 2. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

In the matter of the estate of William Crites, deceased. F. M. Graham was appointed administrator of the estate, and Alice A. Kane appeals. Reversed.

H. C. Jones, for appellant. C. D. Wright and R. M. Wright, for respondent.

HENSHAW, J. William Crites died testate. His will declared all his property to be separate property. It made no provision for the widow, for the reason, as declared, that suitable provision had already been made for her. The principal devisees and legatees under his will were his three children by a former marriage. The will named executors. The executors named forfeited their rights to letters testamentary; whereupon two petitions were filed for letters of administration with the will annexed—the one by Alice A. Kane, a child of the deceased, entitled to inherit and a beneficiary under the will, the other by a nominee of the widow, who took nothing under the will. The court granted letters to the nominee of the widow, and the question presented may thus be stated: Is a widow who takes nothing under a will entitled to letters of administration with the will annexed, in preference to a child of the testator, who is a devisee and legatee under the will?

Section 1350, Code Civ. Proc., now, under amendment of 1907 (St. 1907, p. 313, c. 248, §§ 2, 3) § 1350a, provides that, if the executors named in a will fail to apply for letters testamentary, letters of administration with the will annexed must be issued as designated and provided in granting letters in case of intestacy. Section 1365, Code Civ. Proc., is controlling upon the court's action. It is the manifest intention of the Legislature that section 1365, Code Civ. Proc., shall be determinative in a case arising under section 1350a, Code Civ. Proc. Estate of McDonald, 118 Cal. 277, 50 Pac. 399. Section 1365, in specifying the order of preference in granting letters, contains the important limiting clause that relatives of the deceased are entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof. That this right of succession is a controlling consideration is well established. In re Carmody, 88 Cal. 616, 26 Pac. 373; In re Davis, 106 Cal. 453, 39 Pac. 756; In re Eggers, 114 Cal. 464, 46 Pac. 380; In re Wakefield, 136 Cal. 110, 68 Pac. 499; In re Edson, 143 Cal. 607, 77 Pac. 451. In re Davis was a case of intestacy. The surviving wife, by articles of separation, had relinquished all rights to her husband's property. It was there held that, thus not being entitled to succeed to any portion of his estate, neither she nor her nominee was entitled to letters of administration thereon. But, furthermore, the underlying principle is in that case declared in the following language: "The principle involved in this provision of the statute, restricting the right of administration to those relatives entitled to take the personal estate, is not new. It is but the expression of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

policy which will be found to control in the statutes of many, if not most, of the states upon the subject, and is well recognized in England. It has its foundation in the consideration that administration should be committed to those who are the ultimate residuary beneficiaries of the estate—those to whom the property will go after administration.” Under the mandate of the law, the court in appointing under section 1350a is to follow the procedure laid down in section 1365. This does not mean alone that it shall follow the order there laid down, but it shall follow that order with observance of the qualifications there expressed, and the controlling qualification is that in the person appointed shall be a right of succession. Applying this principle to a will as it must be applied, since, if it be designed, as has been said, for the conservation of estates, it is as important in the case of testacy as intestacy, the rule would deny the right of letters of administration with the will annexed to one who, though an heir at law, did not take under the will. The widow, upon the showing here made was not entitled so to take, and, such being the case, neither she nor her nominee was entitled to letters of administration under the will. It is not meant by this to declare that, notwithstanding the terms of a will, a petitioner, such as a widow, would be forbidden to show that, despite its language, she was entitled to succeed; but, in the absence of such showing, her rights are measured by the terms of the instrument under which she seeks to act, and by those terms in the case at bar she is denied the right of administration.

The decree appealed from is therefore reversed.

We concur: LORIGAN, J.; MELVIN, J.

pose of receiving him as a passenger, and evidence was received on those questions without objection, defendant cannot object on appeal that the complaint did not sufficiently allege that fact; the allegations in that respect being at most merely defective.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193; * Pleading, Cent. Dig. §§ 1355-1374.]

4. CARRIERS (§ 247*)—PASSENGERS—RELATION—COMMENCEMENT.

Where one standing on a street crossing at a regular stopping place signaled the car to stop in order to take passage, and it was practically stopped in obedience to the signal, the relation of passenger and carrier arose.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 988; Dec. Dig. § 247.*]

5. CARRIERS (§ 280*)—PASSENGERS—NEGLIGENCE—CARE REQUIRED.

A carrier must use the highest degree of care in transporting passengers, and is liable for injuries caused by its failure to do so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1087; Dec. Dig. § 280.*]

6. CARRIERS (§ 287*)—PASSENGERS—INJURIES—NEGLIGENCE—STARTING CAR.

Where a street car, which had almost stopped in obedience to a signal to the motorman by plaintiff who intended to take passage, suddenly started forward without warning while plaintiff was getting aboard, the company was negligent, even though the conductor did not know of plaintiff's position; it being his duty to inform himself thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1159, 1161; Dec. Dig. § 287.*]

7. CARRIERS (§ 314*)—PASSENGERS—PLEADING—SUFFICIENCY OF COMPLAINT—NEGLIGENCE.

It is only necessary to allege that plaintiff was injured while being carried as a passenger, and that the injury was caused by the act of the carrier in operating the instrumentality; negligence being presumed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1273-1279; Dec. Dig. § 314.*]

8. CARRIERS (§ 321*)—PASSENGERS—INJURIES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in a passenger's injury action, the evidence was that, if the car had not actually stopped when plaintiff attempted to board it, it was going so slowly that it was practically at a standstill, an instruction based on the theory that the car had stopped was proper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

9. CARRIERS (§ 315*)—PLEADING—INJURIES TO PASSENGER—EVIDENCE—DEPARTURE.

Where the complaint, in a passenger's action for injuries, alleged that the car had come very nearly to a standstill when plaintiff attempted to board it, evidence that, if the car had not actually stopped, it had practically come to a standstill, was not a substantial departure.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 315.*]

10. APPEAL AND ERROR (§ 197*)—PROCEEDINGS BELOW—CHANGE OF THEORY ON APPEAL.

Even if an instruction, based on the theory that the car stopped before plaintiff attempted to board it, was broader than the complaint, which alleged that it had come very nearly to a standstill, where the instruction was supported by evidence, and the case was tried on the theory that the evidence was within the issues, and no question of variance was raised at

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NILSON v. OAKLAND TRACTION CO. (Civ. 538.)

(Court of Appeal, Third District, California.
Feb. 19, 1909.)

1. CARRIERS (§ 314*)—PASSENGERS—PLEADING—SUFFICIENCY OF COMPLAINT—"SIGNAL."

The complaint alleged that it was defendant's custom to stop its street cars at a certain street, and that, when a car approached the corner in charge of defendant's motorman and conductor, plaintiff, being in full view of the motorman and conductor, signaled the car to stop, and it had almost stopped, when plaintiff took hold of the support and was boarding the car, when it suddenly started forward without warning before plaintiff had obtained a footing, so as to jerk him so violently as to prevent him from getting on the car, whereby he was dragged, etc. *Held*, that the complaint sufficiently alleged that the motorman saw plaintiff and understood the signal to stop; the word "signal" meaning to communicate by means of an understood sign, and sufficiently showed that the injury was caused by the want of care on the part of defendant's servants.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

For other definitions, see Words and Phrases, vol. 7, p. 6513.]

2. PLEADING (§ 403*)—COMPLAINT—DEFECTS SUPPLIED BY ANSWER.

If the complaint did not sufficiently show that the car was stopped by defendant's servants in response to plaintiff's signal, the omission was supplied by allegations in the answer denying that the car slowed up at all in response to any signal given by plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1343-1347; Dec. Dig. § 403.*]

3. APPEAL AND ERROR (§ 193*)—PROCEEDINGS BELOW—OBJECTIONS TO COMPLAINT—NECESSITY.

Where a passenger's injury action was tried on the theory that the complaint sufficiently alleged that defendant's servants stopped the car in response to plaintiff's signal for the pur-

trial, defendant cannot object on appeal that the evidence was not within the pleadings.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197.*]

11. CARRIERS (§ 348*)—PASSENGERS—INJURIES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where there was evidence to support a finding that plaintiff was seen by the motorman from the time he attempted to board the street car until he was thrown from the car, an instruction was proper that, even if plaintiff was negligent, yet, if defendant could have avoided the accident by exercising reasonable care after seeing his danger, defendant would be liable.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 348.*]

12. CARRIERS (§ 347*)—INJURIES—ACTIONS—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

That a passenger attempted to board a street car, which he had signaled to stop, while it was moving slowly, was not negligence per se.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1369; Dec. Dig. § 347.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by August N. Nilson against the Oakland Traction Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Harmon Bell, for appellant. C. W. Eastin, for respondent.

BURNETT, J. Defendant appeals from the judgment for \$2,500 in favor of plaintiff and from the order denying its motion for a new trial. The action was for damages in consequence of personal injuries caused by the negligent act of defendant in starting its street car suddenly forward whereby plaintiff, who was about to board it, was thrown violently to the ground.

The allegations of the verified complaint material to the inquiry here are as follows: "That from a time prior to the 6th day of September, 1905, continuously thence forward until after said day, said defendant owned, controlled, operated, and maintained a system of street railroads in, along, and upon the public streets, within the corporate limits of the city of Oakland in said county of Alameda. That on the 6th day of September, 1905, and at the time of the injury to plaintiff herein alleged, said defendant was so operating and maintaining a line of street cars in, along, and upon Broadway street, in said city of Oakland, which cars were operated and propelled by electricity, and each of which cars was in the charge and under the management and control of two servants or agents of the defendant, known as and called, respectively a 'motorman' and a 'conductor.' That on said 6th day of September, 1905, it was the custom of said defendant, by and through its said servants and agents, to stop each of said cars at the corner of Ninth street and Broadway, to enable passengers to board said cars at said point.

That on said day plaintiff waited at said street corner to take passage upon one of said cars of defendant, and while so waiting one of said cars approached said street corner in the usual manner, whereupon plaintiff stepped toward said car and signaled the motorman standing in the front of said car to stop, whereupon said car slowed up until the same had come very nearly to a standstill, whereupon plaintiff took hold of the stanchion or support upon the side of said car for the purpose of boarding the same, and was in the act of boarding the same, whereupon, but before plaintiff could obtain a footing upon said car sufficiently to enable him to board the same and maintain his place upon said car, said car was started suddenly forward with great speed and without warning to plaintiff. That the forward movement of said car was so sudden and unexpected and so rapid that plaintiff was unable with safety to relax his hold upon said support and was also so violently jerked as to prevent him from getting upon said car, and that while so holding said support and in said situation plaintiff was dragged for a considerable distance, and until he was unable longer to maintain his hold upon said car, when he was thrown violently to the ground, and said car continued along said Broadway at a rapid rate of speed, leaving plaintiff where he fell. That at said time no other persons than the motorman and the conductor were upon said car. That said conductor was standing apparently talking to the motorman in the front end of said car, and plaintiff was in full view of said motorman and conductor when he signaled said car to stop as aforesaid." A general demurrer was interposed and overruled by consent. The answer denied any negligence of or by defendant and set up contributory negligence on the part of plaintiff.

Appellant presents a summary of its contentions as follows: "(1) The complaint, on which the verdict is founded, does not state facts sufficient to constitute a cause of action. (2) The instructions involving the question whether the car had come to a stop or not were not justified by the evidence. (3) The giving of the instructions involving the doctrine of last chance was not warranted by the evidence. (4) Plaintiff's own evidence shows that he was guilty of contributory negligence." The objection to the complaint is stated in general terms as follows: "An examination fails to disclose any allegation charging any wrongful act on the part of the defendant or its servants—in fact, it utterly fails to in any way connect the injury suffered by plaintiff with any culpable or negligent act of defendant or its servants." The particular specifications are that there is an omission to allege that the car was started by defendant, or that defendant had knowledge that plaintiff desired to board said car.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is argued that, "in order to properly set forth a cause of action founded on negligence, it is necessary to allege that the acts were done in a negligent manner, unless the doing of the acts themselves necessarily excludes any hypothesis other than that of negligence." In this connection the following citations are made: "It is true that in certain cases where the facts stated do not constitute a cause of action unless done negligently, it must be averred that they were so done, unless the facts themselves necessarily exclude any hypothesis other than that of negligence." *Silvera v. Iverson*, 125 Cal. 269, 57 Pac. 996. "The term 'negligence' for the purpose of pleading is a fact to be pleaded—an ultimate fact, which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the act and makes it a legal wrong." *Stephenson v. Southern Pacific Co.*, 102 Cal. 147, 34 Pac. 618, 36 Pac. 407. The rule is stated with substantial accuracy in the foregoing, although it is to be observed that the declaration from the *Silvera* Case is unnecessary to the decision, and it applies the strict rule in relation to the exclusion of any hypothesis other than that of negligence only to "certain cases." However, in said case it was held that the complaint was sufficient in the absence of a special demurrer; the court saying that "From the averred relation of the parties it was the duty of appellants, as averred, to supply a good reefing pennant, and not having done so, and by reason thereof the respondent having been injured, the appellants were liable for damages whether the wrongful act was the result of negligence, or inattention or other cause." In the *Stephenson* Case also it is further declared—which is, indeed, apodictic—that: "The absence of care in doing an act which produces injury to another is actionable. The term 'negligence' signifies and stands for the absence of care." Although it may be conceded that the complaint before us is somewhat inartificial and defective in the respects indicated, still we think it does appear therein that the defendant was responsible for the act causing the injury to plaintiff, and that said act was the result of inattention and want of care on its part. While there is no express allegation that the car was started suddenly through the agency of defendant's servants, this conclusion is necessarily implied in the language used. It is averred, as we have seen, that the car "was in the charge and under the management and control of the motorman and conductor." If it was under their management and control, its movements were not and could not be without their direction. Hence their participation in the accident is sufficiently alleged.

Again, when it is alleged that plaintiff, standing at a street corner where it was usual for the car to take on passengers, signaled the motorman to stop, whereupon said car slowed up "until the same had come very

nearly to a standstill and plaintiff was in full view of said motorman and conductor when he so signaled said car to stop," it is impossible for any one with ordinary understanding to misconceive the purpose of the pleader to convey the idea that the said change in the movement of the car was in response to the signal of the plaintiff and with a view of accepting him as a passenger. It is equally impossible for any one to have any doubt that the motorman saw the plaintiff and understood the signal. This follows from the meaning of the word "signal," which is "to communicate by means of an understood sign." If the motorman was in full view of and was signaled by the plaintiff, he must have seen the latter.

But if it should be held that the complaint is defective in this respect, the omission should be deemed supplied by the denial of the answer that "the car slowed up at all in response to any signal by plaintiff at any time and place." The issue was thus clearly made as to whether defendant's servants acted in pursuance of the signal of plaintiff. Indeed, the case was tried upon the theory that there was nothing lacking in the complaint to show the agency of the defendant in stopping the car in response to plaintiff's invitation and for the purpose of accepting him as a passenger. Evidence addressed to these considerations was received without opposition, and it is now too late for defendant to maintain an objection to what we hold to be at most a defective attempt rather than an entire failure to allege a material fact. By clear intendment and reasonable construction we find in the complaint a case presented therefore of the plaintiff at the place where he should be signaling the motorman of a regular passenger car to stop in order that said plaintiff may take passage. In response to the signal, the car is brought virtually to a standstill, and the plaintiff is in the act of boarding the same. There is thus revealed the relation of carrier and passenger and the corresponding obligations growing out of this relation.

The rule seems to be well settled, as stated by *Hutchinson on Carriers*, § 1005: "That a person may become a passenger without having come into the carrier's vehicle, if the surrounding circumstances show an intent on his part to become a passenger and an acceptance of him by the carrier as a passenger." The text is illustrated by reference to a case where a man was hurt by the starting of an omnibus just as he was putting his foot on the step; the driver supposing that he had entered. It follows therefore from the facts alleged that plaintiff was entitled to the same care as the law requires on behalf of passengers. This is the highest degree of care in their transportation, and, if injury results to the passenger in consequence of the failure of the carrier to exercise such care, an action for damages will lie. *Osgood v. Los Angeles, etc., Ry. Co.*, 137

Cal. 280, 70 Pac. 169, 92 Am. St. Rep. 171; *Cody v. Market St. Ry. Co.*, 148 Cal. 90, 82 Pac. 666.

Going one step further, we find the allegation that the car was started suddenly forward without warning to plaintiff. This is obviously a violation of the duty owed by defendant to plaintiff, considering the latter's position at the time. It is no answer to say that it does not appear that the conductor had knowledge of plaintiff's position, as under the facts alleged it was his duty to have that information and it is implied as a matter of law. In *McCurrie v. Southern Pacific Co.*, 122 Cal. 558, 55 Pac. 324, it is held that: "A prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the act of the carrier in operating the instrumentality employed in his business. In such case there is a presumption of negligence, which throws upon the carrier the burden of showing that the injury was sustained without negligence on his part." If a case is made out by showing those facts, it must be sufficient in a complaint to allege them, as it appears has been done here.

The court committed no error in giving the following instruction: "When a man signals a street car, at a place where such cars stop with or without signal to take on passengers, for the purpose of stopping it so he can board it and become a passenger, and the car stops or slows up as if intending to stop at that point in answer to the signal, and the man steps forward to the car, in plain view of those in charge of the operation of the car for the purpose of boarding the car, it then becomes the duty of those in charge of the car to ascertain and know whether or not he has safely boarded the car, or is in the act of boarding it, and it is negligence for them to suddenly start the car forward without warning, while he is in the act of boarding the car." The legal proposition involved in the foregoing is not disputed by appellant, but it is contended "that there was no evidence at the trial to the effect that the car had come to a stop," and therefore the instruction was prejudicial for the reason that the jury would be less likely to find plaintiff guilty of contributory negligence for attempting to board a car that had stopped than if it were in motion, and cases are cited to the effect that "the giving of an instruction not supported by the evidence is sufficient ground for reversal when it appears that such instruction misled, or might have misled, the jury to the prejudice of the party complaining." But the plaintiff testified: "And finally when the rear end of the car came, it was moving so slow that I couldn't perceive whether it was moving or not or else standing still for a moment, while I took hold of it with my hand." Mr. Nichols, a witness for plaintiff, testified that: "I

can't say positively that it stopped. It is absolutely impossible for me to tell whether it was stopped, but it was going so slow that it was practically at a standstill." The foregoing is amply sufficient to justify the instruction based upon the hypothesis that the car had stopped. It did not invade the province of the jury, but presented the law applicable to a certain contingency, which, in view, of the evidence, might be found to exist.

Nor was there any substantial departure from the case made by the pleadings. It is true that it was not alleged that the car had come to a stop, but it is averred that "it had come very nearly to a standstill." Even conceding that the hypothesis in said instruction goes beyond the allegation of the complaint, it finds support in the evidence, and the case was tried upon the theory that said evidence was within the issues of the pleadings, and it should not now be held otherwise. If it had been deemed of sufficient importance to call to the attention of the trial court a simple amendment to the complaint, no doubt would have been allowed, and it would have obviated the said technical criticism.

The following instruction is also criticised by appellant: "No more in law than in morals can one wrong be justified by another. A person is bound to conduct himself with reasonable care and prudence toward even a wrongdoer, and if he can so conduct himself, and does not, he is liable, if injury is sustained by the other. Even if there was negligence on the part of the plaintiff in some degree, yet if at the time when the injury was committed it might have been avoided by the defendant by the exercise of reasonable care and prudence, and if the defendant was aware of that fact, then the defendant is liable to the plaintiff for injuries so committed." It is claimed that this is subject to the criticism made in *Bennichsen v. Market St. Ry. Co.*, 149 Cal. 20, 84 Pac. 420, wherein it is said: "The case therefore was tried upon the theory that there was evidence to bring it within the cases which hold that, although the person injured put himself by his own negligence in a place of danger, if the employees in charge of the train discovered his danger in time to prevent injury by the exercise of ordinary care and did not do so, then, notwithstanding the contributory negligence of the injured person, he may recover; but there was no such evidence in the case. There is no pretense that the motorman saw the plaintiff at all at the time of the accident until after it had occurred; on the other hand, it is shown clearly that he did not." There is evidence in the case at bar, however, from which the jury might have drawn the conclusion that plaintiff was seen by the motorman from the time he stepped out to signal the car until he was thrown down. Of course, no one except the motorman himself, who

was not called as a witness, could testify positively as to this fact; but the circumstantial evidence was sufficient to justify this inference. If there was any showing of the existence of the "last chance" to avoid the accident, then the giving of the instruction was not erroneous. Other instructions are criticised on the same ground, but the objection is equally untenable.

As to the question of contributory negligence, it was for the jury to determine. It cannot be said as a matter of law that by reason of his own negligence plaintiff is precluded from recovering. Even if the car was moving slowly, it was not negligence per se to attempt to board it. It is a matter of common knowledge that this very thing is done hundreds of times daily in our large cities, and whether the act involves any peril or want of care must depend upon the particular circumstances of each case. Among the instructions which fully and correctly covered every phase of the evidence is the following upon this branch of the case: "Everyday observation and experience show that it is not necessarily negligent to attempt to board a moving street car. Whether it is or not depends upon the circumstances of each case. While it might be negligence for a man to try to board a car running very rapidly, it might not be negligence to try to board the same car running very slowly. It might be negligence to try to board a moving car of one kind, but not so to try to board a moving car of a different kind. It might be negligence for one man to try to board a car moving at a given rate, but not so for another man to try to board the same car, at the same place, in the same manner, and moving at the same rate. You are the judges of the question whether it was negligence for Nilson to try to board the car in question in this case, and for that purpose are to take into consideration all the evidence in the case and all the circumstances surrounding him at that time."

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

9 Cal. App. 217

KEECH v. JOPLIN, County Treasurer.
(Civ. 544.)

(Court of Appeal, Second District, California.
Oct. 14, 1908.)

COURTS (§ 212*)—APPELLATE JURISDICTION—
CONSTITUTIONAL PROVISIONS.

Under Const. art. 6, § 4, giving the Supreme Court jurisdiction in all cases involving the legality of any tax, etc., and giving the District Courts of Appeal appellate jurisdiction in mandamus, etc., except in cases in which appellate jurisdiction is conferred on the Supreme Court, a District Court of Appeal has no jurisdiction on appeal from a judgment directing a writ of mandate to compel a county treasurer

to pay a warrant drawn on the general fund of a protection district, where the questions involve the validity of the organization of the district and of the tax by which the fund was raised.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 212.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Mandamus proceedings by E. E. Keech against J. C. Joplin, as County Treasurer of the County of Orange, to compel defendant to pay a warrant. From a judgment directing the issuance of the writ, defendant appeals. Transferred to Supreme Court.

Hutton & Williams, B. T. Williams, and H. C. Head, for appellant. E. E. Keech, pro se.

PER CURIAM. This is an appeal from a judgment directing the issuance of a writ of mandate to compel defendant, as treasurer of Orange county, to pay a warrant for \$500, drawn on the general fund of the Newbert protection district. An examination of the record discloses that the question of the validity of the organization of that district and of the tax by which the fund drawn upon was raised are involved in a determination of said appeal. This court has no appellate jurisdiction in such cases (section 4, art. 6, Const.), and we do not think the limitations of our jurisdiction are affected by the fact that the question of the validity of the tax is raised in a mandamus proceeding, instead of in an ordinary action.

The Supreme Court being the proper court to hear said appeal, it is ordered that the cause be, and the same is hereby, transferred to that court.

10 Cal. App. 171

WEHNER v. BAUER. (Civ. 536.)

(Court of Appeal, First District, California.
March 4, 1909. Rehearing Denied
by Supreme Court April
29, 1909.)

1. BILLS AND NOTES (§ 493*)—CONSIDERATION
—PRESUMPTIONS—BURDEN OF PROOF.

The law presumes that a note is given for a consideration, and the maker has the burden of showing want of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

2. APPEAL AND ERROR (§ 979*)—DISCRETION
OF TRIAL COURT—NEW TRIAL FOR INSUFFICIENCY OF EVIDENCE.

A motion for a new trial for insufficiency of the evidence is addressed to the discretion of the trial court, and its action will not be disturbed in the absence of clear abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

3. NEW TRIAL (§ 70*) — INSUFFICIENCY OF
EVIDENCE.

Where, in an action on a note alleged by the maker to have been executed without consideration, the evidence showed that the maker

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had used for a time the money of the payee, and that he desired to borrow the same for a new period; that he offered to pay a specified sum for the use he had had of the money if the payee would take a note therefor; that the maker gave the note to cover the interest on the payee loaning the money for a longer period—the granting of a new trial after verdict for defendant was not an abuse of discretion.

[Ed. Note.—For other cases, see New Trial. Dec. Dig. § 70.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by William Wehner against Alexander Bauer. From an order granting a new trial after verdict for defendant, he appeals. Affirmed.

Carl Westerfeld and A. H. Jarman, for appellant. Samuel G. Tompkins and Wm. P. Vuede, for respondent.

COOPER, P. J. This action was brought to recover upon a promissory note for \$1,000, dated September 30, 1902, a copy of which is set forth in the complaint. The answer of the defendant contained no denial as to the due execution and delivery of the promissory note, but alleged, in effect, that the note was executed without consideration. The case was submitted upon the evidence of plaintiff, and judgment entered in favor of defendant. The court afterwards, upon due consideration, granted the motion of plaintiff for a new trial upon the ground of the insufficiency of the evidence to sustain the judgment. This appeal is from the order so made granting a new trial.

In our opinion the court was justified in granting the new trial. The plaintiff had a promissory note duly made and delivered by defendant to him. Defendant had paid \$30 interest on the note up to March 1, 1903. The law raises the presumption that the promissory note was given for a consideration. The burden was upon the defendant to show that there was no consideration for such note. The evidence of plaintiff tends to show that the defendant had, by reason of certain business matters, used \$25,000 of plaintiff's money for about seven months, and that defendant desired to borrow the \$25,000 for a new period; that thereupon defendant of his own free will offered to pay plaintiff \$1,000 for the use he had already had of the \$25,000 if plaintiff would take his promissory note for the \$1,000. The substance of the agreement was that plaintiff loaned the defendant the \$25,000 for a stated period and for a longer period, and that the defendant gave the promissory note as interest for the use he had already had of the \$25,000 belonging to plaintiff. Defendant knew the consideration he had received when he executed the note. He put his signature to it in payment of what he deemed to be a just obligation due plaintiff. The rule is well settled that a mo-

tion for a new trial on the ground of the insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, and its action in granting the motion will not be disturbed on appeal unless it appears that there was a clear abuse of such discretion. In this case we not only think there was no such abuse of discretion, but that the evidence was such that the court properly granted the motion for a new trial.

The order is affirmed.

We concur: KERRIGAN, J.; HALL, J.

10 Cal. App. 192

CHARTERS v. STANSBURY et al.

(Civ. 594.)

(Court of Appeal, Second District, California March 8, 1909.)

MUNICIPAL CORPORATIONS (§ 513*) — STREET ASSESSMENT — QUIETING TITLE AGAINST LIEN—PARTIES.

It is not ground for reversing judgment for plaintiff, in an action to quiet title against the lien of a street assessment bond, that the term of office of the city treasurer, made one of the defendants, expired after submission to, but before decision by, the trial court, and that his successor was not substituted as a defendant, the assessment and bond being adjudged void, and the injunction running against all the defendants, as well as the city treasurer and his successors in office, as the rights of all parties would have been fully determined, and the decree complete, had reference to the city treasurer been eliminated.

[Ed. Note.—For other cases, see Municipal Corporation, Dec. Dig. § 513.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by John W. Charters against Charles Stansbury and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Cole & Cole and Charles Lantz, for appellants. Lucius M. Fall, for respondent.

TAGGART, J. This is an action to quiet title against the lien of a street assessment bond. It is unnecessary to state the facts of the case. The bond issued for the payment of street improvement work done pursuant to the Vrooman act in the city of Los Angeles under the same specifications considered by the Supreme Court in *Woollacott v. Meekin*, 151 Cal. 701, 91 Pac. 612, and *Van Loenen v. Gillespie*, 152 Cal. 222, 96 Pac. 87, and by this court in *Glassell v. O'Dea*, 95 Pac. 44. In all these cases it was held, on the authority of *Blochman v. Spreckels*, 135 Cal. 662, 67 Pac. 1061, 57 L. R. A. 213, and *Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091, that such specifications rendered void the assessment for street work based thereon.

The other point made, that the judgment should be reversed because the term of office of the city treasurer, who was made one of the defendants, expired after the cause was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

submitted, and before it was decided by the trial court, and his successor in office was not substituted as a defendant in the action, is hardly to be seriously considered. The decree adjudicates that the assessment and bond are void, and the injunction granted runs against all the defendants, as well as the city treasurer and his successors in office. If the reference to the city treasurer were eliminated, the rights of the parties would be fully determined, and the decree complete. It therefore became unnecessary to determine what effect, if any, the failure to substitute the successor of Workman would have upon the judgment, and the denial of the motion to vacate judgment as to him was not prejudicial.

Judgment and orders appealed from affirmed.

We concur: ALLEN, P. J.; SHAW, J.

9 Cal. App. 311

Ex parte WATTS. (Cr. 111.)

(Court of Appeal, Second District, California.
Nov. 9, 1908.)

HABEAS CORPUS (§ 102*) — COMMITMENT BY COMMITTING MAGISTRATE—RECORD.

Where the record, on habeas corpus for the discharge of one committed by a committing magistrate, showed that no deposition, required by Pen. Code, § 702, was taken and filed by the magistrate, and failed to show anything warranting the commitment, accused was entitled to his discharge.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 102.*]

In the matter of the application of O. M. Watts for a writ of habeas corpus. Application discharged.

David G. Taylor, for petitioner. J. D. Fredericks, Dist. Atty., and C. C. McComas, Asst. Dist. Atty., for respondent.

PER CURIAM. The district attorney having recommended to the court that the prayer of the petition be granted, and the court upon an examination of the record being satisfied that no deposition, as required by section 702 of the Penal Code, was taken and filed by the magistrate, and, further, that nothing appears from the record warranting the issuance of a commitment, it is ordered that the defendant be discharged.

7 Cal. Unrep. 356

STEWART v. BURBRIDGE et al. (Civ. 574.)

(Court of Appeal, Second District, California.
Nov. 23, 1908.)

1. APPEAL AND ERROR (§ 395*)—DISMISSAL—FAILURE TO FILE UNDERTAKING.

Where no undertaking has been filed to perfect an appeal from an order denying a motion for a new trial, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3127; Dec. Dig. § 395.*]

2. APPEAL AND ERROR (§ 387*)—NOTICE OF APPEAL—UNDERTAKING.

Where a notice of appeal from a judgment was duly served on the adverse party, and the notice and an undertaking to perfect the appeal were on the same day filed in the trial court, the appeal was properly taken.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 387.*]

Action by C. P. Stewart against O. H. Burbridge and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. On motion to dismiss. Appeal from order dismissed, and motion to dismiss appeal from judgment denied.

Samuel Barnes Smith, for appellants. Woodruff & McClure, for respondent.

PER CURIAM. It appearing to the court that no undertaking has been filed to perfect the appeal taken from the order denying defendants' motion for a new trial in the above-entitled action, it is ordered that the said appeal be dismissed.

It further appearing to the court, from a duly certified copy thereof on file herein, that a notice of appeal from the judgment was served on plaintiff and filed in the superior court, and an undertaking to perfect the same filed on the same day, to wit, on the 17th day of July, 1908, it is ordered that the motion to dismiss the appeal from the judgment is hereby denied.

10 Cal. App. 116

Ex parte McCOY. (Cr. 79.)

(Court of Appeal, Third District, California.
Feb. 23, 1909.)

1. HABEAS CORPUS (§ 90*)—PROCEEDINGS—APPEAL—OBJECTIONS—NECESSITY.

Where petitioner was arrested and committed to custody until the sheriff was directed, on habeas corpus, to produce him, and in the meantime to admit him to bail, and the return recited that, upon the service of the writ, petitioner was admitted to bail, and a commissioner was thereafter appointed, without objection, to take testimony, and the case was continued, during which time much testimony was taken, respondent could not contradict his return by objecting, for the first time on final hearing, that the case was moot, as he should have objected earlier.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 90.*]

2. HABEAS CORPUS (§ 32*)—PROCEEDINGS—SCOPE OF INQUIRY—VALIDITY OF ORDINANCE.

On habeas corpus, the court may determine the validity of the ordinance under which petitioner was arrested, even though the court has jurisdiction under the ordinance, and the process is regular on its face.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 29; Dec. Dig. § 32.*]

3. HABEAS CORPUS (§ 85*)—PROCEEDINGS—EVIDENCE.

Under Pen. Code, § 1484, authorizing the party brought in on habeas corpus to controvert any material facts stated in the return, or allege any fact to show that his imprisonment is unlawful, or that he is entitled to be discharged,

and giving the court power to require the attendance of witnesses, etc., the court may take and consider evidence on disputed questions of fact.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 77; Dec. Dig. § 85.*]

4. LICENSES (§ 7*)—COUNTY ORDINANCES—VALIDITY—REASONABLENESS—JURISDICTION OF COURTS.

An ordinance of a county board of supervisors imposing a license upon an occupation is not conclusive as to the reasonableness of the license imposed, but the courts will determine whether it is a reasonable police regulation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

5. LICENSES (§ 5¼*)—COUNTY ORDINANCES—VALIDITY—REASONABLENESS.

A county cannot enact an unreasonable license tax under its police power any more than the Legislature itself could have done so.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 5¼.*]

6. LICENSES (§ 7*)—COUNTY ORDINANCES—VALIDITY—REASONABLENESS.

Since County Government Act 1907, § 4041, subd. 22 (St. 1907, p. 370, c. 232), authorizes county boards of supervisors to license businesses in the exercise of their police powers, for the purpose of regulation, and not otherwise, if an ordinance imposing a license of five cents a head for grazing sheep, enacted pursuant to St. 1903, p. 41, c. 40, prohibiting licenses greater than five cents a head on the business of herding sheep, etc., was a greater tax than was required to regulate the business, the act of 1903 would not justify the ordinance.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

7. MUNICIPAL CORPORATIONS (§ 122*)—ORDINANCES—VALIDITY—BURDEN OF PROOF.

The burden of showing that an ordinance is unreasonable is on the party attacking it on that ground.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 284; Dec. Dig. § 122.*]

8. MUNICIPAL CORPORATIONS (§ 122*)—ORDINANCES—EVIDENCE—WEIGHT.

The evidence must clearly show that an ordinance is unreasonable in order to invalidate it on that ground; and, when it leaves the court in doubt, the ordinance will be sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 284; Dec. Dig. § 122.*]

9. WORDS AND PHRASES—"PURPOSE."

The word "purpose" means that which a person sets before himself as an object to be reached; the end or aim to which the view is directed in any plan, matter, or execution (citing Words and Phrases, vol. 7, pp. 5865, 5866).

10. HABEAS CORPUS (§ 85*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE.

The court must determine the sufficiency of the evidence, in habeas corpus proceedings just as in other cases; Pen. Code, § 1484, providing for calling witnesses and taking evidence in habeas corpus proceedings, and authorizing the court to do everything necessary to a full hearing.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 85.*]

11. LICENSES (§ 7*)—COUNTY ORDINANCES—VALIDITY—EVIDENCE—ADMISSIBILITY.

Where an ordinance, enacted under County Government Act 1907, § 4041, subd. 22 (St. 1907, p. 370, c. 232; Pol. Code, § 3366), au-

thorizing county boards of supervisors to license, under their police powers, for regulation all businesses, etc., is attacked on the ground of unreasonableness, evidence is admissible that the ordinance was not for regulation but for revenue; and, in determining the validity of an ordinance imposing a license tax upon sheep, etc., all evidence is admissible which tends to show whether the tax is excessive for regulation only, or that it was imposed for a revenue, and not for regulation, such as the physical conditions of the country where the sheep are herded; the effect of the use of county highways by sheep and other animals; the cost of enforcing the ordinance, etc.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

12. LICENSES (§ 7*)—COUNTY ORDINANCES—VALIDITY—EVIDENCE.

On habeas corpus proceedings for violating a county ordinance imposing a license of five cents a head upon sheep grazed in the county, evidence held to show that the ordinance was adopted for revenue, and not for regulation only, and hence was void.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 7.*]

13. WORDS AND PHRASES—"REGULATE."

To "regulate" means to adjust by rule or method or established mode; to direct by rule or restriction; to subject to governing principles of law, but the term does not include the power to prohibit.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6041-6047; vol. 8, p. 7782.]

14. CONSTITUTIONAL LAW (§ 230*)—EQUAL PROTECTION OF LAW.

County ordinances, regulating sheep grazing by requiring sheep herders to avoid injuring highways in driving sheep along them, prohibiting them from leaving dead sheep near a public road, making it unlawful for such persons to herd sheep near a city reservoir, etc., unlawfully discriminate against those engaged in that business, in that they do not apply to sheep driven through the county to market, etc., and not pastured therein, to which they were equally applicable.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.*]

15. LICENSES (§ 7*)—OCCUPATIONS—ORDINANCES.

A license, imposed by ordinance under the police power for purposes of regulation, may be in an amount sufficient to include the necessary or probable expense of issuing the license, and of such inspection and regulation and police surveillance as may be lawful and necessary, together with the incidental cost of supervising the business; but it cannot be based directly on the damage resulting from the business, though that may be considered in determining the necessity of regulation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

16. LICENSES (§ 7*)—REGULATION—LICENSES—SHEEP-HERDING ORDINANCE—VALIDITY.

While, if some special injury is caused to a road by driving sheep over it which are being grazed, the expense of any necessary and reasonable measures regulating the use of the road may be included in the license fee imposed upon sheep grazing, it would be unreasonable to impose a license charge for road repairs generally upon sheep herders, regardless of whether a part of the damage was done by other live stock.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

17. TAXATION (§ 70*)—PROPERTY TAXABLE—"SHEEP."

In the taxation of "sheep" for state and county purposes, unweaned lambs are excluded.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 70.*

For other definitions, see Words and Phrases, vol. 7, p. 6481.]

18. STATUTES (§ 188*)—CONSTRUCTION.

In construing a statute, the words should be taken in their usual and popular sense, unless they have a well-understood technical meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 266; Dec. Dig. § 188.*]

Application for habeas corpus by L. L. McCoy. Writ granted, and petitioner discharged.

McCoy & Gans and Pardee & Pardee, for petitioner. R. M. Rankin, Dist. Atty., and C. E. McLaughlin, for respondent.

CHAPMAN, P. J. Petitioner was, on August 3, 1908, complained against for a misdemeanor in violating an ordinance of the county of Lassen, requiring a license to be paid for raising, grazing, herding, and pasturing sheep and lambs within said county. A warrant of arrest was issued by a justice of the peace, and was duly served by arresting the defendant (petitioner here) and bringing him into the magistrate's court on said day, whereupon he was committed to the custody of the sheriff of Lassen county "pending the calling of his case for trial," and was by the sheriff taken into custody. Petitioner thereupon, to wit, on August 5, 1908, presented his petition to this court, alleging his imprisonment under said commitment, and the writ was ordered to issue directing the sheriff to produce the prisoner, and have him in court on August 14, 1908, "and that in the meantime said petitioner be released on bail in the sum of \$100 cash." In his return the sheriff states that petitioner was committed to his custody by virtue of the commitment, and was detained by virtue thereof; "that upon the service of said writ the said L. L. McCoy was admitted to bail in the sum of \$100 cash as ordered by said writ, and that since such time the said L. L. McCoy has not been in and is not now by me imprisoned or detained." The matter came on to be heard on August 14, 1908, and was fully argued. It appearing, however, that the issues presented were such as to require evidence to be taken, the court accordingly so ordered and appointed a commissioner for that purpose. The further hearing was continued until October 31, 1908. Meantime the commissioner, without objection of respondent, proceeded to take testimony, of which there are several hundred pages, and many exhibits. For the first time, at the hearing October 31st, the point was made by respondent that the case is moot, and the writ must be dismissed, citing *Ex parte Schmitz*, 150 Cal. 664, 89 Pac. 438.

The facts here are wholly unlike the facts in that case, and in the case of *Ex parte Gow*, 139 Cal. 242, 73 Pac. 145. The rule there applied was for the protection of the court against cases made for the sole purpose of testing the validity of the law under which the arrest was made, and where the arrest was voluntary and procured by the defendant, not because he was being detained and deprived of his liberty; for in one of those cases the defendant was already enlarged on bail, and the other on his own recognizance. Here the defendant was arrested and committed to the custody of the sheriff, and, as shown by his return, remained in his custody until admitted to bail by this court pending the hearing of the writ. Petitioner, in his petition, set out the complaint and warrant of arrest, and alleged "that upon said warrant of arrest your petitioner was, on the 3d day of August, 1908, arrested and taken into custody by said sheriff, and ever since said time your petitioner has been, and now is, under said arrest, and in said custody, and restrained of his liberty, as aforesaid." This was not denied in the sheriff's return, and is answered as above set forth. Upon this record the court ordered evidence to be taken, and the cause continued for that purpose, and not until the case came on for final argument, and after the parties had been put to much expense, was any suggestion made that the case is moot. Respondent should have made the objection, if it had any merit, at an earlier stage of the proceeding; and, not having done so, we think he should not now be permitted to come in and contradict his return.

Section 1 of Ordinance No. 82, passed January 11, 1908, by the Lassen county board of supervisors, for the violation of which the petitioner was arrested, provides that: "Every person, association, firm or corporation engaged or engaging in the business of raising, grazing, herding or pasturing sheep or lambs within the county * * * must annually, at the time of engaging in said business each year, procure a license therefor from the license tax collector of said county, and must file the affidavit hereinafter provided for and pay a license fee or charge of five cents for each sheep or lamb raised, grazed, herded, or pastured within Lassen county by such person. * * *" Section 2 provides that, in order to procure the license, the person must file with said license tax collector, with the application, an affidavit showing the number of sheep and lambs then or thereafter to be raised, grazed, herded, or pastured within said county; whether said sheep or lambs are or have been infected with scab, or any other infectious or contagious disease, and, if so, when and where they were located when so infected; the portion of the county in which they are to be grazed, etc., during the current

year; whether the applicant has previously raised, herded, grazed, or pastured sheep or lambs in said county, and, if so, in what part thereof; when, where, and by whom said sheep and lambs have been "dipped"; when the applicant will engage in said business in said county. If it appears from said affidavit that such sheep or lambs are suffering from an infectious or contagious disease, the tax collector must refuse to issue such license, otherwise he shall, upon payment of the fee above provided for, issue the license. Section 3 provides that the collector may, whenever he may deem it expedient, verify the statements made in the affidavit, "in such manner as he may deem best"; and, if he finds that any false statements have been made in the affidavit, he must report the same to the district attorney, "and the cost of making such examination and investigation shall be a county charge to be allowed as other claims against the county." Section 4 provides that every applicant for a license must, upon demand of the license collector, corral or confine his sheep and lambs in such manner as to enable the license collector to make said examination, "and any person * * * refusing to comply with such demand will be guilty of a misdemeanor." Section 5 makes it the duty of the collector to file and examine all affidavits for licenses, and to collect the license fee. Section 6 makes it "unlawful for any person * * * to bring within said county of Lassen any sheep or lambs known to be suffering from any infectious or contagious disease." Section 7 makes it unlawful for "any person * * * engaged in said business of raising * * * sheep or lambs within the county of Lassen to allow or permit the dead body of any sheep or lamb owned, controlled or possessed by them to remain within five hundred yards of any public highway or inhabited dwelling or running stream of water within said county," and it is made the duty of such person to bury or otherwise dispose of the carcass of such sheep or lamb. Section 8 makes it unlawful for any person " * * * to corral or allow their sheep or lambs to rest or remain on any public highway within said county of Lassen." Section 9 makes it "unlawful for any person * * * to erect or maintain sheep corrals, or tanks or other appliances used for the purpose of dipping sheep or lambs within two hundred yards of any public highway * * * or within one-half a mile of any public school building, village or town in said county." Section 10 makes it "unlawful for any person * * * to herd, graze or pasture sheep or lambs on or over the public highways in said county." Section 11 makes it "the duty of every person * * * engaged in the business mentioned in this ordinance in Lassen county to carry on or conduct said business in such a manner as to cause no injury or damage to any public road or highway * * * that

can without inconvenience and without great cost be avoided." Section 12 makes it "unlawful for any person * * * engaged in the business mentioned in this ordinance to drive more than one hundred sheep or lambs at one time on any bridge maintained by said county of Lassen upon any public highway therein." Section 13 makes it "unlawful for any person * * * engaging in the business mentioned in this ordinance to vend, peddle or offer for sale within said county of Lassen any meat from any sheep or lamb infected with any contagious disease." Section 14 makes it "unlawful for any person * * * engaged in the business mentioned in this ordinance to herd or drive any sheep or lambs through or along the streets of any town or village in said Lassen county." Section 15 makes it unlawful for any person engaged in said business in said county "to leave the carcass of any dead sheep or lamb in which said person * * * has placed any strychnine or arsenic or other deadly poison within the said county." Section 16 makes it unlawful for any person engaging in said business in said county "to herd any band of sheep or lambs in or about any ditch, stream or reservoir in Lassen county from which water is furnished to the inhabitants of any town or village in said county in such manner as to pollute the water of said stream, ditch or reservoir." Section 17 makes it the duty of every person engaged in said county in the business mentioned in said ordinance "while passing over the trails and roads of said county to so herd his said sheep and lambs that the same shall travel in said trails and roads and not on the banks thereof nor on the hillsides immediately above the same, except at the places where it is necessary to do so in leaving said trail or road, or in crossing the same to reach any objective point"; and it is made the duty of such person, "while traveling over the public roads and trails of said county, at the approach of any stage, wagon or other vehicle driven by any person, and containing any person or persons, to so herd said sheep and lambs as to make without any unnecessary delay a passageway through the same and permit said traveler or travelers to pass, and likewise any horseman to pass," and it is made unlawful for any person in charge of sheep or lambs "to unreasonably delay any of the people of this state in their lawful passage over said trails or roads." Section 18 declares that "every person * * * violating any of the provisions of this ordinance shall be guilty of a misdemeanor." Section 19 fixes a penalty of five cents for every sheep and lamb raised, grazed, herded, or pastured in said county by any person engaging in the said business in the county, without having first procured a license, and he shall be liable to a civil action to recover said penalty, to be brought by the district attorney in the name of the county. Sec-

tion 20 makes it the duty of the license collector, and all peace officers in their respective townships, to enforce the provisions of the ordinance, and to report to the proper officers every person violating said ordinance, "and all claims for services rendered for expenses incurred by said license collector or said peace officers in performing the duties imposed upon him or them by this section" shall become a charge against the county. Section 21 requires the county auditor to prepare and have printed suitable blank licenses with blank receipts. Section 22 provides that all money collected under the ordinance shall be placed to the credit of the general fund. Section 23 provides that the ordinance shall take effect 15 days after its passage, and repeals all conflicting ordinances with the proviso that existing ordinances shall remain in force as to all pending civil and criminal actions, and also that the right of the county to commence any actions which have accrued under the existing ordinances shall be deemed to be continued in force.

This ordinance was passed pursuant to, and, as claimed by respondent, agreeably to, the power given to the board of supervisors by subdivision 22, § 4041, County Government Act 1907 (St. 1907, p. 370, c. 282). See, also, section 3366, Pol. Code (St. 1901, p. 635, c. 209). The power granted to boards of supervisors by the act of 1907 is: "To license, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, all and every kind of business not prohibited by law, and transacted and carried on within their respective jurisdictions, * * * to fix the rate of license tax upon the same, and to provide for the collection of the same by suit or otherwise." Section 3366, Pol. Code, is couched in the same terms.

It is contended by petitioner: (1) That the license tax imposed by the ordinance in question is not in the exercise of the police powers of the board; (2) That the purpose of the ordinance and license tax is revenue, and not regulation; (3) that the amount of the tax imposed is burdensome, oppressive, and unreasonable; (4) that the purported regulatory provisions of the ordinance are burdensome, oppressive, and unreasonable; (5) that many of these purported regulatory provisions are unreasonably and unlawfully discriminating against those engaged in the business sought to be regulated; (6) that the tax imposed upon lambs is burdensome, oppressive, and unreasonable, and is in violation of the act of February 26, 1903, entitled "an act restricting the powers of boards of supervisors in the matter of imposing licenses upon the business of raising, herding, grazing and pasturing sheep." St. 1903, p. 41, c. 40. This act forbids the imposition of a license tax greater than five cents per head "on the business of raising, herding or pasturing sheep."

Certain questions arose at the argument which should first be disposed of.

1. It is claimed that the court cannot go beyond the face of the process to determine its validity, except to inquire into the jurisdiction of the committing magistrate; that as he clearly had jurisdiction by the terms of the ordinance, and as the process is without flaw on its face, there is an end of the matter. But this assumes that no infirmity of the ordinance, which is the basis of the imprisonment, can be inquired into on habeas corpus, and this, we think, is too broad a claim. In *Ex parte Hollis*, 59 Cal. 405, the court said: "Of course, where a court has jurisdiction of the subject-matter and the parties, its judgment is not reversible on such process. Being conclusive, courts will not go behind it to ascertain whether any errors of law were committed in the proceeding in which it was rendered. But the judgment is not conclusive upon the question of the authority of the court that rendered it. That, as well as any other matter which would render the proceeding void, is always open to inquiry. It were a legal absurdity to say that a judgment of conviction, valid in form, precluded inquiry into authority to render it." In *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717, the validity of an act of Congress was assailed. The court said: "An unconstitutional law is void, and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that the question of the court's authority to try and imprison the party may be reviewed on habeas corpus." The power of the court to examine into the validity of an ordinance on habeas corpus is fully considered in *Ex parte Kearney*, 55 Cal. 212. See, also, *Ex parte Keeney*, 84 Cal. 304, 24 Pac. 34; *Ex parte Hodges*, 87 Cal. 162, 25 Pac. 277. See, also, 15 Am. & Eng. Ency. of Law, p. 204, and notes.

2. It is also claimed, as a sequence of the foregoing proposition, that the court cannot on habeas corpus take evidence upon disputed questions of fact; that the writ must be granted, if at all, upon the petition and return. Section 1484 of the Penal Code specifically confers the right upon the defendant to controvert any of the material facts set forth in the return, "or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge"; and it authorizes the court "to proceed in a summary way to hear such proof as may be produced against such imprisonment," and the court is given "full power and authority to require the attend-

ance of witnesses * * * and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." In *Ex parte Cottrell*, 59 Cal. 420, it was held that, if the return shows that the party seeking the writ is illegally detained, he may controvert the facts, and allege any facts showing his unlawful detention. "In case he does so, he may introduce evidence to prove any issue which he thus raises." In the case of *In re Smith*, 143 Cal. 368, 77 Pac. 180, the facts pleaded in the petition were such as necessarily were dehors the ordinance. These facts were beyond the process and return, and upon them the court declared the ordinance to be unreasonable and oppressive, an invasion of petitioner's constitutional rights, and therefore void. See, also, *Church on Habeas Corpus*, §§ 160-165, 169-177, 230; *Encyclopedia of Ev.* pp. 342, 343, 350, and notes; 15 *Am. & Eng. Ency. of Law*, p. 197. Believing these views to be correct, we made the order for taking evidence, and we see no reason now to refuse to consider the evidence thus taken. *County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909, relied upon by respondent, has not been overlooked. The question there arose on a demurrer to the complaint, and the court said: "On the record before us, consisting simply of the complaint and the demurrer, the validity of the ordinance must be determined from an inspection of its provisions alone, read in the light of facts within the judicial knowledge of the court." It is because the facts set forth in the petition and denied by respondent are not within judicial knowledge, and if true would seem to show the ordinance to be oppressive and unreasonable, and therefore void, that evidence was ordered to be taken.

3. The contention that the action of the supervisors in adopting the ordinance is conclusive of its reasonableness, and particularly as to the amount of the license tax, deserves attention; but we think it is not maintainable. Our reports abound with cases controverting this contention. Among them may be cited *Ex parte Frank*, 52 Cal. 606, 28 *Am. Rep.* 642; *Ex parte Whitewell*, 98 Cal. 73, 32 Pac. 870, 19 *L. R. A.* 727, 35 *Am. St. Rep.* 152; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916; *City of Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674; *In re Smith*, 143 Cal. 368; 77 Pac. 180; *Plumas County v. Wheeler*, 149 Cal. 758, 87 Pac. 909. And a very instructive case is *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, 24 Sup. Ct. 208, 48 *L. Ed.* 342. In the case *In re Smith*, supra, the court said: "When the police power is exerted to regulate a useful business or occupation, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or vocation which in itself is recognized as innocent and useful to the

community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the authority of the courts to declare any regulation invalid will be exercised with the utmost caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes upon rights guaranteed by the Constitution." Quoting from *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 *L. Ed.* 385, the court said: "To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." It will not for a moment be contended that the business of raising sheep is not a useful and necessary branch of our agricultural life; it ranks as one of the most important occupations of the farm, and is deemed of such worth as to call for special protection by national law; it antedates the cultivation of the soil, and is as ancient as civilization itself. Indeed, it is difficult to reconcile as just a law that would single out this pursuit for regulation among all the varied farm industries of the state, to the exclusion of cattle, horses, mules, and goats, and all other farm industries.

4. But it is contended that the Legislature, by implication, conferred authority upon the supervisors to fix the license fee at five cents per head, in the act of 1903. *St. 1903*, p. 41, c. 40. It is there provided "that no license or licenses greater than five cents per head shall be imposed by the boards of supervisors of any county on the business of raising, herding or pasturing sheep, and any and all licenses imposed by the board of supervisors of any county on the business in excess of five cents per head shall be and are hereby declared to be void." In the first place the assumption that the Legislature has here granted the power to fix the fee at five cents per head is not warranted by the language of the act; for it is declared to be "an act restricting the powers of boards of supervisors." The act, if construed to give the power to fix the license fee the amount mentioned, is a limitation beyond which they may not go, and is not a grant to fix that amount. But if this distinction has little weight, it still remains true, as we have shown, that the Legislature has no

power to impose an unreasonable license tax, much less has it power to delegate such power to a municipality. Besides, the act of 1907, *supra*, declares that the supervisors shall have power to impose a license tax for the purpose of regulation, and not otherwise; and, if five cents per head levied as a license tax upon sheep and lambs (the latter not mentioned in the act of 1903) is such excess of that required for regulation as to show that the purpose of the ordinance was not for regulation alone, but was for the purpose of raising revenue, then the act of 1903, so far as it attempts to place a maximum limit of the tax, is inconsistent with the act of 1907, and must give way to it. In other words the later act forbids the levying of any license tax other than for purposes of regulation; and, if it be true that a tax of five cents per head is greatly in excess of any tax required for regulating the business, the act of 1903 furnishes no support to the ordinance. In *Ex parte Pfirrmann*, 134 Cal. 143, 66 Pac. 205, the court gave its meaning of the Political Code (section 3366) found in the act of 1901, and, quoting the act said: "This language is too plain to be construed. It speaks for itself, and declares that boards of supervisors may issue licenses for the purpose of regulation alone. The words 'not otherwise' curtail and cut off all power boards of supervisors theretofore had to issue licenses and charge therefor as a revenue measure. * * * Further than that, it may be said that the trend of our state policy at the present time looks toward a cessation of legislation which has for its purpose the raising of revenue by the collection of direct taxes, under the guise of license, as a condition precedent to the conduct of business. Such legislation seems to be considered an impolitic burden resting upon legitimate business, and a fine upon commercial enterprise."

5. It is claimed that, if there is any evidence, however slight, upon which the board could base their action, the court will not inquire further, but will deny the writ. The courts have expressed themselves upon this point frequently, but nowhere, so far as we have found, to the effect that "any evidence, however slight," will close the doors against relief by the writ. It has been said that "a clear case should be made to authorize an interference on the ground of unreasonableness." In *re Smith*, *supra*; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674. "When the validity of an ordinance is attacked on the ground that it is unreasonable, the burden of showing its unreasonableness is upon the person attacking it." *Id.* Again, the ordinance "must be very clearly obnoxious * * * before it will be declared invalid by the courts. Every intentment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power, and a contrary conclusion will never be reached upon

like considerations." In *re Berry*, 147 Cal. 524, 82 Pac. 44, 109 Am. St. Rep. 160; *Dillon, Mun. Corp.* § 353. In the case of *In re Smith*, *supra*, the court said: "It must happen in the case of many of these ordinances that the unreasonableness and oppression is not apparent upon the face thereof. Evidence in such cases will be admitted to show existing conditions. But this evidence will not go to motive. If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless."

We may pause here to observe that the court uses the term "motive" in an entirely different sense from the sense in which the Legislature used the word "purpose"; that is, in conferring the power to fix a license tax "for the purpose of regulation." The word "purpose" means "that which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, manner, or execution." Words and Phrases Judicially Defined. "The purpose of legislation is to be determined by its natural and reasonable effect, and not by what may be supposed to have been the motives upon which the Legislature acted." *People v. Roberts*, 171 U. S. 658, 19 Sup. Ct. 58, 43 L. Ed. 323. The court in the *Smith Case* did not intend to use the word "motive" synonymously with the word "purpose" as used in the statute; for it said: "Evidence in such cases will be admitted to show existing conditions"—and from these we are to judge of the purpose which, in the present case, it is claimed is shown by the evidence to have been for revenue, and not regulation.

But to recur to the particular point under discussion. It seems to us that, when under the power of the court evidence is taken, the court must judge of its sufficiency to establish an issue precisely as in other cases, except where the validity of a statute is in question the evidence must clearly show the ordinance to be unreasonable; and, where the evidence leaves the court in doubt, that doubt must be resolved in favor of the validity of the ordinance. For example, slight evidence upon an issue of fact favorable to the validity of the ordinance may be overcome by preponderating evidence to the contrary, leaving no reasonable doubt of its reliability and weight. "The general rules of the law of evidence relating to the burden of proof and presumption and the admissibility and sufficiency of evidence are ordinarily applicable in habeas corpus proceedings, although they are not so strictly applied as in actions at law or criminal trials." 21 Cyc. pp. 319, 321-323; 15 Am. & Eng. Ency. of Law, p. 197. What, indeed, would be the use of calling witnesses and taking evidence "to a full and fair examina-

tion of the case," as section 1484, Penal Code, provides, if the court is not to determine the sufficiency of the evidence adduced?

6. In the sense in which the term "purpose" is used in the act evidence is admissible which would tend to show that revenue, and not regulation, was the object or end to be attained, and also as bearing upon the necessity for and extent and character of the regulation required to be given the business. The court will consider the "circumstances in the light of existing conditions." In *re Smith*, supra. These conditions are multifarious and indefinable by fixed rules. In *Plumas County v. Wheeler*, supra, the Supreme Court said: "We cannot undertake to specify all the particulars which should be brought into view where the reasonableness of a municipal ordinance is challenged." The court there undertakes to enumerate some of the expenses to the municipality which may be shown in addition to such as arise directly in the enforcement of the regulatory provisions themselves. "In fixing the fee it is proper and reasonable to take into account, not the expense merely of direct regulation, but of all the incidental consequences of the business licensed. * * * To arrive at the amount of such expense it would be necessary to consider the topographical condition of the country; the extent of the industry as practiced there; the effect of the industry on the roads, trails, and other public property of the county; the probable cost of prosecution for violations of the ordinance; and any other matters having a reasonable tendency to indicate the cost to which the county would be subjected by the business sought to be regulated." These are suggested as some of the expenses that may be considered in determining the amount of license tax necessary for the regulation of the business. But there are many other considerations that may be brought into view as tending to show the true purpose and effect of the tax. The conditions in the so-called mountain counties as differing from the conditions in valley counties; the conditions existing in different parts of a county; the sparseness of population, and infrequency of roads and highways, in the parts of the county where sheep are principally pastured; facts having any reasonable tendency to show the amount of the tax required for regulation of the business; also the effect upon the highways in driving cattle, horses, mules, and goats over the highways used, as compared with the effect of the use of highways in driving sheep, and this, not only as to the live stock grazed and pastured in the county, but the strictly migratory stock passing through the county to and from ranges in other counties, and to market, for damage to the highways, and the extent thereof by live stock other than sheep—would tend to show that all damage

to highways, and the necessity for regulatory measures relating thereto, are not attributable alone to the business of raising and pasturing sheep in the county. Evidence is pertinent, also, which tends to show by comparison that the tax for regulation exceeds, or nearly equals, the tax for revenue, if it should appear that there is no necessity or requirement for a tax for regulation approaching the requirements of a tax for revenue. The fact may be shown that the larger number of the sheep the subject of the tax are brought to the county for summer pasture only, and for less than half of the year, and that the principal sheep ranges are, because of climatic limitations, incapable of being used for pasturing sheep in the winter season, and that but comparatively few sheep are raised and remain throughout the year in the county. Evidence may be considered which tends to show to what extent, if at all, any or all, or how many, of the regulatory provisions have been, or are in fact being, enforced, or in fact have entailed, or are likely to entail, cost upon the county, and to what extent such cost is reasonably necessary, and reasonably attributable to the business of raising, herding, and pasturing sheep in the county. In short, facts may be considered which have a reasonable bearing upon the question whether the tax is unreasonably excessive for the purposes of regulation only, or tend to show that the tax is either purposely imposed for revenue, or from its effect it plainly appears to be a revenue measure.

The case of *Postal Telegraph Cable Company v. Taylor*, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342, involved the reasonableness of an ordinance which imposed an annual license fee of \$1 on each pole, and \$2.50 on each mile of wire used in the borough. The court said: "We come, then, to an examination of the question whether this fee, in the light of the admitted facts as set forth in the affidavit of defense, can, by the widest stretch of the imagination, be regarded as reasonable. The borough is, where the poles are planted and the wires stretched, sparsely settled, and the danger to be apprehended from the poles and wires reduced to a minimum. The borough has in fact done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended \$1 for any such purpose. It has incurred no liability to pay any expense arising from inspection or supervision on its behalf. * * * To uphold it in such case as this is to say that it may be passed for one purpose and used for another—passed as a police inspection measure, and used for the purpose of raising revenue—that the enactment of a police measure may be used as a subterfuge for the purpose of raising revenue, and yet, because it is said to be an inspective measure,

the court must take it as such, and hold it valid, although resulting in a rate of taxation which, if carried throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for the reasons that do not exist in fact. * * * Confessedly there has been here no inspection, no expense incurred to provide for one, even though not made, and all expenses and liabilities that might fairly and reasonably be incurred on the part of the borough are not one-twentieth of the amount it exacts for an inspection which it has not made. Under such facts it would seem to be plain that the ordinance was adopted as a means for the raising of revenue, and not to repay expenses for inspection. Judging the intention of the borough by its action, it did not intend to expend anything for an inspection of the poles and wires, and did intend to raise revenue under the ordinance. Courts are not to be deceived by the mere phraseology in which the ordinance is couched." The Supreme Court said, in *Plumas County v. Wheeler*, supra: "It is also well settled that the power to regulate a business may be exercised by means of a license fee or charge. The amount of the license fee, however, must not be more than is reasonably necessary for the purpose sought; i. e., the regulation of the business. If it is so great that the court can plainly see that the purpose of its imposition was to realize a revenue under the guise of regulating the business, the provision for the fee cannot stand as an exercise of the police power."

7. With these principles as our guide, let us examine the facts in the case. The county of Lassen may be designated as "mountainous," the greater portion of the western part being of high elevation and in the belt of heavy winter snows; is in considerable part timbered, and of such climatic conditions as to admit only of summer pasturing, and by sheep is generally so used for three to five months of the year, depending upon the seasonal storms. A somewhat similar region is found in a large area of the northern and eastern part of the county, but less timbered, less snow and rain, to some extent a sage-brush country, and used for summer and fall pasture of live stock, and some portions so used in the winter. Of valleys more or less cultivated Honey Lake Valley, elevation about 4,000 feet, the lowest in the county, and Big Valley, are the principal ones, with here and there small valleys in the eastern and northern parts of the county. The total area of the county is about 3,000,000 acres, of which a little over 600,000 acres are assessed, and of this only about 100,000 acres are assessed as agricultural land. The population is centered in and around these valleys. The western, along most of the northern, and in the eastern parts of the county, few persons have per-

manent residence—these are essentially summer grazing regions for stock, mostly driven to them in the spring, and taken out in late summer. Except in the more thickly inhabited portions of the county, there are very few public roads, and the topography of the country and the settlements in the county admit of, and require, but few principal highways, and some of these are not made use of by sheep raisers. The public roads, in large part, are over comparatively level stretches of country along the sides of which sheep spread out and feed as they travel, doing very little, if any, injury to the roads. The places which give rise to most complaint of injury are on mountain grades and along graded hillsides, chiefly by causing dirt and rocks to slip or roll into the roadway. Like injury to a considerable extent is caused by driving horses, mules, cattle, and goats, over the same roads, which are pastured in the county, but pay no license tax. Similar injury is also caused to the roadways by live stock of all kinds, driven through the county to other counties for pasture, and in going to market, which pay no license tax. Petitioner's sheep are driven from the Sacramento valley to his own land in Lassen county, and are there pastured, and on the public lands, as are a large number which are included in the ordinance, also driven to their ranges, and remain there until returned again to the valley, using the highways only in going and returning, and some not using the highways at all in Lassen county. It is not claimed that the injury to the roads caused by the sheep is in any sense permanent, for they are restored at no great expense by clearing the rocks and debris from the road after the sheep are driven to the ranges, and later after they are driven back to the valley.

The evidence is that about 275,000 sheep and lambs are grazed and pastured in the county during a portion of the year. The tax collector reported to the board of supervisors, July 9, 1908, that "six sheep owners in Lassen county pay taxes on 12,825 sheep, leaving 254,700 sheep on which no tax for revenue is received unless by license." Respondent stated in his return that "there are at the present time 275,000 sheep and lambs in said county." He states that at the time the ordinance was passed the average annual number did not exceed 150,000. The evidence of men engaged in the business and familiar with all the facts shows that the number is, and has been for several years, about 275,000. The number paying property tax is as above stated, which leaves 262,175 of what may be termed "migratory" sheep and lambs. It appears from the evidence that some of the sheep which are assessed for taxes in Lassen county are pastured part of the year in that county, and some, in order to procure feed, are there taken to Plumas or Modoc county for pasture, for two or three months, in the na-

tional forest reservations. These sheep pay a property tax in Lassen county, and a license tax there also, and another license tax in Plumas or Modoc county, and a rental license of 8 cents per head to the general government, of which the county now gets 25 per cent., one-half of which goes to the road fund. The sheep coming into the county from the Sacramento valley remain from three to five months; and, while it is impossible for them to remain after the stormy season begins, they must take out a license for one year, and this applies to 95 per cent. of the sheep pastured in the county, and in some cases the valley sheep are taken for part of the season from Lassen county to Plumas or Modoc for pasture, and are there subject to a second license tax for one year. It appears also that the assessment roll for the county is something near \$6,000,000, from which for the year 1907-08 the taxes yielded to the general fund a little over \$25,000, and the road fund nearly \$24,000. The license tax imposed upon the business of pasturing sheep, having an assessed value of about \$500,000, amounts to more than one-half the general fund or road fund derived from property tax on more than 10 times that assessed value. Sheep, not including lambs, which are not assessed in Lassen county, or elsewhere, were valued for state and county purposes for the year, 1907-08 at \$2.50 per head, and the rate was \$1.80 on each \$100 or $4\frac{1}{2}$ cents per head of sheep, excluding lambs, which the evidence shows are about one-third of the flocks. The license tax, which may be imposed for regulation only, is more than the tax for revenue purposes on sheep, and is imposed upon lambs which are not assessed. Excluding lambs as not assessable for state and county purposes, and treating them as sheep, the license tax is 5 cents per head as against 3 cents for state and county revenue. The principal expense to the county alleged to be caused by this business is for work done on the public roads. The limit of taxes for road purposes is 40 cents upon each \$100, and Lassen county levied up to this limit. This tax for that purpose would be 1 cent per head upon sheep, and on the number subject to license tax would yield \$2,750, whereas the license tax amounts to \$13,750. It appeared also that the general road fund is reinforced, to some extent, from the share of the government rentals paid for grazing of stock on national reservations, of which there are over 500,000 acres in Lassen county. Numerous license ordinances adopted by the county are not without significance as tending to show the object and purpose of these measures. January 9, 1900, the license tax was fixed by Ordinance No. 51, at 3 cents per head of sheep, lambs, and goats. It contained no regulatory provisions. On April 7, 1900, a similar ordinance, No. 52, fixed the license at 5 cents for each sheep, lamb, or goat. These ordinances were

passed when the board had power to license for revenue, and were passed for that purpose. On January 7, 1903, after the law was passed limiting the power to license for regulation only (St. 1901, p. 635, c. 209; section 3366, Pol. Code), Ordinance No. 64 was adopted. In its title it purported to be for regulating the business of raising, grazing, herding, or pasturing sheep, lambs, or goats within the county and imposed a license tax of 10 cents per head of each sheep, lamb, or goat, but the ordinance did not contain a single regulatory provision. On March 5, 1903, two months later, after the Legislature had passed the act of February 26, 1903, limiting the license tax to 5 cents per head "on the business of raising, grazing, herding or pasturing sheep," Ordinance No. 67 was adopted, reducing the license to 5 cents per head, but the ordinance contained no regulatory provisions whatever. The evidence is that conditions in Lassen county then were the same substantially as now, and for years previous, and the business was conducted as now. There can be no doubt but that these ordinances were adopted for the purpose of swelling the county revenues, and can be given no other interpretation. Ordinance 69 followed along March 10, 1904, and was similar to Ordinance 67, but contained in addition some regulatory provisions. No change in existing conditions occurred in the meantime, and, so far as the regulatory provisions are concerned, the evidence is that no pretense was made of enforcing any of them. Then came Ordinance No. 82, January 11, 1908, in question here, which includes sheep and lambs, and contains a large number of regulatory provisions. But the evidence discloses no material changes in the conditions in Lassen county relating to the business in all these years, except it may be that the number of sheep grazed in the county has increased to some slight extent. The area of grazing land has not changed, nor has the manner of conducting the business. Conditions have not changed, and nothing appears to show that for regulation alone the charge should be as great as when the tax was laid for revenue. The simple truth is, as appears from the evidence, that the ordinances have changed in name, but the purpose remains the same; i. e., to obtain revenue.

In *Plumas County v. Wheeler*, supra, the court said: "The amount of the license fee must not be more than reasonably necessary for the purpose sought; i. e., the regulation of the business." How wide a scope must be given to the term "regulation"? How are we to determine where the purpose to regulate ceases, and the purpose to obtain revenue begins? In the exercise of the police power of the board, under which alone the ordinance may be passed, to what extent may the board go in the direction of exacting the payment of money for the privilege of engaging in a useful and harmless business. Clearly no

further than is necessary to regulate the business. What do we mean by regulate? To regulate means to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles of law. It does not include a power to suppress or prohibit. 24 Am. & Eng. Ency. of Law, pp. 243, 245. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license, and the probable expense of such inspection, regulation, and police surveillance as municipal authorities may lawfully give to the particular business, the expenses attending direct regulation and oversight, and the incidental cost to which the municipality is subjected in properly supervising the business. *Plumas County v. Wheeler*, supra. The municipality may impose under the police power such charge for the license as will cover the expense of issuing it, and the additional labor of officers and other expenses incurred. *Cooley's Const. Lim.* (Ed. 1886) p. 242. If all the items of expense reasonably necessary for the proper supervision and control of the business would amount to less than 5 cents per sheep or lamb, the ordinance cannot be sustained. *Plumas County v. Wheeler*, supra. "A police regulation or restraint is for the purpose of preventing damage to the public or to third persons." *City of Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674. Witness Sharp, called for respondent, submitted what is entitled an "Estimate of the Auditor of the probable annual cost and expense of regulating the sheep business," as follows:

License collector's commissions....	\$ 850 00
Printing licenses, affidavits, etc....	50 00
Expense of enforcing section 2 of Ordinance No. 82.....	1,000 00
Expense of criminal prosecution for violation of the ordinance.....	1,200 00
Damage to public roads.....	10,000 00
	\$13,100 00

This estimate the witness testified was made at the request of the board "for the purpose of the hearing of this case," not by the board as a basis for its ordinance previously passed. The bills presented in support of the estimate for printing licenses amounted to less than \$20. In further support of the item a bill was presented for publishing the ordinances, \$60, which certainly was not pertinent. The ordinance makes no provision for payment of commissions to the license tax collector, set down at \$850. The tax collector receives a salary, and is allowed a deputy at a stated salary (St. 1907, p. 536, c. 282), and by section 4126, p. 391, it is made his duty to "collect all county licenses." The district attorney and sheriff are also paid salaries, and the statute (section 4290, p. 545) provides that "the salaries and fees provided in this title shall be in full compensation for all services and fees of every kind and description rendered by the officers named in this title, either as officers or ex officio

officers, their deputies and assistants, unless otherwise provided, and all deputies employed shall be paid by their principals out of the salaries provided in this title, unless in this title otherwise provided."

The item of \$1,000 is for enforcing section 2 of the ordinance. This section requires the person raising or pasturing sheep in the county to make an affidavit setting forth certain facts. It does not impose any duty on any officer to enforce this requirement. We must look to other sections for that. There is no expense to the county in the act of the sheep raiser making the affidavit, except the trifling cost of the affidavit. Section 3, however, empowers the tax collector, whenever he deems it expedient, and "in such manner as he may deem best," to verify the statements in the affidavit, and "to ascertain the true facts with relation thereto"; and, if he finds that any false statement has been made, to report the same to the district attorney, and the cost of such examination is made "a county charge to be allowed as other claims against the county." It is contended by petitioner that this requirement of the tax collector falls within his ordinary and statutory duties, and cannot be made a county charge, to be assessed against this business, and covered by the license tax. There is much force in this contention. The bills presented by the tax collector's deputies, appointed to secure affidavits from sheep raisers, are, however, so inconsiderable a sum, as shown by the evidence, that we may dismiss the estimated item as unsupported. The evidence is that there has never been any attempt at supervision or inspection of the business, and no expense incurred in that direction at any time since this or any of the ordinances have been in force. The dipping and doctoring of sheep have been attended to by inspectors appointed under state and national law, and the evidence is that the sheep generally throughout the county have been free from scab—the prevailing trouble among sheep raisers. The interest of the flock master compels him to look to this with vigilance.

The item of \$1,200 for expense of criminal prosecutions for violations of the ordinance is largely conjectural. Presumptively civil actions, if successful, will pay their cost by the fines collected, and if unsuccessful, it should not be fastened on the business regulated. The district attorney and peace officers charged with the duty of enforcing the ordinance are entitled to no compensation for such service except that provided by law. The district attorney may incur certain liabilities in the preparation and prosecution of cases which become a county charge under section 228 of the county government act (St. 1897, p. 575, c. 277), not, however, relied on here; but it is not reasonable to suppose, and past experience of the county so shows, that any such sum as \$1,200 annually, legally chargeable to the business, will be incurred in

prosecuting violations of the ordinance. The evidence is that under Ordinance No. 69 three civil actions and nine criminal actions were commenced in 1907. All these were dismissed by the district attorney as settled, except one in which a fine of \$200 was imposed and collected. Two cases were commenced in 1908 under Ordinance No. 82, a civil and criminal action against petitioner. The district attorney testified that he had actions in contemplation under some of the regulatory provisions relating to dead sheep being left in or near a highway. Such prosecutions, it is claimed, must be made either under section 2737, Pol. Code, or section 374, Pen. Code, and not under this ordinance. Ex parte Leo Stephen, 114 Cal. 278, 46 Pac. 86. But, conceding that the foregoing items relate to legitimate expenses which may reasonably arise out of the regulation of the business, the evidence shows that the expenses thus incurred amount to but a small part of the total collections sought to be made by the ordinance for regulation. The principal item is \$10,000 for "damages to public roads." It is contended by petitioner that "there is a vast difference between the regulation of a business and the taxing of such business for some alleged damage caused by it. The one seems to be within the police power, and the other is within the taxing and revenue power." All the definitions of the term "regulate" restrict its meaning to providing a rule for conducting the business to be regulated, to inspection and police surveillance, supervision and oversight, and the license fee must have relation to expenses incurred for these purposes. It may not be gauged upon an estimate of consequences or damages which may result from the business. These may be considered as suggesting the necessity for regulatory provisions, but not as a basis for some direct or remote damage that may accrue to the state or county, nor for the support of the government, which are to be met by licenses for revenue, forbidden in the present case. The use of the public roads is not to be denied the men engaged in the sheep industry. They have the same right to their use as other citizens. If through their use by the sheepmen some detriment different from or greater to the roadways occurs, such use may be regulated, and the expense of any necessary and reasonable regulatory measures may be made part of the license fee charged, and the ordinance contains provisions to this end. But to fix a license charge to meet repairs on roads generally throughout the county which must be paid by all who engage in the business, regardless of whether all of them contributed to the injury, and regardless of damage done by other live stock, would be unreasonable. The evidence is that many sheep are brought into, and taken out of, the county without any appreciable damage to the roads. Many sheep are taken to the western part of the county that never pass over the roads fur-

ther east, and over but short distances anywhere, and so of many sheep entering the eastern and other parts of the county—they traverse few miles of roads, and on some roads not at all. The regulatory provisions are designed to obviate much of the alleged damage, and, if enforced, might to some extent do so, but no attempt has ever been made to enforce them; the county apparently endeavoring to recoup the damage by license tax. There is much evidence upon this feature of the case. Naturally, the sheep raiser minimizes the damage to roads by sheep, and probably exaggerates the damage done by other live stock. On the other hand, the same may be said of witnesses who testify to the greater damage by sheep—they exaggerate that, and minimize the other damage. All concede some damage by all kinds of live stock when driven over the roads in certain places. But it may be safely said of the sheep that it is only on mountain and side-hill grades that they do appreciable damage, and this the evidence shows is repaired at no considerable cost by simply throwing the rocks out of the road, and these grades constitute but a small fraction of the entire highways. And the evidence, as shown by the road commissioners' reports for the past three years, is that the expenditures were largely for bridges and general repairs, in no wise made necessary by the use of the roads by sheep.

It is contended that many of the regulatory provisions are unlawfully discriminating against those engaged in the said business. The evidence is that a great many sheep, as well as other live stock, pass through the county over its roads to other counties for pasturage, and to market, to which these provisions of the ordinance do not apply. It is claimed also that, while the county cannot impose a license tax upon such sheep (*County of Mono v. Flanigan*, 130 Cal. 105, 62 Pac. 293), the county can, and should if regulating the business at all, make such sheep and live stock subject to the regulatory provisions of the ordinance. The tax collector, in a report to the supervisors, July 9, 1908, said: "There are continually coming into and pasturing through the county, from different directions, numerous large bands of sheep not herein accounted for. In passing and repassing these migratory sheep destroy feed and roads, and molest waters to an extent that can hardly be estimated." The regulatory sections which are not made applicable to this class of sheep, and they seem to call for regulation if any do, are: Section 7, relating to leaving the dead body of a sheep near a public road; section 11, making it a duty to avoid injury to the highways; section 12, making it unlawful to drive more than 100 sheep upon a bridge; section 13, restricting the right to peddle tainted meat; section 14, making it unlawful to herd or drive sheep along the streets of a village; section 15, making it unlawful to expose the

poisoned carcass of a sheep; section 16, making it unlawful to herd any band of sheep about water ditches and reservoirs; section 17, prescribing the manner in which sheep shall be herded in traveling along the roads and trails. Substantially all of the important regulatory provisions are brought under the ban of this objection. Shorn of its regulatory features, nothing would remain but a revenue measure, and, being such, would be void.

Finally, it is contended that the license tax upon lands is burdensome, oppressive, and unreasonable, and is violative of the act of February 26, 1903, supra. The evidence is that about one-third of the flocks are lambs, born in March and April. This is especially true of petitioner's sheep, and substantially all, for but few sheep are raised in Lassen county. These nursing lambs are but two or three months old when taken to the ranges, and leave when six or seven months old. They are not taxed for state and county purposes, and are not treated as sheep by the national foresters. It appeared by the evidence that in buying and selling sheep, and in transactions relating to the business, lambs are not known as sheep *eo nomine*, and are not dealt with as sheep, before they are a year old, and are then spoken of as "yearlings." The ordinance itself admits the distinction by naming sheep and lambs separately, which would be unnecessary if lambs are regarded as sheep. The act of February 26, 1903, mentions sheep only, and it is not improbable that the Legislature had this distinction in mind. The act limits the charge upon the business of raising, herding, grazing, and pasturing sheep. It is contended, and it so appeared, that the business of raising sheep consists in raising lambs and producing wool; that raising lambs is a considerable part of the business of raising sheep, to which the act refers; that without taxing lambs, the extreme limit allowed by the act is imposed upon this business, and that in taxing lambs the ordinance goes beyond the prescribed limit of power.

It is furthermore contended that, if there be doubt as to whether the Legislature meant to include lambs in the act, the lamb should have the benefit of the doubt because of its tender age and much less value, and because it would be unreasonable to treat it for purposes of licensing or taxation the same as an old sheep. In interpreting the meaning of the word with reference to taxation for state and county purposes, it is universally interpreted to exclude unweaned lambs, just as the young of other animals are excluded. The statute provides that words "are construed according to the context and the approved usage of the language." Civ. Code, § 13. "In construing statutes words are to be taken in their usual and popular sense, unless they have a well-understood technical

meaning." Houghton's Appeal, 42 Cal. 35. We do not find it necessary to decide the point. We think it otherwise plainly appears that the ordinance is unreasonable, and was adopted for the purpose of raising revenue, and was not intended to be, and is not, an ordinance adopted for regulation only, and is therefore void.

It is ordered that the petitioner be discharged.

We concur: HART, J.; BURNETT, J.

10 Cal. App. 168

OTS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

(Civ. 622.)

(Court of Appeal, First District, California.
March 3, 1909.)

1. INJUNCTION (§ 170*) — PRELIMINARY INJUNCTION—POWER TO DISSOLVE OR MODIFY.

Code Civ. Proc. § 532, providing that a defendant may apply on reasonable notice to the judge who granted a preliminary injunction without notice for the dissolution or modification thereof is limited to injunctions granted without notice, and does not justify the dissolution or modification of a temporary order granted after notice and hearing.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 355, 356; Dec. Dig. § 170.*]

2. APPEAL AND ERROR (§ 100*)—ORDERS APPEALABLE—TEMPORARY RESTRAINING ORDER.

While a temporary restraining order made on notice is appealable, an order refusing to vacate or modify such an order is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 675; Dec. Dig. § 100.*]

3. INJUNCTION (§ 167*) — PRELIMINARY INJUNCTION—POWER TO DISSOLVE OR MODIFY.

A temporary injunction granted on notice and a hearing, and from which no appeal has been taken, cannot be modified or dissolved until the trial on the merits, unless the injunction is within Code Civ. Proc. § 532, providing for dissolving or modifying an injunction, though granted on notice, in an action to prevent the diversion, pending the litigation, of water for use for irrigation or domestic purposes only.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 354; Dec. Dig. § 167.*]

Petition for a writ of review by Alexander Ots against the Superior Court of the City and County of San Francisco and another to vacate an order modifying a temporary injunction. Order annulled.

Frank J. Golden, for petitioner. Geo. W. Hollister, for respondents.

COOPER, P. J. This is a petition for a writ of review to vacate an order made by the superior court, modifying a temporary injunction.

It appears that in an action brought in the superior court of the city and county of San Francisco by Alexander Ots, as plaintiff, against J. A. Morrell et al., defendants, the said superior court, after notice and up-

on hearing all parties, duly made and granted to plaintiff a temporary injunction, enjoining defendant Morrell from withdrawing from the Wells Fargo-Nevada National Bank any funds belonging to the National Airship Company, a corporation, and further forbidding J. B. Cook and the said Wells Fargo-Nevada National Bank from paying or delivering to said Morrell any goods, chattels, or moneys in their hands belonging to the said National Airship Company. This temporary order was duly served, and no appeal was taken therefrom. Afterwards, on motion of said Morrell, upon notice, under the express protest of plaintiff, the superior court made a further order modifying the temporary injunction which it had issued, by directing that said J. B. Cook deposit with the said Wells Fargo-Nevada National Bank a certificate of deposit for \$1,500 issued by said bank to said Morrell, and further directing the said Wells Fargo-Nevada National Bank to pay from the proceeds thereof to said Morrell the sum of \$150. The effect of the modification of the order was to release or allow \$150 of the moneys held in custody under the restraining order to be paid by the bank to Morrell.

In our opinion the court had no power to modify its injunction which had been granted upon notice. The Code provides (Code Civ. Proc. § 532) that: "If an injunction be granted without notice the defendant, at any time before the trial, may apply, upon reasonable notice, to the judge who granted the injunction, or to the court in which the action is brought; to dissolve or modify the same." The provision as to dissolving or modifying is limited by the words of the section to injunctions granted without notice. The section is silent concerning an injunction which has been granted upon notice, and evidently for the reason that it was not intended that the court, after having heard the parties, having passed upon and adjudicated the right to an injunction, pending the trial, could again of its own mere caprice change or dissolve its order. The order so made upon notice was an appealable order, and either side, if dissatisfied, could have appealed from it. Its merits could have been tested on appeal, but not on another motion in the same court where the order was made. If the party against whom an appealable order has been made should make a motion to vacate or modify the order, he could not appeal from an order refusing to so vacate or modify the order. The courts proceed on the principle that there must be an end to litigation; and hence there should be some point at which the right to question or change even a temporary injunction ceases. In our opinion, when such injunction has been granted upon notice and a hearing, and no appeal has been taken, it cannot be modified or dissolved until the trial of

the case upon its merits. This rule will tend to make the law certain, and will work no hardship because usually the case can be brought to trial within a reasonable time. This view of the section is strengthened by the fact that the section makes provision for dissolving or modifying an injunction upon certain terms, even if granted upon notice, in an action to prevent the diversion, pending the litigation, of water used or to be used for irrigation or domestic purposes only.

What we have said is sustained in principle in the early case of *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 551, where a similar section of the practice act was discussed. It was there said by Mr. Justice Field: "By the statute the right to a temporary injunction pending the action is considered as adjudicated by the decision at the hearing upon the order to show cause. The remedy of the defendants in such case, when the right to apply for dissolution upon the filing of the answer is not expressly reserved, is by appeal. The privilege of moving for dissolution, upon the filing of the answer, is limited to cases where the injunction is originally granted without notice to the adverse party."

The reasoning given in regard to the dissolution of an injunction applies to an order modifying an injunction. See, further, *Natoma Water & Mining Co. v. Parker*, 16 Cal. 83; *Curtiss v. Bachman*, 110 Cal. 439, 42 Pac. 910, 52 Am. St. Rep. 111; *State v. Dist. Ct.*, 23 Mont. 564, 59 Pac. 917.

The order is annulled.

We concur: KERRIGAN, J.; HALL, J.

10 Cal. App. 194

GLOWNER v. DE ALVAREZ et al.
(Civ. 599.)

(Court of Appeal, Second District, California.
March 9, 1909.)

1. ADVERSE POSSESSION (§ 94*)—PAYMENT OF TAXES.

Under Code Civ. Proc. § 325, requiring for the establishment of adverse possession, not only occupation and claim for five years continually, but the payment of all the taxes which have been levied and assessed on the land, it is not enough to show occupation and claim for such time, and payment of taxes for four years thereof, and assessment of the taxes for the fifth year to the occupant, and offer of such person to pay them for such year, but refusal thereof by the tax collector, because they had already been paid by the person against whom it was sought to acquire title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 94.*]

2. TAXATION (§ 415*)—ASSESSMENT.

The validity of an assessment of taxes on land does not depend on whether the person in whose name they are assessed is the owner of the property.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 696-701; Dec. Dig. § 415.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by George W. Glowner against Concepcion R. de Alvarez and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Avery & French and F. W. Allender, for appellants. Chas. Lantz, for respondent.

TAGGART, J. This is an action to quiet title. Plaintiff was the record owner of the lands in question which were sold to the state for taxes and a deed therefor made to the state in August, 1897. On November 5, 1901, a deed was made by the tax collector of Los Angeles county, where the property is situated, on behalf of the state, to the defendant, and on that day she went into possession of the entire premises under said deed, claiming title thereto and remained in the exclusive possession thereof adverse to the whole world until the commencement of the action. She paid the taxes on the lands for the years 1902, 1903, 1904, and 1905, and they were assessed to her in the year 1906 and she offered to pay the same, but the tax collector refused to accept them from her, they having already been paid by the plaintiff. It is admitted that the tax deed was void for reasons stated by the court in its findings.

The complaint is in the ordinary form, and the defendant sets up her title by tax deed and by adverse possession, both in her answer and also by cross-complaint. But the one question is presented on the appeal: Can adverse possession be established by showing that the land has been occupied and claimed for five years continuously, and all taxes thereon paid for four years, and the land assessed to the claimant for the fifth year, but the taxes for that year paid by the party against whom it is sought to acquire the title? The answer must be in the negative. The validity of the taxes assessed against the property did not in any manner depend upon the name in which they were assessed. The assessment is of the property, and not against the owner. As said in *Klumpke v. Baker*, 131 Cal. 80, 82, 63 Pac. 137, 676: "The name of the owner of the property assessed is an incidental provision for the sake of convenience, but a failure to give the correct name of the owner is declared by the statute not to impair the assessment." In connection with the establishment of a title by adverse possession, the question of assessment only becomes important for the purpose of determining whether any taxes at all need to be paid. If no assessment of the property had been made for the year 1906, no taxes would have been levied and assessed which were required to be paid. Code Civ. Proc. § 325; *Bald-*

win v. Temple, 101 Cal. 396, 35 Pac. 1008, concurring opinion of McFarland, J., 101 Cal. 403, 35 Pac. 1010.

There are no equities in favor of a party seeking by adverse holding to acquire the property of another, as said by Harrison, J., in his concurring opinion in *Cavanaugh v. Jackson*, 99 Cal. 672, 675-676, 34 Pac. 509, 510: "Section 325 of the Code of Civil Procedure requires that one who seeks or claims to obtain title by adverse possession shall have paid 'all the taxes, state, county, or municipal, which have been levied and assessed upon such land during the five years of his adverse occupancy.' If, when he offers to make a payment to the tax collector, the tax which has been levied has been already paid, he cannot comply with one of the requirements of the statute, and must fail to acquire a title by adverse possession. There is no hardship in this construction. If the owner of the land pays the taxes as they fall due, there is no reason why his title should be impaired by a subsequent payment by another. The statute makes the payment of taxes as important an element as actual occupancy of the land for the purpose of gaining a title by adverse possession, and the burden is upon the claimant to do the acts required to create the adverse title. He should be as vigilant in paying the taxes as in holding possession of the land. He is seeking to gain the title of another through statutory authority, and it is for him to see that he does all of the acts which the statute requires." This language is approved in *Carpenter v. Lewis*, 119 Cal. 18, 50 Pac. 925.

That the defendant's inability to pay the taxes was due to the act of plaintiff constitutes the real reason why the running of the statute was stopped. There is no principle of law which would estop plaintiff from saving his title by preventing the last act being done by the party seeking to acquire it, any more than there is to estop him at any other stage during the process of an attempt to acquire his title. Defendant had not done all the acts required to create an adverse title at the time the plaintiff brought his action. Had the defendant tendered the taxes on the property for 1906 to the tax collector and that officer refused to accept them, although they were not paid, then the exceptions suggested in the opinion in *McNoble v. Justiniano*, 70 Cal. 395, 11 Pac. 742, might have been before us. Under the facts presented by the record they are not.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 173

PEOPLE v. OLIVAS. (Cr. 114.)(Court of Appeal, Second District, California.
March 4, 1909.)**1. CRIMINAL LAW (§ 793*)—INSTRUCTIONS—CODEFENDANTS.**

Where defendant and another were jointly charged with burglary, and the circumstances were such that, if the codefendant was the real perpetrator, defendant might still be guilty of aiding and abetting, the court properly refused to charge that if the evidence pointed as clearly to some other person as it did to the defendant, or if the jury had a reasonable doubt as to whether defendant or some other person was the guilty party, they should acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1858, 1939; Dec. Dig. § 793.*]

2. CRIMINAL LAW (§ 829*)—REQUESTS TO CHARGE.

Requests to charge, covered by the instructions given, may be properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Charles Olivas was convicted of burglary, and he appeals. Affirmed.

Chas. A. Palmer, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appeal by defendant from a judgment of conviction and from an order denying a new trial. The information filed charged defendant and one Gallego jointly with the crime of burglary. Defendant Olivas demanded a separate trial, upon which trial evidence was offered tending to show that both of said defendants were implicated in the criminal act, although some of the evidence offered tended to show that defendant Olivas was the most active participant therein.

The only error assigned relates to the action of the trial judge in refusing the following instruction: "I instruct you the defendant, Charles Olivas, is the only person on trial before you for this alleged offense, and that if you find from a consideration of all the evidence that it points as clearly to some other person as the person who committed the crime in question, as it does to the defendant, or if, after a fair and full consideration of all the evidence, the jury entertain a reasonable doubt as to whether the said Charles Olivas or some other person was the guilty party, then it is your duty to acquit the defendant." There was no error in the refusal of the court to give this instruction. The circumstances of the case were such that, even if the evidence indicated that the other defendant was the real, active participant in the crime, nevertheless, under section 31 of the Penal Code, defendant might still be guilty as one aiding and abetting therein. As a matter of fact, the

evidence tended strongly toward showing the guilt of both. The court, under these circumstances, would not have been warranted in instructing the jury as requested.

The facts of this case are materially different from those in *People v. Hemple*, 4 Cal. App. 120, 87 Pac. 227, in which case a majority of the court determined that the refusal to give a similar instruction, under the peculiar circumstances of that particular case, was error. The element of reasonable doubt involved in the last clause of the instruction was completely covered by a number of the instructions given, and its repetition was unnecessary.

We find no error in the record, and the judgment and order appealed from are affirmed.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 144

CUMMINGS et al. v. ROETH et al.
(Civ. 542.)(Court of Appeal, Third District, California.
Feb. 26, 1909.)**1. APPEAL AND ERROR (§ 1149*)—RECORD—CORRECTION TO CONFORM WITH ORDER OF COURT.**

Where a trial amendment to the complaint was allowed, and defendants were granted leave to file an answer denying the amendment, verification being waived by consent of parties, but did not file it, and judgment was rendered, the failure to file the answer is not ground for reversal; but the judgment on appeal may direct the lower court to cause the answer to be filed to make the record conform with the order permitting the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1149.*]

2. SPECIFIC PERFORMANCE (§ 49*)—CONTRACTS ENFORCEABLE—ADEQUACY OF CONSIDERATION.

There is no definite rule fixing the exact proportion of the actual value of the property to the consideration mentioned in the contract, which courts will regard as rendering the contract not specifically enforceable under Civ. Code, § 3391, providing that specific performance cannot be enforced against a party to a contract, if he has not received an adequate consideration therefor, or if it is not, as to him, just and reasonable; but the proportion may be more or less than one-half, depending somewhat upon the circumstances.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.*]

3. SPECIFIC PERFORMANCE (§ 49*)—PROCEEDINGS—DISCRETION OF CHANCELLOR.

If bonds which were part of the consideration for a contract to convey land were valueless, so that the only consideration promised was \$20,000 for property worth \$45,000, it would be within the discretion of the chancellor to deny specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 49.*]

4. VENDOR AND PURCHASER (§ 44*)—CONTRACT—CONSIDERATION—EVIDENCE.

In a proceeding for specific performance of a contract to convey land, the consideration for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which consisted in part of bonds of a mining company, evidence *held* to show that neither the bonds nor the mines which were their security had any market value at the time of the transaction.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 44.*]

5. SPECIFIC PERFORMANCE (§ 49*)—CONTRACTS ENFORCEABLE—INADEQUACY OF CONSIDERATION—CONSTRUCTION OF STATUTE.

Under Civ. Code, § 3391, providing that specific performance of a contract cannot be enforced against a party thereto if he has not received an adequate consideration therefor, an executory contract cannot be so enforced where the consideration is inadequate, even though the parties intentionally entered into the contract fixing the inadequate consideration.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. § 49.*]

6. SPECIFIC PERFORMANCE (§ 128*)—PROCEEDINGS—DAMAGES TO PLAINTIFFS ON DENIAL OF RELIEF.

Where specific performance of a contract for sale of real property was denied in a suit by the contract purchasers, they could not recover the amount of rentals of the property, as damages, as they would be entitled thereto only in case they obtained the specific performance of the contract.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 412-419; Dec. Dig. § 128.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Annie E. Cummings and another against George Roeth and another. From a judgment for defendants and an order denying a new trial, plaintiffs appeal. Affirmed, with directions.

Roger Johnson, for appellants. Welles Whitmore, for respondents.

CHIPMAN, P. J. This is an action to enforce the specific performance of a contract entered into by defendant Roeth with plaintiffs to convey land. Judgment passed for defendants, from which and from the order denying their motion for a new trial plaintiffs appeal.

The following are the facts averred in the amended and supplemental complaint and in an amendment thereto filed by leave of court at the trial: That plaintiffs are husband and wife and on March 26, 1906, defendant Roeth, being then the owner of certain real property, situated in the city of Oakland, entered into a written agreement with plaintiff Annie E. Cummings, whereby he agreed to execute and deliver to her a deed conveying to her the said property free and clear of all liens and incumbrances, in consideration of the sum of \$20,000 in cash to be paid to him and 40 gold bonds of the American Magnesite Company, a corporation, of the par value of \$1,000 each, then held by plaintiff J. J. Cummings, and which constituted a part of the only series of bonds ever issued by said company, each and all of which were of the same issue and value and were payable to bearer, "which said money and

bonds said Annie E. Cummings therein agreed to pay and deliver to said Roeth for said property, and said property was at all times herein mentioned prior to April 18, 1906, of a value not to exceed \$45,000, and said 40 bonds were at all of said times and now are of a value in excess of \$25,000, which said money and said bonds were then and there a full and adequate consideration and price for said property, and said contract was in all respects just and reasonable." It is averred that on April 7, 1906, plaintiff Annie E. Cummings "tendered to said Roeth the said sum of \$20,000 in gold coin of the United States, and the said 40 bonds of \$1,000 each, * * * and she then and there demanded a conveyance of said premises as provided in said agreement; but said Roeth then and there wholly failed and refused to convey said property to said Annie E. Cummings, * * * and said failure and refusal has ever since continued," and that said Annie "ever since has been, and now is, ready, able, and willing to pay said money and to deliver said bonds for said property"; that prior to April 18, 1906, the rental value of said property was \$450 per month, and ever since that date the rental value has been \$1,500 per month. It is then averred that defendant Burpee holds the legal title to said real property to secure an indebtedness of \$16,000 from said Roeth to him. Plaintiffs pray judgment requiring defendant Roeth to perform specifically his said agreement upon the payment of said money and the delivery of said bonds by plaintiff Annie E., and that out of the purchase price all claims of said defendant Burpee be paid, and he be required "to convey said land as the court may direct," that an account be taken of the rental value, and plaintiffs be given judgment therefor.

Defendants deny specifically the averments of the complaint and aver that said bonds "were not of the value of \$1,000 each, or of any market value, or would be of any value to defendants; and defendants allege that \$20,000 is not a fair, or full, or adequate consideration for said land and premises." For a separate answer defendants aver: That said bonds, "are not worth their par value, and are of very little or no value, and are of a value not exceeding \$100 per bond"; that plaintiff (which one not stated) on March 26, 1906, represented that said bonds "covered property, known as the Rose Brick Company, in truth and in fact, on said 26th day of March, 1906, said bonds did not cover or include the Rose Brick Company or any part thereof"; that on said day plaintiff represented that the bonds of said company were of their face value, whereas on said day and ever since they "have not been of any value other than \$100 per bond, and they are not marketable at \$100 per bond, or at any value whatever, and their value is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not capable of any pecuniary estimation"; that plaintiffs, "by fraud and false representations, are endeavoring to force defendants to convey said premises to said plaintiff for an inadequate and unjust consideration, to wit, the sum of \$20,000; and that the pretended 40 bonds are of no value, and do not form a part of the consideration for the conveyance of said property."

The court found: That the contract was entered into as set forth in plaintiffs' amended and supplemental complaint; that the bonds were not of the face value as alleged; that the value of the land was \$45,000 and no more on March 26, 1906; that tender was attempted to be made by plaintiffs, but was prevented by defendants; that tender would have been useless for the reason that said Roeth would not have complied therewith; that plaintiff Annie E. was on the day tender was attempted by her to be made, and ever since has been, and now is, ready and willing to pay said \$20,000 and deliver said bonds; that neither of plaintiffs on March 26, 1906, nor at any other time represented said bonds "were of the face value, or that they were of the value of \$1,000 per bond, or made any representation as to the value of said bonds"; that "plaintiffs have not, nor has either of them, attempted or endeavored, nor are either of them endeavoring by fraud or false representation, to force defendants or any of them to convey said premises to the plaintiffs or either of them"; that said bonds did not cover the Rose Brick Company, nor did plaintiffs or either of them represent to said Roeth that said bonds included said Rose Brick Company, or any part thereof. The court made no finding as to the rental value of said premises, but after making findings favorable to plaintiffs in substantially all their averments, except as to the value of said bonds, the court found as follows: (8) On said 26th day of March, 1906, the said sum of \$20,000 and said 40 bonds were not a full and adequate or full or adequate consideration or price for said property, and the court finds that said bonds had not on said date and have never since had any value." Hence followed the conclusion of law that plaintiffs were not entitled to judgment, and that they take nothing by their action. If finding No. 8 is supported by the evidence, a finding as to the rental value of the land involved becomes immaterial, and whether the evidence supports the finding is the principal question in the case.

1. At the trial the court granted plaintiffs leave to file an amendment to paragraph 3 of the amended and supplemental complaint. "The court (to Mr. Whitmore, attorney for defendants): You had better file a pleading in form denying the amendment, and verification may be waived. It may be treated as if it was a verified answer. Is that consented to? Mr. Johnson (attorney for plaintiff): Yes, sir. Mr. Whitmore: Then I

will put in a general denial." The trial was resumed, evidence pro and con admitted upon the issues, and judgment rendered; but no answer to this amendment was filed. It is claimed that "this condition of the record leaves the finding No. 8 entirely without support and renders a new trial imperative," citing *Green v. Chandler*, 54 Cal. 626; *Gamache v. School District*, 133 Cal. 145, 65 Pac. 301.

In the first of these cases the action was to foreclose a mechanic's lien. There was no allegation in the complaint that the whole of defendant's land was required for the convenient use of the structure, but the trial court found that it was so required. The Supreme Court held that "the finding was not within the issues made by the complaint and answer." The court added "And there was no evidence whatever given on the trial, or at the time of rendering judgment, upon which the court could determine" the fact as found. The other case cited was where certain findings were held "to be entirely outside of any issue made by the pleadings." The failure to file the answer is not ground for reversal of the judgment. The record can still be corrected to conform with the order permitting the amendment (*French v. McCarthy*, 125 Cal. 508, 58 Pac. 154), and the judgment on appeal may direct the lower court to cause the answer to be filed (*Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766).

2. So far as may be applicable to the case here, section 3391 of the Civil Code furnishes the rule by which we are to be guided as to the law of the case. It provides as follows: "Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract; (2) If it is not, as to him, just and reasonable." The other provisions relate to fraud and mistake, neither of which is here involved. This section has been considered many times by our Supreme Court. It was said in *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148: "It is a rule of equity, embodied in section 3391 of the Civil Code, that specific performance cannot be enforced against a party to a contract if he has not received adequate consideration for the contract, and if the contract is not, as to him, just and reasonable." There seems to be no definite rule, and it would be impracticable to establish one, fixing the exact proportion of the actual value of the property to the consideration mentioned in the contract, which the courts will regard as bringing the particular case within the principle. It may be more or less than one-half, depending somewhat upon the circumstances. In *White v. Sage*, 149 Cal. 613, 87 Pac. 193, the cases are examined, and it was there shown that contracts perfectly valid, free from fraud or mistake as the contract here is found to have been,

may nevertheless be denied specific performance if harsh, unjust, and unfair. And the doctrine applies equally to vendor and vendee. It was said: "There must be a showing of the value, at least, so that the court can determine whether or not it was in reasonable proportion to the price to be paid, or of other facts which are sufficient to satisfy the court that the contract is just and reasonable to the buyer in all its material elements." In the oft-cited case of *Seymour v. De Lanceny*, 6 Johns. Ch. (N. Y.) 222, 3 Cow. 445, 15 Am. Dec. 270, it was said: "Though mere inadequacy is not of itself sufficient to set aside a transaction, yet it may be sufficient to induce the court to the exercise of its discretionary power to enforce a specific performance of a private contract for the sale of land and to leave the party to seek his compensation in damages at law, especially where the inadequacy of price is so great (a little less than one-half in that case) as to give the contract the character of unreasonableness, inequality, and hardship." We must hold, in view of the decisions upon the question, that if it be true that the bonds in question were without value, and that the only consideration promised was \$20,000 for property of the value of \$45,000, it was within the discretion of the chancellor to deny the relief prayed for. The only remaining question therefore is: Does the evidence support the finding that the bonds "had not on said date (date of the contract) and have never since had any value"?

The evidence is and it is admitted that the bonds never had any market value, and the reason given was that they had never been listed or on sale in open market. There is evidence that some bonds were sold in the East, prior to March 26, 1906, at par, but under what circumstances does not appear. The only attempt to show value, aside from individual opinions of some holders of the bonds that they were worth their face, was by evidence of the value of certain magnesite mines which are the security for the bonds. These mines are some distance from Livermore station in this state, and the ores cannot be hauled by team so as to produce any profit in selling them. It is conceded that it will be necessary to build a railroad from Livermore to the mines at a cost estimated at \$175,000, before the ore can be profitably moved. There is a large deposit at the mines, some 27 locations covered by the bonds, but its value is potential and speculative. These mining locations are not patented, and \$100 worth of work must be done annually on each to preserve the right to ultimately complete title. The trust deed, under which the bonds are secured, gives no assurance that this will be done, and the deed gives to a minority holder of the bonds no right of foreclosure for any default; a majority only having this right. No interest had been

paid from earnings of the company and none at all for the year immediately preceding the date of the trial, although interest had been paid, from some source, up to the date of the contract. The trust deed provided that the stockholders of the company should not be liable for any default in payment of principal or interest. In short, the value of the bonds depends entirely upon the value of the mines and their producing capacity. This may some day be ample and may meet the anticipations of the witnesses, but we cannot say that the court, upon the evidence before it, made its finding without sufficient support. Neither the bonds nor the mines were shown to have any market value at the time of the transaction.

3. It is urged with much insistence that defendant Roeth is estopped from claiming inadequacy of consideration, and that, having made a contract in good faith and upon his own independent judgment, he will not now be heard to plead inadequacy of consideration. It appeared from the uncontradicted testimony (in fact, defendants offered no testimony whatever) that, before plaintiffs would consent to consider the matter of purchasing the property, they required defendant Roeth to investigate for himself the value of these bonds and whether he would make the trade. Considerable dickering back and forth was had between them and counter propositions made before the offer of plaintiffs was accepted, which was to pay \$20,000 and deliver 40 of the bonds for the property. Professor Pomeroy says: "The rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation." 2 Pom. Eq. Jur. § 926. But it was held in *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190, that under section 3391, Civ. Code, specific performance will not be decreed unless there was adequate consideration. The court said: "Before the Code, the preponderance of authority was that mere inadequacy of consideration, not amounting to evidence of fraud, was not ground for refusing specific performance. (Citing the section.) Here the inadequacy of consideration seems to be mentioned as a distinct ground from the injustice and unreasonableness, and the provision seems to be explicit and absolute." Cited in *Windsor v. Miner*, 124 Cal. 494, 57 Pac. 386; *Prince v. Lamb*, 128 Cal. 129, 60 Pac. 689; *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548; *Stiles v. Cain*, 134 Cal. 172, 66 Pac. 231. In *Windsor v. Miner* it

was held as essential to the relief of equity that plaintiff must allege and prove adequacy of consideration and fairness in the contract. The cases on the point are cited in *Prince v. Lamb*, holding to a strict compliance with subdivisions 1 and 2 of section 3391. In *Stiles v. Cain* it was decided that a complaint for specific performance of a contract to convey land must state facts showing that it is based upon an adequate consideration, and is, as to the defendant, fair and just; and it follows that if these facts must be alleged they must be proved.

It seems to be the policy of the statute to deny the equitable relief of specific performance, even if the parties knowingly and intentionally entered into the contract, where the case falls within the provisions of the statute, and to remit the party aggrieved to his action at law for damages. The observations of the writer of the opinion in *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970, relied upon by appellants, must be read in the light of the facts in that case, and it will then be seen that the court did not intend to modify or in any respect depart from the rule laid down in section 3391. In the case cited the trial court found as fact "that at that time, namely, the 16th day of May, 1902 [date of the contract], the said sum of \$450 [the agreed price for the lot] was the reasonable value of said lot, and that the said contract was and now is fair and just," thus bringing the case directly within the Code (section 3391), and making it a case, as the court held, coming under section 3388 of the same Code. In a note to section 193, *Pom. on Contracts* (Specific Performance), it is stated that: "Where the parties have knowingly and deliberately fixed upon a price, however great or small, there is, of course, no occasion nor reason for interference by a court, for owners have a right to sell their property for what they please, and purchasers have a right to pay what they please"—citing *Harris v. Tyson*, 24 Pa. 360, 64 Am. Dec. 661; *Davidson v. Little*, 22 Pa. 245, 247, 60 Am. Dec. 81. These cases make a distinction between executed and executory contracts. *Davidson v. Little* was the case of an executed deed to land. The court said: "A party who complains that he has been wronged, and brings a bill on such grounds, must make a clear case before he can expect a decree to cancel his own deed. If, however, he repents before the execution of the contract and stands upon the defensive, he may have all the advantage of his adversary's weakness as well as his own strength. * * * An unexecuted contract has often been annulled, or the vendee left to his action at law, when there was no proof of foul practice, except inequality between the price agreed on and the thing sold; but inadequacy alone must be rejected as insufficient to justify cancellation of a conveyance, ex-

cept in the case of an heir expectant, who anticipates his inheritance by selling it before he gets it." Whether our statute admits of a distinction between executed and executory contracts need not be considered, for in the present case the contract is executory and does not class itself with such as are referred to in the above-mentioned note of Mr. Pomeroy.

4. Appellants cite *Gregg v. Carey*, 4 Cal. App. 354, 88 Pac. 282, to the point of the estoppel pleaded and also to the point that they are entitled to damages on the pleadings and evidence, if specific performance be denied. No damages are claimed except for rentals of the property, and these could only be recovered in the event that plaintiffs succeeded in their main contention and were given the decree prayed for. The court did, however, allow damages in the case cited to the extent of the money paid on the purchase price, but here no money has been paid. The doctrine of estoppel was properly applied to defendant Carey because he directed the agent of plaintiff "to see defendant Lewis in the matter," under such circumstances as estopped him from repudiating the contract, as falling within the provisions of sections 2300 and 2317, Civ. Code. Specific performance of the contract was denied on the ground that the defendants were unable to make a deed to the property.

The judgment and order are affirmed, with directions that the trial court cause defendants to file an answer to the amendment to the complaint, in accordance with its order made at the trial, and as of the date when said order was made.

We concur: BURNETT, J.; HART, J.

10 Cal. App. 206
BURKE v. MAZE. (Civ. 547.)

(Court of Appeal, First District, California.
March 10, 1909. Rehearing Denied by
Supreme Court April 29, 1909.)

1. CORPORATIONS (§ 228*)—SUBSCRIPTIONS FOR STOCK—LIABILITY OF SUBSCRIBER.

The amount due from stockholders for stock subscribed is a trust fund for the creditors of the corporation, and the unpaid subscriptions are a part of the assets and may be collected for the creditors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 874; Dec. Dig. § 228.*]

2. CORPORATIONS (§ 228*)—SUBSCRIPTIONS FOR STOCK—LIABILITY OF SUBSCRIBER.

The liability of stockholders for the amount due on their subscriptions for stock arises from their contract of membership in the corporation, evidenced by the certificates of shares, and on the insolvency of the corporation the directors must collect the amount due to pay the creditors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 874; Dec. Dig. § 228.*]

3. CORPORATIONS (§ 261*)—SUBSCRIPTIONS FOR STOCK—LIABILITY OF SUBSCRIBER.

Before the liability of a stockholder for an unpaid subscription for stock in an insolvent corporation will become fixed, a call for the amount due must be made, and on the directors failing to call for the amount due the creditors may invoke the aid of equity to collect the unpaid subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1071-1073; Dec. Dig. § 261.*]

4. BANKRUPTCY (§ 421*)—DEBTS PROVABLE IN BANKRUPTCY.

Under Bankr. Act July 1, 1898, c. 541, §§ 17, 63, 30 Stat. 550, 562 (U. S. Comp. St. 1901, pp. 3428, 3447) providing that a discharge in bankruptcy releases the bankrupt from his provable debts, and that debts founded on a contract, etc., are provable, the amount due from a bankrupt stockholder on his subscription for stock of a corporation insolvent at the time of the filing of the petition in bankruptcy is provable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772-786; Dec. Dig. § 421.*]

5. APPEAL AND ERROR (§ 843*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.

Where the facts sufficient to enable the court on appeal to dispose of the case are the facts alleged in the pleadings and found to be true, the court on appeal will not determine the question whether a bill of exceptions not served as provided by Code Civ. Proc. § 650, may be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Action by E. V. Burke against E. R. Maze. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Rehearing denied by Supreme Court, 101 Pac. 440.

William A. Coulter, for appellant. Will M. Beggs and R. C. McComish, for respondent.

COOPER, P. J. This appeal is from a judgment in favor of plaintiff. The controversy arose out of the following facts: The Union Savings Bank of San Jose was incorporated about November, 1888. In 1893 the defendant had become the owner of 50 shares of the capital stock of said bank of the par value of \$100 per share, for which he held certificates duly and regularly issued. In March, 1899, said bank was declared insolvent and placed in liquidation. At the time the bank was so declared insolvent, defendant had paid only 90 per cent. of his subscription for said 50 shares of stock, and was still liable on proper call for the remaining 10 per cent. of the par value of the stock owned by him. On June 5, 1900, after the bank had been placed in liquidation, the defendant filed his petition in the United States District Court to be adjudicated a bankrupt. He was so adjudged to be a bankrupt, and by order of said court duly given and made discharged from all his liabilities which were provable against his estate in bankruptcy and which existed on the said 5th day of June,

1900. This order or decree of discharge is set forth in defendant's answer, and not denied, and the court found that such discharge was duly given and made as alleged, but "that the debt herein sued upon was not a provable debt at the time of said discharge." Said bank continued insolvent, and in January, 1907, it was indebted to its creditors in the sum of over \$100,000, and had no resources with which to pay its creditors except by calling in the balance of the unpaid subscriptions to its capital stock; and thereupon through its board of directors, it duly issued an assessment or call for \$10 per share upon such capital stock. Defendant, at the time of said call or assessment, appeared upon the books of said bank still to be the owner of said 50 shares of stock, and there is no claim made, or evidence in the record, to show that defendant's said shares of stock ever passed to the trustee in bankruptcy. In March, 1907, said bank, through its board of directors, by resolution duly made, elected to proceed by action to recover the various sums which remained delinquent by reason of said call, and the amount of the call against defendant, \$500, remained unpaid and delinquent. The bank afterwards, and prior to the commencement of this action, sold and assigned its alleged right to collect the said assessment or call from this defendant to one Beggs, who in turn assigned and transferred it to plaintiff, who is now the holder and owner of whatever right or title the bank had to proceed by suit against this defendant.

The sole question thus presented for determination is as to whether or not the 10 per cent. still remaining unpaid on defendant's shares of stock, subject to call by the board of directors, was a debt provable against defendant in bankruptcy. The amount due from the stockholders for the subscribed stock of the corporation is a trust fund for the creditors of the corporation, and such unpaid subscriptions to its stock are a part of its assets, and may be collected for its creditors. *Vermont, etc., Co. v. Declez, etc., Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; *Walters v. Merced Academy Ass'n*, 126 Cal. 583, 59 Pac. 136; *Visalia, etc., R. R. Co. v. Hyde*, 110 Cal. 632, 43 Pac. 10, 52 Am. St. Rep. 136. Such liability arises by virtue of the stockholders' contract of membership in the corporation, evidenced by the certificates of shares (*Morawetz on Private Corporations* [2d Ed.] § 128; *Union Sav. Bank v. Willard*, 4 Cal. App. 690, 88 Pac. 1098). It therefore appears to be clear that the defendant was liable by reason of his contract for \$10 per share, which amount it was the duty of the directors of the bank to call for and collect in order to pay the creditors the amounts due them.

A discharge in bankruptcy releases the bankrupt from all his provable debts (with

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

certain exceptions, of which this is not one). Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428). The said act further provides (section 63): "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability * * * as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, * * * (4) founded upon an open account or upon a contract, express or implied." As the bank had become insolvent the directors or receiver, as the case may have been, could have proven the claim of the bank against the defendant. The court of bankruptcy could have heard proof if necessary as to the amount of the debts of the bank and the value of its assets. In other words, it could readily have determined as to whether or not it was necessary to collect the amount for which defendant was liable to the bank in order to pay the creditors. The bank was insolvent, and it is manifest that it was the duty of the directors to collect the unpaid subscriptions. The defendant was liable. His liability was founded upon his subscription or ownership of the certificates of stock, on which 10 per cent. yet remained unpaid, and upon the existence of creditors and debts of the bank requiring the payment of the subscription in order to satisfy them. It is true that, before the obligation or liability of the defendant became fixed so as to permit the bringing of a suit against him, there must have been a call for the amount; but we must presume that the corporation, even if insolvent, intended to follow the law and perform its duty. If it did not do so, the power of the court, as a court of equity, could have been invoked by the creditors, and means would have been found to collect the unpaid amount so due by defendant. It therefore logically follows that, if defendant had assets, such assets went into the hands of the trustee in bankruptcy, and the directors of the bank could have proven the claim against the defendant, and received the dividend that might have been paid through the bankruptcy court. It makes no difference whether the bankrupt had assets subject to the claim of his creditors, as the principle is the same. The debt of the defendant existed; it was provable in the bankruptcy proceedings. The following authorities sustain the views herein expressed: *Iron v. Manufacturers' National Bank* (C. C.) 27 Fed. 591; *Carey v. Mayer*, 79 Fed. 926, 25 C. C. A. 239; *Glenn v. Abel* (C. C.) 39 Fed. 10; *In re Smith* (D. C.) 146 Fed. 923.

Counsel for respondent call our attention to several cases which apparently hold to the contrary. Most of these cases arose where there was no question as to the insolvency of the corporation; but, if any of them hold that in case the corporation had

become insolvent at the time of the filing of the petition in bankruptcy the claim for an unpaid subscription could not have been proven, we cannot follow them. In *Purdy's Beach on Private Corporations*, vol. 1, § 332, after discussing the rule contended for by plaintiff as to the bankruptcy of shareholders with unpaid subscriptions, the author says: "If, however, the company is in liquidation at the time of his bankruptcy, the estimated amount of future calls may be proved." See the authorities cited in note 15 to the above section.

It is not necessary to decide the question raised by plaintiff's attorneys that the bill of exceptions cannot be considered because not served as provided by section 650 of the Code of Civil Procedure. The facts as to the debts, insolvency of the bank, and defendant's ownership of the certificates of shares, are all alleged in the complaint, not denied by the answer, and found to be true. The court also finds the discharge in bankruptcy as alleged and set forth in the answer.

The judgment is reversed, and the court below directed to order judgment for defendant on the findings.

We concur: HALL, J.; KERRIGAN, J.

10 Cal. App. 206

BURKE v. MAZE. (S. F. 5,262.)

(Supreme Court of California. April 30, 1909.)

1. COURTS (§ 212*)—APPELLATE JURISDICTION—CONSTITUTIONAL PROVISIONS.

Under Const. art. 6, conferring on the District Courts of Appeal appellate jurisdiction in cases in which the demand does not amount to \$2,000, etc., an appeal from a judgment for \$500, due on a stock subscription, is properly taken to the District Court of Appeal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 212.*]

2. APPEAL AND ERROR (§ 1082*)—DECISIONS OF INTERMEDIATE COURTS—REVIEW ON REHEARING.

The Supreme Court will grant a rehearing in a case properly appealed to a District Court of Appeal only when error appears on the face of the opinion of the appellate court, or when a doubtful and important question is presented on which the Supreme Court desires further argument; but, where a case is properly appealed to the Supreme Court and by it referred to the District Court of Appeal for hearing and decision, the Supreme Court will look into the record to see whether anything deserving consideration has been overlooked in deciding the case, or any of the facts misconceived in material particulars, and, if so, will order a rehearing, though the opinion of the appellate court may be correct on its face.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1082.*]

In Bank. On petition for rehearing of decision of District Court of Appeal. Denied.

For opinion of the District Court of Appeal, see 101 Pac. 438.

PER CURIAM. The petition for a rehearing of this cause in the Supreme Court

after judgment in the District Court of Appeal is denied. It is a cause which, under the recent amendment to article 6 of the Constitution, went properly by direct appeal to the District Court for the First District. In such cases a rehearing in this court is granted only when error appears upon the face of the opinion of the appellate court, or when a doubtful and important question is presented upon which we desire to hear further argument. In such cases the denial of a petition for a rehearing would or might establish a mischievous precedent, and for that reason alone we feel obliged to review the decision of a cause which is not within our jurisdiction by direct appeal. In causes properly appealed to this court and referred by us to the District Court for hearing and decision, the rule as to rehearings is different; for, if it is contended that the case stated in the opinion of the District Court of Appeal differs materially from the case as it appears in the record, we feel bound to look into the record to see whether anything deserving consideration has been overlooked in deciding the cause, or any of the facts misconceived in material particulars. If so, we order a rehearing notwithstanding the opinion of the District Court may be correct on its face, because the complaining party has a right to the opinion of this court upon the precise case shown by the record. The petition for a rehearing of this cause, like many similar petitions recently filed, indicates that this distinction is not generally understood by members of the bar; for counsel bases a long and ingenious argument, supported by numerous authorities, upon facts which he contends are disclosed by the record, but which are not shown by the opinion.

For the reasons very fully stated in the case of *People v. Davis*, 147 Cal. 346, 81 Pac. 718, we cannot enter upon the investigation to which he invites us, and we think it not inappropriate to suggest to members of the bar that they engage in a fruitless labor in petitioning for a rehearing in this court of a cause properly appealed to a District Court of Appeal upon a statement of facts contrary to, or outside of, the case stated in the opinion of that court.

155 Cal. 472

Ex parte BAILEY. (Cr. 1,304.)

(Supreme Court of California. April 13, 1909.)

1. FISH (§ 3*)—FISH IN PUBLIC WATERS.

An ordinance of a town, making it a misdemeanor to use a fishing net within said town, less than 1,000 feet from any wharf, construed in the light of its evident intention to make the wharves advantageous for fishing with hook and line, was beyond the power of the town to enact, as the right to take the fish was one open to all people in common.

[Ed. Note.—For other cases, see *Fish*, Cent. Dig. §§ 3-8; Dec. Dig. § 3.*]

2. FISH (§ 5*)—PRIVATE RIGHTS.

A riparian owner has not an exclusive right to take fish from the water fronting on his land when he does not own the soil under the water, but merely has the exclusive right to use his land in connection with the fishery.

[Ed. Note.—For other cases, see *Fish*, Cent. Dig. §§ 11-15; Dec. Dig. § 5.*]

3. FISH (§ 3*)—FISH IN PUBLIC WATERS.

The common right of fishery in public water can be restrained in the interests of navigation only so far as is necessary to prevent impediment of navigation.

[Ed. Note.—For other cases, see *Fish*, Cent. Dig. §§ 3-8; Dec. Dig. § 3.*]

Petition by John C. Bailey for writ of habeas corpus. Petitioner discharged.

W. H. Savage and M. C. Hester, for petitioner. Towser, Taft & Odell, for respondent.

ANGELLOTTI, J. At the time of the issuance of the writ herein, the petitioner was in custody under a judgment pronounced upon his conviction of a violation of the provisions of an ordinance of the town of Santa Monica, adopted November 19, 1900. His claim was that the ordinance is void. His application was pending unsubmitted at the time of the fire of April 18-20, 1906, and the record was destroyed. It is only within the last few weeks that the record has been restored, and the matter submitted for decision.

The ordinance in question is as follows:

"Ordinance 346. An ordinance regulating seining in certain portions of the town of Santa Monica.

"The board of trustees of the town of Santa Monica do ordain as follows:

"Section 1. It shall be and is hereby made unlawful for any person to set, draw or use any fishing net or seine in the Pacific Ocean at any point or place within said town less than one thousand feet from any wharf, dock or pier located in said town.

"Sec. 2. Any person violating section 1 of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction, shall be fined in a sum not exceeding fifty dollars, or be imprisoned in the town jail, for not more than thirty days, or both, at the discretion of the trial court."

We think it is manifest from the terms of the ordinance that it was in no sense designed for the preservation and protection of fish for the benefit of the people of the state, as are the laws enacted by the State Legislature in that behalf to be found in title 15 of the Penal Code, and it will therefore be unnecessary to consider the claim that a municipality in the exercise of the police power may enact such regulations for the protection of wild game within its borders as may not be in conflict with general laws of the state. We do not desire to

be understood, however, as suggesting that a municipality has any such power. It is unnecessary to decide this point, for such manifestly was not the purpose of the ordinance. The prohibition against the use of fishing nets and seines extends only to places "less than one thousand feet from any wharf, dock or pier located in said town." The presence of a wharf, dock, or pier is the material thing, and it was clearly the sole object of the ordinance to protect and add to the piscatorial advantages of the wharves, docks, and piers in the town.

The ordinance conveys the idea that the object was to make such wharves, etc., advantageous for fishing with hook and line; the idea being that more fish could be thus taken by those fishing therefrom if seining and netting were prohibited within a thousand feet. If this was the object of the ordinance, and it appears clear to us that this is the only object that can reasonably be inferred from the language used, it was clearly beyond the power of the town to enact. Nothing is better settled than the doctrine that the ownership of wild game, not reduced to actual possession by private parties, of which the fish in our waters constitute a part, is in the people of the state in their collective sovereign capacity. *People v. Truckee, etc., Co.*, 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183. The people of the town of Santa Monica have no such proprietary interest in the fish swimming in the waters of the Pacific Ocean within the corporate limits of the town as authorizes them to protect and preserve them therein, simply that they may be taken by those fishing from the wharves. Until actually reduced to possession, the fish belong to all the people of the state in common, and those engaged in the exercise of the common right to take them from what is a public highway, open to all people alike, cannot be impeded in the slightest degree in the exercise of that right solely for the purpose of making the wharves, etc., of the town a more advantageous place from which to fish. To allow this would practically amount to a segregation of a portion of the fish at large in the ocean to the uses of the town of Santa Monica, to the injury of persons otherwise entitled to take them in such manner as they saw fit. Such legislation could be sustained only on the theory that Santa Monica has some sort of a proprietary interest in the fish in that part of the ocean which is within the corporate limits of the town, but, as we have seen, such a theory has no foundation in fact. It is said by counsel for respondent that it has been held that the right of the riparian owner to take fish from the water on or fronting on his land is exclusive, but this is too broad a statement of the rule. The ruling in *People v. Truckee, etc., Co.*, 116 Cal. 397,

48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183, cited by him, was simply that "the right of fishery upon his own land is exclusively in the riparian proprietor. The rule is stated in 2 Farnham's *Waters & Water Rights*, § 375, as follows: "An exclusive right of fishery in the water adjacent to property is not one of the rights of the riparian owner. He can claim such right only when he owns the soil under the water, or the right has been expressly conferred upon him. By reason of the location of the riparian owner and his exclusive right to use his land in connection with the fishery, he has certain advantages not common to the public, and in some cases this will give him a virtual monopoly of the fishery; but the fact that he has the exclusive right to draw a seine on his property does not exclude the public from the right to draw seines if they can do so without trespassing on the shore." Again, in section 401, with relation to municipalities, it is said: "But except in private waters of which the municipality has the title, it has, in the absence of statute or custom, no title to or exclusive control over the fisheries within its limits."

It is said that there is nothing before this court to show that it is not a necessary provision, "for the proper conduct of traffic upon and about the wharves, that seining should be excluded within the limit provided by the ordinance." Except in so far as it might operate to reduce the number of fish available to those fishing from the wharves, a matter entirely beyond the control of the town, learned counsel has not suggested, and it is impossible to conceive, how the acts prohibited by the ordinance could impede in the slightest degree anything that it was desired to do on the wharves. The only other theory that has occurred to us upon which it might be claimed that the ordinance was a valid exercise of power on the part of the trustees of the town was that it was in aid of navigation in the vicinity of the wharves, docks, and piers, and to enable vessels to conveniently and safely reach the same. This claim, however, is not made, and manifestly the ordinance was not designed for any such purpose. The absolute prohibition of any use of any kind of fishing net or seine within a thousand feet of each and all of the wharves, docks, and piers in the town of Santa Monica could not have been considered essential to easy and convenient access thereto by vessels. While the common right of fishery in any public water must give way to the right of navigation so far as is necessary for the fair, useful, and legitimate exercise of the latter right, it cannot be unnecessarily and unreasonably impeded thereby. *Farnham on Water & Water Rights*, §§ 33a, 393. We can see no ground upon which the ordinance in question can be sustained. It is an inter-

ference with the common right of fishery not warranted in the lawful exercise of the police power.

It is ordered that the petitioner be discharged from custody.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(155 Cal. 436)

In re HITE'S ESTATE.

GROVE v. GROSS. (S. F. 5,046.)

(Supreme Court of California. March 31, 1909.
Rehearing Denied April 29, 1909.)

1. WILLS (§ 651*) — CONSTRUCTION — CONDITIONS—VALIDITY—CONTEST.

A provision of a will forfeiting devises to any person who shall contest the will is not contrary to, but is favored by, public policy, since it discourages litigation, and the inhibition may apply to contests on the ground of insanity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1542; Dec. Dig. § 651.*]

2. COMMON LAW (§ 9*)—MAXIMS.

While public policy requires that the courts be open to all suitors, the law deplores and discourages litigation.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 3; Dec. Dig. § 9.*]

3. WILLS (§ 665*) — CONSTRUCTION — INTENTION OF TESTATOR — USE OF PARTICULAR WORDS.

In determining whether proceedings by a legatee amounted to a contest of a will within a provision forfeiting bequests to any legatee who should "contest" the will, the meaning of the word as used by testator, in view of his purposes, is the controlling consideration.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1566; Dec. Dig. § 665.*]

4. WILLS (§ 439*) — CONSTRUCTION — TESTATOR'S INTENTION.

Having found testator's meaning and purpose in using a particular word in a will, his intention will be given due effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 955; Dec. Dig. § 439.*]

5. WILLS (§ 665*)—CONDITIONS—"CONTEST" OF WILL.

A will provided that, if any devisee contested it, he should receive no part of the estate. Respondent, who was not related to testator, was given \$5,000 under the will, but by a codicil the legacy was reduced to \$2,000, and by the same codicil a legacy to testator's sister was largely increased. Respondent filed opposition to probate, and moved to strike parts of proponent's answer thereto, and the hearing of the contest was continued from time to time, when finally the sister agreed to give respondent \$2,500 for withdrawing her opposition. *Held*, that respondent's action amounted to a "contest," and she forfeited her legacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1566; Dec. Dig. § 665.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1494, 1495.]

6. WILLS (§ 665*)—CONDITIONS—CONTEST OF WILL—OPERATION AS TO LEGACIES.

Such contest worked a forfeiture of the legacy, though there was no gift over.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1566; Dec. Dig. § 665.*]

7. COMMON LAW (§ 9*)—MAXIMS.

Where the reason of a rule of law does not exist, the rule itself should not be followed.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. § 3; Dec. Dig. § 9.*]

8. WILLS (§ 476*)—CONSTRUING INSTRUMENTS TOGETHER—WILLS AND CODICILS.

While a will and codicil constitute but one testament, they will not be construed as a single instrument, where a manifest intention requires otherwise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 997; Dec. Dig. § 476.*]

9. WILLS (§ 665*)—CONDITIONS—CONTEST OF WILL—FORFEITURE.

The provision against contests applied to codicils, and neither the rule of strict construction against forfeitures, nor Civ. Code, § 1342, providing that a testamentary disposition shall not be divested except upon the occurrence of the precise contingency prescribed by testator, prevented a forfeiture by a legatee contesting the codicils.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1566; Dec. Dig. § 665.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John R. Hite, deceased. Application by Etta Gross for an order directing the payment of a legacy, to which Willie Virginia Grove filed objections, and from a decree granting the petition and overruling a demurrer thereto, objector appeals. Reversed, with directions to overrule demurrer.

H. M. Wright, Louis Titus, and W. E. Creed, for appellant. E. W. McGraw, for respondent.

HENSHAW, J. John R. Hite died April 18, 1906, leaving a large estate, and papers purporting to be a will, with two codicils thereto. The will bore date July 29, 1902. By it he gave to his sister, Lucretia V. Grove, \$10,000, to his half-brother, Gabriel Hite, \$10,000, to Alex. Matthews and Etta Gross, children of an old friend, \$5,000 each, to a Mrs. Stearn \$5,000, to two certain charities \$5,000 each, to any person legally determined to be his widow \$5, and all the rest and residue of his property in one-third shares to his sister, Lucretia V. Grove, his nephew J. Claude Riley, and the children of his deceased sister, Mrs. Cupp, of whom appellant is one. The will contained this provision: "Twelfth:—If any of my heirs or devisees, or any one else, contests this, my last will and testament, it is my will and desire, and I declare that he, or she, or they, shall receive no part whatever of my estate, and if such an event happens, I hereby revoke any devise or bequest herein made to such contestant or contestants." On March 29, 1906, he executed a codicil to said will, in which he declared the will of July 29, 1902, to be his last will and testament, and republished and reaffirmed and ordained the same, with the following

modifications: He gave to Alex. Matthews, Etta Gross, and Mrs. Stearn \$2,000 each, instead of \$5,000, revoking such \$5,000 legacies. He gave to Mrs. Mary Grove \$5,000, and to a trust company, in trust for the son of one Richard Blennerhassett, a note held by him against said Blennerhassett. On April 16, 1906, he executed a second codicil, giving to his sister, Lucretia V. Grove, a legacy of \$200,000 in place of the \$10,000 legacy originally given, and providing that such disposition should not interfere with the residuary provision already made in her behalf. He also expressly ratified and confirmed in all other respects the original will and codicil. On June 4, 1906, F. A. Berlin, the executor named in the will, filed in the superior court his petition for proof and establishment of such papers as the last will of deceased. On July 16, 1906, Etta Gross filed a paper entitled "Contest of Codicil, dated March 29, 1906," opposing the probate thereof as part of the will of deceased, on the ground of nonexecution, want of mental capacity, and undue influence. On the same day she and J. Claude Riley, one of the residuary legatees, filed their opposition to the probate of the codicil of April 16, 1906, on the same grounds. The executor employed attorneys to meet these oppositions, and on September 19, 1906, filed his answers. Thereafter Etta Gross and Riley made a motion that certain portions of the answers be stricken out, which motion was granted. The hearing of these contests was continued by consent several times, until finally set for January 2, 1907, for hearing. On December 26, 1906, an agreement was entered into between Etta Gross and Riley on the one side, and Lucretia V. Grove, the chief beneficiary by the second codicil, on the other, whereby Mrs. Grove agreed that there should be distributed from her legacy to Etta Gross \$2,500, to Matthews \$2,500, and to Riley \$47,000, and in consideration thereof, Etta Gross and Riley agreed to withdraw their opposition to the probate of the codicils. The opposition was thereupon dismissed, and the will and codicils admitted to probate, without any hearing of the proposed contests, and, so far as the record on this appeal shows, without any act on the part of Etta Gross and Riley in the matter of making a contest other than those above enumerated. Appellant's counsel state, several times in the briefs, that a deposition of a witness was taken for use on the contest, but the record on this appeal does not so show. In due course Etta Gross made application under a petition for partial distribution for an order of the court directing the payment to her of the legacy of \$2,000 provided in the codicil. Mrs. Willie Virginia Grove, a residuary legatee and devisee under the will, filed written objections to the petition of Etta Gross. A general demurrer to these objections was interposed. The demurrer

was sustained, the petition granted, and from that decree Mrs. Willie Virginia Grove appeals, urging that Etta Gross had forfeited all her rights under the will by reason of her contest. Whether or not such a result follows from the actions of Etta Gross is the question here for determination.

Preliminarily, it is to be observed that a condition such as this, not only does no violence to public policy, but meets with the approval of that policy. Public policy dictates that the courts of the land should be open, upon even terms, to all suitors. But this does not mean that it invites or encourages litigation. To the contrary, it deprecates litigation. "Interest reipublicæ ut sit finis litium," and the great statute of frauds and perjuries, and the laws limiting the time of the commencement of actions, with many other of its rules and doctrines, are all designed to give repose and security by preventing litigation. However, upon this matter it is quite sufficient to quote from the opinion of this court in *In re Garcelon*, 104 Cal. 592, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, which itself draws from and cites with approval *Cooke v. Turner*, 14 Sim. 493: "In addition to this we think the principle upon which the case of *Cooke v. Turner*, 14 Sim. 493, was decided is sufficient to sustain the validity of this covenant, so far as relates to the question of public policy. The question in that case arose upon a condition in a will to the effect that, if a devisee should dispute the will, or the competency of the testator to make it, the devise thereby given to her should be revoked. It was argued in that case that such a condition was void, as against public policy, because having a tendency to set up the wills of insane persons by restraining heirs named therein as devisees from contesting such wills; but the court, in answer to this argument, said: 'There appears to be no more reason why a person may not be restrained by a condition from disputing sanity than from disputing any other doubtful question, whether of fact or of law, on which the title to a devise or grant may depend.' And the court then, after calling attention to certain conditions which, if found in a will, would be declared void as against public policy, such as conditions in restraint of marriage or of lawful trade, proceeded to say: 'But, in the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty, either perfect or imperfect, on the part of an heir to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or by the devisee; and we conceive, therefore, that the law leaves parties to make just what contracts and engagements they may think expedient as to raising or not raising questions of law or fact among themselves, the sole object of which is to

give the enjoyment of the property to one claimant rather than to another." The reasons why such provisions are upheld as part of a sound public policy cannot be more aptly stated than in the language of the Supreme Court of the United States in *Smithsonian Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793, where the matter was discussed in the following language: "The propositions thus laid down fully commend themselves to our approval; they are good law and good morals. Experience has shown that, even after the death of a testator, unexpected difficulties arise; technical rules of law are found to have been trespassed upon; contests are commenced wherein, not infrequently, are brought to light matters of private life that ought not to be made public, and in respect to which the voice of the testator cannot be heard, either in explanation or denial, and as a result the manifest purpose of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property, and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions, the courts rightly hold that no legatee, without compliance with that condition, shall receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes."

Such a condition, then, not being repugnant to, but favored by, public policy, the question of paramount importance arises: Did respondent bring herself within the purview of that condition? Did she, within the meaning of the language employed by the testator, "contest his will"? It will at once be conceded that the verb "contest" is not to be construed according to its popular and primary meanings—to oppose, dispute, contend, or controvert. It is to be given legal significance. But when consideration is paid to its legal meanings, it will be found that to it have been assigned different imports, in accordance with the manifest intention of the statute in which it is employed. Thus, by section 1308 of the Code of Civil Procedure, where it is provided that, if no one appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses, and where by section 1330 of the Code of Civil Procedure it is provided that in all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, a jury trial may be had, this court, in construing the latter section, and in determining the rights of a contestant after probate, held that such contestant was entitled to a trial by jury, where a contest before probate had been filed, a general demurrer thereto had been sustained, and the con-

test then abandoned. *Estate of Robinson*, 106 Cal. 493, 39 Pac. 862. Upon the other hand, the Code of Civil Procedure, dealing with the subject-matter of contests, after providing that any person interested may appear and contest the will, declares, in section 1312: "Contestant to file grounds of contest and petitioner to reply." If a demurrer is interposed and sustained, the court "must allow the contestant a reasonable time" within which to amend. If the demurrer is overruled, the petitioner must "answer contestant's grounds." Again, section 1333, Code Civ. Proc., provides that "if no person within one year after the probate of a will contests the same." In these latter instances clearly the word is employed in a different sense, and means the mere filing in legal form of written grounds of opposition. *Breeding v. Grantland*, 135 Ala. 497, 33 South. 544. But this consideration need not be extended, and is had only for the purpose of establishing that there are various legal significations in which the word may be employed. The basic question for determination is the meaning of the word as employed by the testator, and that determination is to be arrived at from a consideration of his purpose, and the end which he sought to attain. Respondent contends, applying the familiar rule of strict construction where forfeiture is involved, that "contest" here means a legal opposition, pressed home to a decision, and that nothing short of this fulfills the terms of the condition subsequent. But having regard, as we must, to the controlling consideration of the purpose of the testator, can this be true? If so, then the testator contemplated permission to any disaffected heir, devisee, or legatee to use all of the machinery of the law to overthrow his wishes; to urge upon the court any of the "technical rules" which it may be thought were trespassed upon; to drag into publicity matters of the testator's private life; to assail his sanity—all to thwart "the testator's manifest purpose." And, after having done all this, if before a judicial determination has been actually rendered he has been able to force a compromise through the fears of the other beneficiaries under the will, or, failing this, has reached the conclusion that his efforts for the destruction of the instrument will prove abortive, he may dismiss his petition, receive the benefit of the testator's bounty, and be heard to declare, "I have not contested." This cannot be.

What, then, was the real purpose which the testator sought to effectuate by the simple and understandable word which he employed? For, having found that meaning, the law will give it due effect. That purpose, it seems to us, is plainly to be discerned. It was, as said by the Supreme Court of the United States in the *Smithsonian Institution Case*, *supra*, to prevent the invocation of any of the technical rules of law to be employed to thwart his ex-

pressed wishes; it was to prevent all attacks upon his character, reputation, or sanity by dragging into publicity his private life; and it was equally to secure to the beneficiaries whom he named the fruits of his bounty. When it appears that the effect of the legal action which a contestant has taken has been to thwart the testator in any of these most obvious purposes, can the party, who has deliberately and designedly taken such action, be heard to say that he has not contested? We think not. Let us consider for a moment the facts here disclosed by the record. Etta Gross was not related to the testator. She had no claim whatsoever upon his bounty. By his will he left her a legacy of \$5,000, as a child of one of his old friends. By the contested codicils he cut this legacy down to \$2,000, and at the same time by one of them gave to his own sister—a natural recipient of his bounty—\$200,000 in lieu of a \$10,000 legacy. Etta Gross assails these codicils. She files written grounds of opposition, which the law recognizes as a "contest." She subsequently invokes judicial action of the court by a motion to strike out portions of the proponent's answer to her contest. Her contest is set for hearing, and the hearing from time to time continued, with the final result, which must always have been in contemplation, of forcing a compromise from the sister, who naturally stood in terror of losing her \$200,000 legacy. Can it be said that one who has thus used the machinery of the law, by methods competent and designed to work an overthrow of the testator's expressed wishes, and who has accomplished her result to the extent of taking from another legatee, by compromise, a portion of the testator's money which he had bequeathed to her, who for her personal end and gain has instituted the contest, and having accomplished her end has abandoned it, can it, we repeat, be said that she, within the meaning of the testator's inhibition, has not contested? Clearly it cannot. The decision of each of such cases, as it arises, must be controlled by its facts. It does not follow herefrom that the mere filing of a paper contest, which has been abandoned without action, and has not been employed to thwart the testator's expressed wishes, need be judicially declared a contest. But wherever an opponent uses the appropriate machinery of the law to the thwarting of the testator's expressed wishes, whether he succeed or fail, his action is a contest.

Respondent next urges that, even if it be held that the acts of Etta Gross amount to a contest, yet, as she was a legatee, and there was no gift over of her legacy in the event of a contest, no forfeiture results. It is recognized that a forfeiture of land devised will result under such circumstances, without a specific devise over. That decisions in abundance may be found holding

that the same rule does not apply in cases of legacy is an anomaly of the law of wills. It rests upon no substantial distinction, and, where recognized, it is adopted in deference to the weight of earlier adjudications. It was not a part of the common law as such, but came to be recognized in England by the chancery courts to preserve uniformity, since legacies could be sued for and recovered in the ecclesiastical courts which followed the rules of the civil law. By the civil law the fiction was introduced that, unless there was a gift over of such legacy, a forfeiture would not be decreed. The provision for forfeiture would be construed as a mere threat, held in terrorem over the legatee, but not intended to deprive him of his interest. Only in the event that the will made provision for a gift over would the conclusion be adopted that the testator intended a forfeiture. For this reason, and for the added reason that it was at one time supposed that such a provision violated public policy as being "against the liberty of the law," this interpretation and construction found their way into the adjudications. The matter is learnedly discussed by Vice Chancellor Lord Cranworth, in *Re Dickson's Trusts*, 1 Sim. (N. S.) 37, 61 Eng. Reprint, 15. The codicil there revoked a legacy to a daughter in the event that she became a nun. There was no gift over. The petitioner contended that it was a universal rule that, in every case of a testamentary gift of personal property with a condition subsequent, there must exist an express gift over, or a forfeiture would not be decreed. Lord Cranworth upon this expressed himself as follows: "I do not, however, think that any such rule of law exists." Reviewing the authorities, he shows that it was applied only where the condition was against contesting or in restraint of marriage, which latter was clearly in violation of public policy. In speaking of the conditions subsequent, touching contests of wills, he says: "Judges in deciding them have never felt very sure of the ground on which they were treading. It is, however, certain, that the decisions have proceeded on maxims of the civil and not the common law. * * * Inasmuch, therefore, as legacies may be sued for and recovered in the ecclesiastical courts, where the rule of the civil law would prevail, this court has felt itself bound to conform to that law, in order that there might not be a conflict of decision in the two courts." The result in England has been that the courts of equity, to avoid such conflict of decision, have followed the common law, and decreed forfeitures in the case of land, and have followed the ecclesiastical courts and refused forfeitures in the case of legacies, except where there was an express gift over. Many cases may be cited from the courts of this country where the decisions of England have been adopted. The Supreme Court of the United States, bound by the doctrines of the

common law, has done so. *Pray v. Belt*, 1 Pet. 670, 7 L. Ed. 309; *Parsons v. Winslow*, 6 Mass. 169, 4 Am. Dec. 107; *McIlvaine v. Gethen*, 3 Whart. (Pa.) 575; *Mallet v. Smith*, 6 Rich. Eq. (S. C.) 12, 60 Am. Dec. 107; *Maddox v. Maddox's Adm'r*, 11 Grat. (Va.) 810; *Binnerman v. Weaver*, 8 Md. 517. But, upon the other hand, this distinction, resting as it does upon such an insecure foundation, has by no means met with universal acceptance. See *Hoit v. Hoit*, 42 N. J. Eq. 390, 7 Atl. 856, 59 Am. Rep. 43; *Donegan v. Wade*, 70 Ala. 501; *Thompson v. Gaut*, 14 Lea (Tenn.) 315; *Briethaupt v. Bauskett*, 1 Rich. Eq. 465; *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419. The matter is summed up by Judge Redfield (2 Redfield on Wills, *679), in the following language: "The rule of the English law, as to conditions against disputing the will annexed to some bequests, seems to be in a most absurd state of confusion. It is held such a condition is void as to personalty, unless the legacy be given over in the event of a failure to perform the condition, but that such a condition is entirely valid as to real estate, whether there be any gift over or not. And it is agreed that there is no substantial ground for any distinction in this respect between real and personal estate. Hence we assume that in this country any such condition, which is reasonable, as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation, will be held binding and valid." In this state the question is *res integra*. We are not embarrassed in its consideration by any adjudication of our own, and are at liberty to decide in accordance with sound reason. If it be that the rule anciently rested for its support upon the doctrine of public policy, we find, even in England, where the rule prevails, that such support has been withdrawn. If it rests, as it seems to have rested in England, upon the desire of the chancery court to conform to the decisions of the ecclesiastical court, such a reason does not in this state obtain. In brief, no reason can be shown why such a rule founded neither upon public policy, nor the dictates of the common law, should by us be given recognition. The reason which may have existed in other jurisdictions does not here exist; and, in the absence of the reason, the rule itself should not be followed.

It is next urged by respondent—invoking the rule of the strict construction of forfeitures and the provision of the Code (Civ. Code, § 1342)—that a testamentary disposition, when vested, cannot be divested, unless upon the occurrence of the precise contingency prescribed by the testator for that purpose; that the provision against contests applied to the will, and not to the codicils, and that in contesting the codicils, therefore, the respondent did not contest the will; or, again, that the inhibition against contest-

ing the will applied to the whole will, and that the contest of the codicils as part of the will was not a contest of the will as a whole. Upon the first proposition cases are cited, notably that of *Sloane v. Stevens*, 107 N. Y. 122, 13 N. E. 618, where, under the peculiar circumstances, the language of a will has not been extended to apply to a codicil. In the case instanced the language of the will was: "I hereby release all claims or demands which I have at my death against any person or persons named in this will." The court held, for reasons given, that this language did not operate to release a debtor not named in the body of the will, but named in a different connection in a later codicil thereto. In like manner, in *Alsop's Appeal* and *Riley's Appeal*, 9 Pa. 374, it was held, under the language of the will which divided the residue of the estate *pro rata* amongst legatees therein named, that when by a subsequent codicil he gave specific legacies to other persons, they were not let in to share in the residue. The citation of such cases might be indefinitely multiplied, but they are of little value, for, as was also well said by the Court of Appeals of New York (*Collister v. Fassitt*, 163 N. Y. 286, 57 N. E. 490, 79 Am. St. Rep. 586): "It is a trite saying that no will has a brother, and it may also be said that the citation of numerous authorities in most instances is of little assistance to the court, as each will must be construed in the light of the peculiar surrounding circumstances, the scheme disclosed, the language employed, and the intention of the testator gathered from the general situation." The general rule, of course, is as expressed by the Pennsylvania court in the case cited: "Though for some purposes a will and codicil are to be regarded as making but one testament, they will not be considered as a single instrument, where a manifest intention requires otherwise." In all of these cases the courts were striving to arrive at the meaning, purpose, and intent of the testator as found expressed in the will. What was the purpose and intent of the testator in the case of the will under consideration? So far as language goes, in both codicils he declares that he has reread, reconsidered, reordained, and republishes and ratifies and confirms, his will as of the dates, respectively, of the codicils. Thus the language of the codicils merely modifies the original will to the extent of the legacies, but expressly reaffirms it in every other particular. By such language the codicils become as much an integral part of the will as though their purport had been expressed in one of the original clauses thereof. Moreover, the purpose which the testator sought to subserve, as before discussed, forbids as well a contest of any part as of the whole. The same reasons moving him to forbid a contest in the one case would operate in the other. It is concluded, therefore, that neither of the posi-

tions of respondent in this regard is tenable.

This discussion covers all the propositions advanced by the respondent which seem to call for consideration, and, for the reasons given, the court erred in overruling the demurrer to appellant's written opposition to the petition for partial distribution on behalf of respondent Etta Gross.

The decree of partial distribution is reversed, with directions to the trial court to overrule the demurrer to the written opposition of Mrs. Willie Virginia Grove.

We concur: MELVIN, J.; SHAW, J.; SLOSS, J.

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In re HITE'S ESTATE. (S. F. 5,047.)

(Supreme Court of California. March 31, 1909.
Rehearing Denied April 29, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 256*)—ALLOWANCE OF CLAIM—APPEAL—RIGHT OF APPEAL.

Under Code Civ. Proc. § 1616, as amended in 1905, authorizing an attorney rendering services to an administrator to apply to the court for an allowance of compensation, and giving the attorney and other parties interested an appeal from the order fixing compensation, the attorney may appeal from an order denying compensation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 851; Dec. Dig. § 256.*]

2. EXECUTORS AND ADMINISTRATORS (§ 216*)—CLAIMS AGAINST ESTATE—SERVICES OF ATTORNEY.

Code Civ. Proc. § 1616, as amended in 1905, requires the court, on application of an attorney, to make an order directing the administrator to pay him out of the estate such compensation for his services thereto as it deems proper. Section 1619, added in 1905, allows administrators, etc., for attorney's fees for the ordinary probate proceedings the same amounts allowed by section 1618 as amended in 1905 as compensation for their own services, with such further allowance as the court may deem just for any extraordinary services, as contesting claims against the estate, etc. *Held*, that the only purpose of section 1616 was to enable an attorney to directly obtain such compensation for services as would be allowed to the administrator as necessary expenses, and did not alter the liability of the estate; and, on an application by an attorney for compensation for services other than in ordinary probate proceedings, the probate court has the same discretion as in allowing to the administrator attorney's fees paid by him, and it should deny the application, though not opposed, if the services should not be paid for out of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 757; Dec. Dig. § 216.*]

3. EXECUTORS AND ADMINISTRATORS (§ 219*)—ALLOWANCE OF CLAIMS—CLAIMS OF ADMINISTRATOR.

It is the duty of the probate court, even in absence of objection, to carefully examine claims presented by an administrator, and reject those that are illegal or unjust.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 760; Dec. Dig. § 219.*]

4. EXECUTORS AND ADMINISTRATORS (§ 111*)—EXPENDITURES—COUNSEL FEES.

An executor cannot be reimbursed for counsel fees in an unsuccessful attempt to prove a will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 448; Dec. Dig. § 111.*]

5. EXECUTORS AND ADMINISTRATORS (§ 111*)—ALLOWANCE OF CLAIMS—SERVICES RENDERED ESTATE—ATTORNEY'S FEES—"EXTRAORDINARY SERVICES"—"ORDINARY PROBATE PROCEEDINGS."

Code Civ. Proc. § 1616, as amended in 1905, allows executors all necessary expenses of the management and the settlement of the estate, and authorizes any attorney, who has rendered services to an executor, to apply to the court for an allowance of suitable compensation out of the estate therefor. Section 1619 allows administrators, etc., for fees for their attorneys for the ordinary probate proceedings, the same amounts allowed for their own services by section 1618 as amended in 1905, with such further allowance as the court deems reasonable for any extraordinary services, as for litigation necessary for the administrator to prosecute or defend. Petitioners applied for compensation from the estate for their services as attorneys in opposing a contest of two codicils, altering the legacies given by the will, and giving some additional ones. *Held* that, while counsel fees incurred in opposing a contest may be charged against the estate, if it goes to the parties benefited by the litigation, under the circumstances the estate had no interest in the contest, and the application for compensation out of the estate was properly denied, such expenses being chargeable to those legatees having a direct interest in supporting the codicils, and services in probating the instruments, such as the order admitting them to probate, etc., were not "extraordinary services," but were services rendered in "conducting the 'ordinary probate proceedings,'" within section 1619, for which compensation was allowable only on final accounting.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 451; Dec. Dig. § 111.*]

For other definitions, see Words and Phrases, vol. 3, p. 2629.]

6. EXECUTORS AND ADMINISTRATORS (§ 111*)—EXPENDITURES—COUNSEL FEES.

The mere fact that the statute authorizes an administrator to resist opposition to probate does not, of itself, entitle him to reimbursement from the estate for attorney's fees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 452; Dec. Dig. § 111.*]

7. APPEAL AND ERROR (§ 533*)—RECORD—CONTENTS—OPINION.

The trial court's opinion constitutes no part of the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2339; Dec. Dig. § 533.*]

8. EXECUTORS AND ADMINISTRATORS (§ 495*)—COMMISSIONS.

An executor or administrator is not entitled to the commissions allowed by law until settlement of his final account.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2088-2106; Dec. Dig. § 495.*]

9. EXCEPTIONS, BILL OF (§ 22*)—CONTENTS—DOCUMENTS.

Where an appeal from an order denying compensation out of the estate for attorney's fees, rendered in opposing a contest, was sub-

mitted upon all the records, files, and papers in the cause, the will and the codicils were properly included in the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 29; Dec. Dig. § 22.*]

10. APPEAL AND ERROR (§ 1074*)—REVIEW—QUESTIONS CONSIDERED—HARMLESS ERROR.

Where the insertion of certain documents in the bill of exceptions did not prejudice appellant's rights, it need not be determined on appeal whether they were properly inserted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4252; Dec. Dig. § 1074.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of John R. Hite. Application by Louis Titus and others for compensation as attorneys out of the estate. From an order denying the application, applicants appeal. Affirmed.

Louis Titus, H. M. Wright, and W. E. Creed, in pro. per. E. W. McGraw, for respondent.

ANGELLOTTI, J. This is an appeal from an order denying the application of appellants for an order allowing them compensation, in a sum to be fixed by the court, for services rendered by them as attorneys at law prior to the probate of the will of deceased, to and under employment by the person named in said will as executor. The application was made and acted on by the court after the suspension from office of said executor, after the appellants had ceased to act as attorneys in the estate, and before any final accounting of the affairs of said estate. The legal services alleged to have been performed for which the estate could in any event be held liable, so far as the same can be held to constitute other than services in conducting the "ordinary probate proceedings," consisted of advice and assistance in the matter of preparing to resist certain contests of two codicils to said will, and in representing the executor in the proceedings instituted in court in support of said contests. The provisions of the will and codicils, and the facts in relation to those proceedings, are stated in the opinion in Estate of Hite (S. F. 5,046, this day filed) 101 Pac. 443, and need not again be stated here. One of the residuary devisees filed an opposition to the application of appellants, in the form of a demurrer, upon grounds which may here be conceded not to have been well based. It appears from the record that the matter of such application was submitted to the court "on the files, papers, and records in the case," and the court made the following disposition thereof: "It is ordered that the demurrer of J. Claude Riley be and is sustained, and, petitioners declining in open court to amend their petition, it is ordered that the same be denied."

The action of appellants in applying di-

rectly to the court for an order fixing their compensation, and directing payment thereof, is based on the provisions of section 1616, Code Civ. Proc., as amended in 1905. Prior to such amendment it was settled that the attorney of an executor or administrator was not a party interested in the estate, and must look solely to the executor or administrator for his compensation, such officer being allowed credit on his accounting for such reasonable fees as he had paid his attorney for advice and conducting necessary proceedings and suits in court. Section 1616, Code Civ. Proc., as amended in 1905, provides: "Any attorney who has rendered services to an executor or administrator may at any time during the administration, and upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself for compensation therefor, and the court shall on the hearing of such application make an order requiring the executor or administrator to pay to such attorney out of the estate such compensation as to the court shall seem proper." The section gives an appeal to the attorney, and other parties interested, from any order "fixing the amount of such compensation," which this court held, on a motion to dismiss this appeal, included the right to appeal from an order denying any compensation. At the same time section 1618, Code Civ. Proc., was amended, and a new section, numbered 1619, was added. As amended, section 1618 allows the executor or administrator for his services certain commissions on "the amount of the estate accounted for by" him, and section 1619 provides: "Executors and administrators shall be allowed for fees of their attorneys for conducting the ordinary probate proceedings the same amounts as are allowed by the last section as compensation for executors and administrators for their own services. In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary services, such as sales or mortgages of real estate, contested or litigated claims against the estate, litigation in regard to the property of the estate, and such other litigation as may be necessary for the executor or administrator to prosecute or defend."

It is clear that section 1616, Code Civ. Proc., as amended, was not intended to subject an estate to any greater liability in the matter of attorney fees for legal services rendered to an executor or administrator than existed prior to the amendment. So far as legal services in conducting "the ordinary probate proceedings" are concerned, the Legislature by section 1619, Code Civ. Proc., established the compensation in the way of certain fixed commissions on the "amount of the estate accounted for by" the executor or administrator, and for such proceedings such

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

commissions constitute the compensation that the court may order paid on an application by the attorney under section 1616, Code Civ. Proc. For the legal services denominated in section 1619 "extraordinary service" the probate court was left with the power that it formerly had to determine whether the same was necessarily required of the executor or administrator in the proper discharge of his duty, and what would be a just and reasonable allowance to make to the executor or administrator on account thereof; and on application by an attorney under section 1616 for compensation for such services, he is entitled to receive only such compensation therefor as the probate court would have allowed the executor or administrator for fees of attorneys on an accounting. The whole purpose, and the only effect, of section 1616 as amended is to make the attorney a party interested in the estate for the purpose of directly enforcing his claim for such compensation for legal services as would be allowed the executor or administrator on an accounting as necessary expenses in the discharge of his duties.

It would appear to follow that, when an application of this character is made directly by attorneys, the probate court has the same broad discretionary power in hearing and deciding the same that it formerly had, and still has, in regard to a charge made in the account of an executor or administrator for fees paid to attorneys in the matter of the settlement of the estate. It is thoroughly settled that objections or exceptions on the part of one interested in an estate, to the credits claimed by an executor or administrator in his account, are not essential to the power of the court to disallow or reduce them, and that it is the duty of the court, even where no objection is presented, to carefully examine the account, and reject of its own motion all claims of the executor or administrator that are illegal in themselves or unjust in fact. See *In re Sanderson*, 74 Cal. 199, 210, 15 Pac. 753; *Estate of More*, 121 Cal. 635, 639, 54 Pac. 148; *Estate of Franklin*, 133 Cal. 584, 587, 65 Pac. 1081; *Estate of Willey*, 140 Cal. 238, 243, 73 Pac. 998. In actual practice this rule has always been observed in the matter of the charges made for fees of attorneys, and the power of the probate court in this regard is the same now that it always has been, save that for "the ordinary probate proceedings" the court must allow the commissions fixed by section 1619 as amended. We have no doubt that the same rule is applicable where an application for attorney's fees is made directly by the attorney.

In view of what we have said, if we concede that neither of the grounds of objection stated in the written opposition presented by Riley to appellants' application by way of demurrer was well founded, it does not follow that the order of the lower court denying such application must be reversed. The

court had the power, and it was its duty, to deny the application, in the absence of any written opposition thereto, if the services for which compensation was sought were not such as should be paid for from the funds of the estate. Although the court ordered that "the demurrer of J. Claude Riley be and is sustained," it clearly enough appears from the record that the matter of the application was considered upon the facts shown by the files, papers, and records in the matter of the estate, and denied in the light of those facts. As we have seen, the record shows that the matter was submitted to the court on such files, papers, and records; and, in view of the character and subject-matter of the application, the order of the court was, in effect, that the allegations of the petition, considered in the light of the facts shown by the files, papers, and records of the estate, did not establish a case in which the court should then allow attorney fees from the estate. Did the court err in so concluding?

We have no statute in this state which in terms authorizes an executor named in a will to recover from the estate fees paid by him to attorneys in resisting a contest of the will before probate. It was held in *Estate of Olmstead*, 120 Cal. 447, 454, 52 Pac. 804, that such attorney fees are not allowable as "costs" under section 1720, Code Civ. Proc. If allowable at all, they are allowable under the general provision of section 1616, Code Civ. Proc., that executors shall be allowed all necessary expenses in the care, management, and settlement of the estate, and the provision of section 1619, Code Civ. Proc., that executors, etc., shall be allowed for attorney fees such further allowance, in addition to the ordinary commissions, as the court may deem reasonable for such extraordinary service, as the conducting of such litigation "as may be necessary for the executor or administrator to prosecute or defend." We are not called upon here to determine whether a court has the power, under these provisions, to make an allowance for attorney fees from the estate in such a case, where the contest is successfully resisted or withdrawn before trial, and the will is admitted to probate. Assuming the power to exist, it was clearly for the probate court to determine whether the case was one wherein it was necessary or proper for the executor to resist the opposition to the probate. The mere fact that the statute authorizes him to resist the opposition does not give him the right to be reimbursed from the estate for his expenses in the way of attorney fees. It is conceded by appellants that in this state, if the opposition to the alleged will is finally sustained, and the instrument is denied probate, he cannot be reimbursed at all for such expense (see *Estate of Olmstead*, supra); and this is so even though his resistance to the opposition was in good faith. The statute nowhere requires the executor named in the will, who has petitioned for its probate, to resist the

claim of one filing written grounds of opposition thereto. He may or may not, at his option, become a party to the contest by demurring or answering the opposition. See section 1312, Code Civ. Proc. It is obvious that there are many cases in which the executor named in the will would not be warranted in engaging in litigation, at the expense of the estate, for the purpose of establishing the paper offered by him for probate, even though he believed that it should be admitted, and that a trial of the contest would so establish. Mr. Woerner says: "Whether the executor is entitled to credit for the expenses incurred in the litigation to establish a will depends on circumstances in several directions. In so far as he simply performs a duty, the expenses fairly incurred by him in a contest with the heirs at law are payable out of the estate, whatever be the consequences to the successful contestants; but, if he voluntarily assume the burden of a contest which properly belongs to the legatees or devisees, he must look to them, and not to the estate, for reimbursement. It is held to be the duty, or at least the privilege, of the person named as executor in a paper purporting to be a last will, to propound the same for probate in the proper court; but the executor is not bound to become a party to an issue of *devisavit vel non*, unless he be secured for the expenses by the persons interested in the will. * * * If, therefore, an administrator or executor incur expense at the request, or in the interest, of a legatee or devisee, in the fruitless attempt to establish a will, the parties are liable therefor, but not the estate. If the will is established, however, the costs and counsel fees, *being chargeable against those who are benefited by the litigation*, may be charged against the estate, *if it go to the parties so benefited*; otherwise, the executor's remedy is by action for contribution." 2 Woerner on Administration (2d Ed.) § 517. (The italics are ours.) We think this states a most equitable rule, and one that is in full accord with the established doctrine in this state that an executor or administrator as such has no part to play in contests between heirs, devisees, or legatees, disputing regarding the distribution of the estate. As in the case of a contest on distribution, a contest of a will is generally nothing more than a contest between heirs and devisees and legatees for the property of the deceased. As put in a Pennsylvania case: "As regards the quantum of the estate, it is a matter of indifference whether there be a will or not. Will or no will is a question which cannot affect the estate, in this respect, in the slightest degree; but it may be, and generally is, a matter of great interest to those who claim as legatees or devisees under the writing purporting to be a will. They are the only persons interested in establishing it as a will. While on the other hand, the heirs at law or next of kin to the deceased, who are either

excluded by the writing from receiving any portion of the estate, or as much of it as they would be entitled to in case of intestacy, are the persons principally interested in opposing the establishment of the writing as a will." See Mumper's Appeal, 3 Watts & S. (Pa.) 442. There is no decision of this court relative to contests before probate that is in conflict with the expressions above quoted from Woerner on Administration. In *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230, where it was held that, until the will had been admitted to probate, or probate thereof denied, the court has no power to appropriate the funds of the estate to aid either proponent or contestant in the matter of attorney fees, witness fees, and other expenses, the court said: "It is safe to assume that parties interested as devisees and legatees will always take the necessary steps, and provide necessary funds, to procure the attendance of witnesses to establish the validity of a will, if it is worthy of probate." In *Estate of McKinney*, 112 Cal. 447, 44 Pac. 743, it appears to have been held that it was within the power of the probate court, in its discretion, to refuse to allow attorney fees in resisting a contest before probate, even though the contest was unsuccessful, and that the action of the court in this regard would not be disturbed unless there had been an abuse of such discretion. In *Estate of Whetton*, 98 Cal. 203, 32 Pac. 970, a contest after probate, it was claimed that the executor had no legal right to support and defend the will, and that his opposition to the petition for revocation could not be considered. This was the only question presented by the appeal, and it was held, of course, that he did have such right. In view of our statutory provisions on the subject, no other decision was possible. What was incidentally said to the effect that it was the duty of the executor under his trust to oppose a contest after probate was *obiter dictum*. We do not think that it can be laid down as an absolute rule that the executor is always required to oppose a contest after probate. However, the *dictum* referred to was limited by the court to contests after probate, and there was no question in the case relative to the right of the executor to reimbursement for expenses incurred in resisting a contest. The facts in relation to the proposed contests were such as to warrant the court, in the exercise of its discretion, in refusing any attorney fees to the executor on account thereof. As we have seen, the oppositions filed were not to the original will, but only to the codicils. The second codicil, executed two days before Hite's death, was solely for the benefit of *Lucretia V. Grove*, the only change made thereby being to increase her legacy of \$10,000 to \$200,000. She was the one person in the world to be benefited by the sustaining of the codicil, which would reduce the residuary share by \$190,000. Two-thirds of this reduction would have to be borne by the resid-

uary legatees other than herself, who would be compelled to pay two-thirds of the compensation of attorneys for services rendered in maintaining a codicil reducing their share of the estate, if such compensation is paid by the estate. It would be difficult to find a clearer example of a contest in which the estate is absolutely without interest, one in which it is just and equitable that those having a direct interest in maintaining the paper assailed should bear all the costs and charges of maintaining it. The first codicil simply gave additional legacies aggregating about \$9,000, and reduced legacies given by the original will in the same aggregate amount. The only parties interested in maintaining this paper were the new legatees. We think the court was fully warranted in declining to allow compensation from the estate on account thereof.

The opinion of the learned trial judge is incorporated in respondent's brief. While it constitutes no part of the record, it is proper to say that it appears therefrom that he was of the opinion that, conceding the power of the court in a proper case to allow attorney fees for resisting a contest before probate, a question not decided by him, this was not a proper case for such allowance.

It is further urged by appellants that in any event they were entitled to be allowed compensation for the formal work of preparing necessary papers on probate of the will and codicils, such as the order admitting them to probate, the certificate establishing the same, the written testimony of the witnesses, etc. Such services were rendered in "conducting the ordinary probate proceedings" mentioned in section 1619, Code Civ. Proc., and the compensation therefor is included in the commissions "upon the amount of the estate accounted for" by the executor, established by the same section as the compensation of attorneys for the ordinary probate proceedings in the matter of an estate. A court would not be authorized, in view of this statute, in making any further allowance on account of such services, as for any extraordinary service. We do not think that it was intended by section 1616, Code Civ. Proc., to require a court to make any allowance on account of such commissions in advance of a final account by the executor or administrator. While that section provides that any attorney who has rendered services "may at any time during the administration" make an application for compensation for his services, and the court shall thereon make an order requiring the payment of such compensation for the services as the court shall deem proper, the section must be read with section 1619. Under the latter section the compensation of an attorney for all the "ordinary probate proceedings" is made up of the commissions specified upon the amount of the estate accounted for by the executor or ad-

ministrator. The amount to be allowed for all the ordinary proceedings cannot be ascertained until the amount of the estate accounted for in the administration is known; and, unless the whole amount of the compensation can be ascertained, it is impossible to arrive at the proportionate amount to be allowed for a part of such services. It is settled that an executor or administrator is not entitled to the commissions allowed him by law until the settlement of his final account. See *Estate of Rose*, 80 Cal. 166, 180, 22 Pac. 86; *Estate of Carter*, 132 Cal. 114, 64 Pac. 123, 484. We think the same rule must be held applicable to attorneys under the commission method of compensation provided for by section 1619, so far as the ordinary probate proceedings are concerned, and that nothing is due from the estate on account thereof until such services are completed. For the so-called "extraordinary service," for which the court may fix and allow such additional compensation as it deems just and proper under all the circumstances, no reason now appears to us why an allowance cannot be made at any time after the service is rendered.

Objection is made to the inclusion of the will and codicils in the bill of exceptions; but, as we have already seen, the matter was submitted to this court for consideration upon all the records, files, and papers in the cause, and these papers constituted a part thereof. Objection is made to the insertion of other statements in such bill; but, as we deem them absolutely immaterial and without prejudice to appellants' rights, it is not necessary to determine whether or not they should have been inserted.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.

155 Cal. 468

OSTRANDER v. CITY OF RICHMOND
et al. (S. F. 5,140.)

(Supreme Court of California. April 9, 1909.)

1. WORDS AND PHRASES—"MAY."

While the courts have never hesitated to construe "may" as "must," or "shall," when the context and policy of the law demanded that interpretation, the legislative intention must plainly appear before such judicial correction will be made.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 5, pp. 4418-4447; vol. 8, p. 7719.]

2. MUNICIPAL CORPORATIONS (§ 408*) —
STREET IMPROVEMENTS — ASSESSMENTS —
METHOD — STATUTES — CONSTRUCTION —
"MAY."

The Vrooman act (St. 1885, p. 147, c. 153), as amended by St. 1905, p. 63, c. 67, provides that whenever a contemplated improvement in the opinion of the city council is of more than local or ordinary public benefit, or whenever the total estimated costs exceed one-half the total assessed value of the lots fronting on such pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

posed work, the city council "may" make the expense chargeable on a district. As originally drawn, the act required the trustees of the city to order payment of a portion of the expense from the city treasury if the estimated cost of the improvement exceeded one-half the assessed value of the property. St. 1889, pp. 159, 160, 170, c. 151, amended the act so as to confer discretionary power on city councils. The amendments of 1891 (St. 1891, p. 196 et seq., c. 147) are similar in this respect, and no material change has been wrought by amendments adopted since then. *Held* that, in view of the history of the act, the Legislature intended to confer a wide discretionary power, and that the word "may" would not be construed to mean "shall," so as to require the expense of a street improvement to be made chargeable on a district, where the estimated cost exceeds one-half the assessed value of the lots fronting on the proposed work.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 408.*]

In Bank. Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge. Action by Georgina Ostrander for injunction against the City of Richmond and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Aylett R. Cotton, for appellant. Wm. H. Hart and Morrison, Cope & Brobeck, for respondents.

MELVIN, J. This appeal presents but one question for an answer by this court. That question relates to the interpretation of the word "may" as employed in a statute. The trustees of the city of Richmond passed a resolution of intention to pave Macdonald avenue in said city. After the proceedings usual in such matters, respondents Edgar A. Mizner & Co. were awarded the contract for the work. Appellant raises no objection to the regularity of the form of the proceedings leading up to and including the letting of this contract, except that the jurisdiction of the board of trustees to order the work is denied because the cost of the proposed improvement will be more than one-half of the assessed valuation of the property fronting on Macdonald avenue along that portion of said street described in the resolution of the board of trustees. Appellant, who is the owner of land fronting on Macdonald avenue, upon the theory that the trustees have power to act only upon the district plan of assessment and not upon the method usually described as the "front-foot" system, prayed for an injunction to prevent further proceedings by the contractors, the city of Richmond, and the officers of the municipality. A demurrer to this complaint was sustained without leave to amend, and this appeal is taken from the judgment sustaining said demurrer.

The so-called "Vrooman Act" (St. 1885, p. 148, c. 153, § 3), as amended in 1905, provides among other things that "whenever the contemplated work of improvement, in the opinion of the city council, is of more than local

or ordinary public benefit, or whenever, according to estimate to be furnished by the city engineer, the total estimated costs and expenses thereof would exceed one-half the total assessed value of the lots and lands assessed, if assessed upon the lots or land fronting upon said proposed work or improvement, according to the valuation fixed by the last assessment roll whereon it was assessed for taxes for municipal purposes, and allowing a reasonable depth from such frontage for lots or lands assessed in bulk, the city council may make the expense of such work or improvement chargeable upon a district, which the said city council shall, in its resolution of intention, declare to be the district benefited by said work or improvement, and to be assessed to pay the costs and expenses thereof." St. 1905, p. 63, c. 67, § 1. Appellant insists that, inasmuch as the "total estimated cost" of the work exceeds one-half the assessed value of the land fronting upon the proposed improvement, the word "may" should be given mandatory force, and interpreted as "must" or "shall." While the courts have never hesitated to construe "may" as "must" or "shall" when the context and the policy of the law demanded that interpretation, the legislative intention must plainly appear before such judicial correction will be made. Where, for example, a legislative body is given by law apparently discretionary power to levy a tax for a special purpose and the same body is required to incur the indebtedness to be paid by such tax, the apparent discretion is withdrawn, and the word "may" is construed as "must" or "shall." *Galena v. Amy*, 72 U. S. 705, 18 L. Ed. 560; *Village of Kent v. U. S. ex rel. Dana*, 113 Fed. 232, 51 C. C. A. 189; *State v. Board of Commissioners of Buffalo County*, 6 Neb. 454; *People v. Board of Supervisors of Otsego County*, 51 N. Y. 401; *People v. Board of Commissioners of Rio Grande County*, 7 Colo. App. 229, 42 Pac. 1032.

Examining the statute before us, we find no special reason for the construction which appellant desires. Upon its face, the act gives an authority which the trustees may or may not exercise. It may be that the "front-foot" plan is the only one whereby a just distribution of the burdens incident to the work of improvement may be accomplished. It may well be that in the present instance no land would be benefited save that fronting on Macdonald avenue. If such be the fact, surely the Legislature never intended that the trustees should adopt such plan of assessment as would involve the declaration that a certain district would be benefited by the work, when as a matter of truth no benefit whatever would result to a part of the district. Surely it was never contemplated by the Legislature that the trustees should stultify themselves for the purpose of providing a district plan of assessment. On the

contrary, we must conclude that the Legislature intended by this enactment to confer a wide discretionary power, and that the word "may" as here used aptly contributed its part to the accomplishment of this design. This conclusion is strengthened when we consider the Vrooman act historically. As originally drawn, that act imposed a duty upon the trustees in case the estimated cost of improvement exceeded one-half the assessed value of the property fronting on the street to be improved. They were required to order payment of a portion of the expense from the city treasury. Sections 23 and 26 of the act contained the following provisions: "Whenever the estimated or actual cost of any work contemplated or ordered to be done by the city council, and chargeable under the provisions of this act against any lot or lots of land, or the owner thereof, shall exceed one-half of the assessed value of such lot or lots as borne upon the last assessment roll whereon it was assessed, made for the levying of taxes for municipal purposes the amount of the cost of said work, exceeding said one-half of the assessed value of said lot or lots, shall be paid out of the city treasury, unless the owner of such lot or lots shall, in writing, signed by himself or his authorized agent, consent that the whole expense of said improvement may be made a charge against said lot or lots." Page 149. "And whenever the city council shall order to be done any of the work mentioned in section 2 of this act, it shall be deemed to exercise its discretion mentioned in this section, and to include an order for the payment out of its treasury for the excess of any assessment for said work otherwise chargeable upon any lot, or portion of a lot, over and above one-half of the valuation of said lot, or portion of a lot, in its last preceding assessment for municipal taxation." Page 162. These provisions clearly indicate the policy of the Legislature with reference to street improvements of an unusually extensive character. They were not permitted to exist very long, however, in their mandatory form. In 1889 they were amended in such a manner as to confer discretionary power upon city councils. St. 1889, pp. 159, 160, c. 151. By section 2 it was enacted that "the city council may make the expense of such work or improvement chargeable upon a district," etc.; while in section 13 the council was given the privilege, "in its discretion," of making the cost and expense of the work a charge against the municipal treasury. St. 1889, p. 170. By this act a change in legislative policy with reference to this kind of street work is clearly shown. The amendments of 1891 (St. 1891, p. 198 et seq., c. 147) are similar to those of 1889 in this respect, and there has been no material change wrought by the amendments adopted since that time. Mr. Finlayson, in his work on Street Laws

of California, after discussing the act of 1885, as interpreted in *Kreling v. Muller*, 86 Cal. 465, 25 Pac. 10, and as amended by the acts of 1889 and 1891 (St. 1891, p. 196, c. 147), writes (at page 34): "It seems, therefore, that under the act as it now reads the council may adopt the district assessment plan in those cases where, under the front-foot plan, more than half of the assessed value of the lot will have to be taken to pay the expenses of the improvement, or it seems it may follow the front-foot plan even to the extent of taking all the lots fronting upon the proposed improvement." This conclusion we deem logical and correct.

We are convinced, therefore, that there is nothing in the act itself requiring us to give commanding significance to the word "may," and that this view is emphatically supported by the history of the section in which that word is used.

The judgment of the superior court is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

155 Cal. 476

NOLAN v. NOLAN et al. (S. F. 4,891, 4,892.)
 (Supreme Court of California. April 14, 1909.
 Rehearing Denied by Supreme Court
 May 13, 1909.)

1. VENDOR AND PURCHASER (§ 266*)—VENDOR'S LIEN—TERMINATION—ASSIGNMENT.

The transfer of a note, given for the purchase price of land secured by a vendor's lien for collection only, did not waive the seller's lien, under Civ. Code, § 3047, declaring that an absolute transfer of the written contract of sale by the seller waives his lien to the extent of the sum payable under the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 687; Dec. Dig. § 266.*]

2. VENDOR AND PURCHASER (§ 261*)—VENDOR'S LIEN NOTE—ASSIGNMENT—EVIDENCE.

Evidence *held* to warrant a finding that a transfer of a vendor's lien note was conditional for collection only, and not absolute.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 691, 692; Dec. Dig. § 261.*]

3. EVIDENCE (§ 471*)—OPINION—OWNERSHIP OF NOTE.

In an action on a note, the questions asked plaintiff whether the note sued on was his property, and questions asked an alleged assignee for collection whether she ever owned it, were not objectionable as calling for the opinion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149, 2150; Dec. Dig. § 471;* Witnesses, Cent. Dig. § 833.]

4. EVIDENCE (§ 461*)—WRITTEN CONTRACT—CONTRADICTION—INDORSEMENT.

Where plaintiff claimed that an assignment of a note to his daughter was for collection only, a question asked plaintiff as to whether, when he signed the indorsement, he intended

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to part with the ownership of the note to his daughter was not objectionable as contradicting the legal effect of the indorsement by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2132; Dec. Dig. § 461.*]

5. HOMESTEAD (§ 108*) — ENFORCEMENT OF MORTGAGE—EXHAUSTION OF OTHER SECURITIES.

A debtor who has mortgaged an existing homestead will be heard, on the marshaling of securities, to insist that recourse shall last be had to the homestead property, and that the lienholder whose security affects the homestead with other land shall resort, first, to the other lands, even though by so doing the security of other creditors on the same land is impaired or destroyed.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 167; Dec. Dig. § 108.*]

6. HOMESTEAD (§ 108*) — ENFORCEMENT OF LIENS—EXHAUSTION OF OTHER SECURITIES.

Plaintiff conveyed the N. lands to defendant, his son, taking in payment the son's unsecured note for the price. The son thereafter purchased the K. lands, and mortgaged both tracts to M. Thereafter the son's wife recorded her declaration of homestead on the K. land, when plaintiff sued and obtained a decree enforcing a vendor's lien subsequent to the mortgage on the N. land. *Held*, that defendants, because of such subsequent homestead declaration, were not entitled to a decree requiring the mortgagee to first exhaust the N. land before attempting to collect the mortgage from the homestead tract, but that plaintiff was entitled to require that the K. land be first sold to satisfy the mortgage to the benefit of the security of his vendor's lien.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 167; Dec. Dig. § 108.*]

Department 2. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by James M. Nolan against Arthur M. Nolan and others. From a judgment for plaintiff, sustaining a vendor's lien on certain land, defendants Arthur M. Nolan and wife appeal, and from an order requiring Cathrin Morgan, a prior mortgagee, to first sell a tract on which plaintiff had claimed a lien, he appeals. Affirmed on defendants' appeal, and reversed on plaintiff's appeal.

J. C. Ruddock and Arthur J. Thatcher, for appellant. Thomas, Pemberton & Thomas and Mannon & Mannon, for respondents.

HENSHAW, J. In 1891 plaintiff was the owner of a parcel of land in Mendocino county, which, for brevity, may be called the "Nolan Place." In that year he sold this land to his son Arthur M. Nolan, defendant, taking in payment the son's unsecured promissory note for the purchase price, payable 15 years after date, and bearing interest at the rate of 2½ per cent. per annum. The defendant Arthur also purchased an adjoining tract of land, the "Kennedy Place." Thereafter he married. In 1901, subsequent to his marriage, he executed a mortgage to defendant Cathrin Morgan to secure the payment of a promissory note for \$5,000. This mortgage covered both the Nolan place and

the Kennedy place. On January 11, 1906, the defendant Maud Nolan, wife of Arthur, recorded her declaration of homestead on the Kennedy place. On January 22, 1906, the plaintiff commenced this action to recover the amount due on his promissory note, and to have adjudged to him a vendor's lien on the Nolan place to secure its payment, and to have his lien foreclosed. Cathrin Morgan pleaded by answer and cross-complaint, setting up her mortgage, and her ignorance of any claim of lien upon the part of plaintiff. The court decreed to Cathrin Morgan a mortgage lien upon both the Kennedy place and the Nolan place paramount to the vendor's lien, which it found to exist in favor of the plaintiff upon the latter. Cathrin Morgan's judgment was for \$5,663.50 and costs. Plaintiff was decreed a vendor's lien upon the Nolan place, subordinate to the Morgan mortgage, for \$4,269.20 and costs. The court, however, further adjudged and decreed, against the protest of the plaintiff, that Cathrin Morgan do not resort to the Kennedy place (upon which had been declared the homestead) unless under sale the Nolan place should prove insufficient to satisfy her judgment, and that plaintiff, under his vendor's lien, should have only the surplus, if any remaining, after the sale of the Nolan place and the satisfaction of the Morgan judgment. Plaintiff appeals from that portion of the judgment so directing the order of the sale of the properties, and this appeal is numbered 4,892. Defendants Nolan had tendered issue upon the ownership in plaintiff of the promissory note, contending that he had parted with it by assignment absolute, and so had lost his vendor's lien. From the findings of the court against them upon this issue they appeal, and their appeal is numbered 4,891. Upon both of these appeals Cathrin Morgan stands indifferent.

S. F. 4,891. It is not disputed that under the sale by plaintiff to his son, the former acquired a vendor's lien (Civ. Code, § 3046), but it is said that the evidence establishes the loss of this lien by an absolute transfer of the promissory note (Civ. Code, § 3047). It is insisted that the finding of the court to the contrary is not supported by the evidence, and, further, that the court erred in its rulings in admitting and rejecting evidence upon the question. The finding of the court was that plaintiff had never made any absolute transfer of the note. The evidence shows that, after holding the note for some years, there was placed upon it the words "Assigned to Ann O'Neil. James M. Nolan." It shows, also, that Ann O'Neil, who was the daughter of plaintiff and sister of defendant Arthur Nolan, wrote several letters to her brother, notifying him that she held the note, would demand payment of it when

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

due, and would entertain propositions looking to an adjustment and cancellation of it before that time. But it is testified to, both by the father and the daughter, that this indorsement was not designed to effect an absolute transfer; that an absolute transfer was never made; that plaintiff never parted with the ownership; that Ann O'Neil never in fact owned the note; that she assumed ownership only for the purpose of compelling her brother to pay her father, who was about 90 years of age. Plaintiff, in testifying that he never parted with the ownership, explains the indorsement by saying that he proposed to make a journey, and that he entertained the idea that these words would be necessary as an authorization to his daughter to collect the note for him in his absence. This evidence was sufficient to support the finding that there was no absolute transfer, and a conditional assignment for collection, or other like purpose, would not destroy the vendor's lien in the event that he was subsequently compelled to resume full ownership of the note. *Bancroft v. Cosby*, 74 Cal. 583, 16 Pac. 504.

It is further insisted by appellants that the court erred to their injury in overruling their objections to certain questions propounded to plaintiff and to his daughter, Mrs. O'Neil, as follows: "Q. (asked of plaintiff). Is this note not your own property? A. It is. Q. (asked of Mrs. O'Neil). Did you ever own it [the note]? A. I never did. Q. Do you know who owns it? A. My father does. Q. (asked of plaintiff). Now, when you signed this [the indorsement], did you intend to part with the ownership to your daughter?" It is argued against the first three questions that they were improper in calling for the opinion or conclusion of the witness, and not for the facts. Of the last it is said that it was improper, as permitting parol evidence to contradict the legal effect of a writing. Upon the first proposition the industry of counsel has collated numerous cases where appellate courts have discussed the impropriety of permitting the opinion of witnesses to be substituted for facts in cases not calling for expert evidence. A review of these cases would not be profitable. Each one depends upon its own particular circumstances. Of course, there is no general rule of evidence which permits a witness to substitute opinions for facts. Such a rule would lead to the utter confusion and confounding of the administration of justice. The true rule is simple, and, so far as this state is concerned, well established: To permit, or to refuse to permit, such questions is a matter resting largely in the discretion of the trial court, which discretion will not here be reviewed, unless it is made plain that the court's ruling in admitting the evidence has worked an injury. Generally speaking, the admission of the answer to such a question cannot work

an injury where a fair latitude upon cross-examination is allowed; for under such cross-examination the facts are certain to be adduced.

It will be found frequently that an appellate tribunal upholds the rulings of the trial court in sustaining an objection to such questions, but the cases are far less numerous where it has felt compelled to reverse the inferior tribunal for permitting them. Thus in *Kreuzberger v. Wingfield*, 96 Cal. 251, 31 Pac. 109, this court had under review the ruling of the trial court in permitting answers of a witness to the following questions: "Q. And your work is in every way according to the contract that you agreed to do with Von Herlich? Q. What is the character of the work on the Eighth street side as regards the contract? Is it in accordance with the contract?" This court, holding that the trial court did not err in overruling the objections to the questions, quoted with approval from *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108: "While it would not have been a legal error to have sustained the objection, I am of the opinion, under the circumstances of this case, that it was not a legal error to overrule it. The object of all examinations in judicial tribunals is to elicit truth, and there are many cases where the form of questions and the manner of examination must be left to the discretion of the trial judge. No injustice could have been done, because the answer would not be likely to prevail against facts which might be drawn out on cross-examination, or proved by other witnesses, inconsistent with it." See, also, *Alexander v. Central L. & M. Co.*, 104 Cal. 532, 38 Pac. 410; *Tate v. Fratt*, 112 Cal. 613, 44 Pac. 1061; *Bunting v. Salz (Cal.)* 22 Pac. 1132; *Hardison v. Davis*, 131 Cal. 635, 63 Pac. 1005. *Kaltschmidt v. Weber*, 145 Cal. 596, 79 Pac. 272, is instructive upon this question. There the following question was propounded: "Who has had the management and control of your wife's earnings during the past 15 years?" An objection to the question was sustained. It was argued on appeal that only "the facts" were permissible in evidence, and that this called for a mere conclusion of the witness. It was held, after discussion, that even if it did call for a conclusion, it was not such a conclusion as rendered the question obnoxious under objection. It was rather the declaration of an ultimate fact within the knowledge of the witness.

The question as to the intent of the plaintiff in placing the indorsement upon the note was proper and permissible. In principle it is like the rule permitting the introduction of parol evidence to show the true consideration of a written instrument. It did not vary the terms of the writing, for those terms did not express an absolute transfer. It was merely evidence that the transfer was made conditionally, and that the plaintiff retained

the beneficial ownership of the contract. If such evidence were not admissible, then it must follow that, whenever an assignment is made for purposes of collection, the assignor's lips are sealed, and the assignee, who under such circumstances is but a trustee, could never be held accountable for the trust property. The appeal of defendants Arthur M. Nolan and Maud Nolan, his wife, from certain portions of the judgment, and from the order of the court denying their motion for a new trial, is denied.

S. F. 4,892. The question presented upon this appeal is one of more complexity, and, in the jurisprudence of this state, a new one. It may be thus stated: Where A. has a lien upon two parcels of land, and B. has a lien on but one of those parcels, may the common debtor, by virtue of the equity of an after-declared homestead upon one of these parcels, compel the creditor, A., in marshaling securities, first to exhaust the security upon the land to which B. alone can resort, where the inevitable result will be the impairment, if not the destruction, of B.'s security? In stating the question we have spoken of the declaration of homestead as having been made by the common debtor, after the attachment of the creditors' liens. In this instance the homestead was declared by the wife, but this circumstance is immaterial. It was a declaration, made upon the separate property of her husband, after the liens had attached, and can have no higher place in equitable regard than if it had been placed upon the property by the debtor himself.

The doctrine of the marshaling of assets and securities is of equitable creation, and in its early application was considered solely with regard to the respective rights of the creditors. The debtor was given no hearing, and allowed no voice in the matter. 1 Story's Jurisprudence, § 640 et seq. It was to many courts a startling and reprehensible extension of the doctrine, when it was first announced, that the creditors' rights could be interfered with by an equity arising in favor of the husband or wife by virtue of a homestead. Of the states which announced this extension California was among the earliest, if not the first. In *Bartholomew v. Hook*, 23 Cal. 277 (decided in 1863), a judgment had been recovered against the husband, and it had become a lien on his land. Subsequently the wife filed a declaration of homestead upon the land, and it was by this court decided that, though the creditor could have recourse to the homesteaded property if necessary for the recovery of his debt, yet the wife had, by her declaration of homestead, acquired such an interest in the land as to justify her in maintaining an action against the sheriff to compel him first to resort to the other property of the debtor husband before proceeding against the homestead. Following this came the case of *McLaughlin v. Hart*, 46 Cal. 639 (decided in 1873), which

held that where A. and his wife had given to B. a mortgage upon a tract of land, upon 50 acres of which there was a declaration of homestead, and subsequently A. had given mortgages upon the same land, excepting the 50 acres affected by the homestead, to C. and D., upon foreclosure proceedings the junior mortgagees could not compel B. to resort first to a sale of the homestead, to the end that their security might not be impaired; but, to the contrary, A. and his wife, by the equity of their homestead, could compel B. first to resort to and exhaust the lands not affected by it, even though the result of such procedure would be the destruction of the security of C. and D. The justice of this determination was soon recognized and declared in *McCreery v. Schaffer*, 26 Neb. 173, 41 N. W. 996; *Colby v. Crocker*, 17 Kan. 527; *Brown v. Cozard*, 68 Ill. 178; *McArthur v. Martin*, 23 Minn. 74; *Mitchelson v. Smith*, 28 Neb. 583, 44 N. W. 871, 26 Am. St. Rep. 357; *White v. Fulghum*, 87 Tenn. 281, 10 S. W. 501; *Equitable Life Ins. Co. v. Gleason*, 62 Iowa, 277, 17 N. W. 524; *Flowers v. Miller* (Ky.) 16 S. W. 705; *Wilson v. Patton*, 87 N. C. 318. Yet it is interesting in this connection to note that the propriety of this extension of the doctrine of the marshaling of assets and securities did not appeal to all of the courts with equal force. Thus in 1876 we find the eminent Chief Justice Gray of the Supreme Court of Massachusetts deciding that the creditors' action in enforcing collection of his debts could not be controlled by the tenant who had acquired a homestead right before the mortgage deed, and who urged that the estate was sufficient to satisfy the mortgage without having recourse to the homestead. He says: "The power of a court of chancery to compel a mortgagee to resort, in the first instance, to one of several estates mortgaged, is exercised only for protection of equities of different creditors and incumbrances or of sureties, and not for the benefit of the mortgagor. As against him, the mortgagee has the right to enforce the contract between them according to its terms, and is not obliged to elect between different remedies or securities"—citing Story's Equity Jurisprudence. The decisions of this state, and of other states which have followed them, are then sweepingly, if not satisfactorily, disposed of by the learned Chief Justice in the following language: "The cases in some of the western states, cited by the learned counsel for the tenant, so far as they countenance any equity in the owner of a right of homestead as against a party in whose favor he has waived or released it, are supported by no reasons." *Searle v. Chapman*, 121 Mass. 19. The Supreme Court of Wisconsin met the same question in *White v. Polleys*, 20 Wis. 530, 91 Am. Dec. 432 (1866), and held that, where a mortgage covers the homestead, and also other property which is subject to the lien of

a subsequent judgment, the debtor has no right to have the latter exhausted to satisfy the mortgage, in order to preserve the homestead. *White v. Polleys* quotes from an earlier decision of that court in *Jones v. Dow*, 18 Wis. 241, to the following effect: "Until the Legislature shall have declared the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this." Following which forcible declaration, the Legislature did so declare. Laws Wis. 1870, p. 198, c. 133, § 1.

Still, notwithstanding some contrariety of opinion, it may be said that, by the great weight of authority, the debtor who has mortgaged an existing homestead will be heard, upon a marshaling of securities, to insist that recourse shall last be had to the homestead property; that a lienholder, whose security affects the homestead with other land, will at the instance of the debtor be compelled to resort first to the other lands, even though by so doing the security of still other creditors upon these other lands is impaired or destroyed. Mr. Freeman considers the question in the following language: "The more reasonable view is that the equities of the homestead claimants to retain their home are at least equal to that of their creditors to have it sold, and therefore that chancery will not aid the latter by compelling the judgment creditor to first resort to the homestead. Perhaps a more difficult question is: May one who has a lien on the homestead and other property be compelled by the homestead claimants to first resort to the latter? On the one side, it is insisted that the right to compel a marshaling of assets never existed in favor of judgment debtors, but only in behalf of persons claiming under them, and that the creation of the lien by the homestead claimants was, in effect, an agreement on their part that the lienholder might at his discretion sell any of the property which was subject to such lien, and that such agreement precludes such claimants from exercising any control over such discretion. But homestead laws should be liberally construed, and no intention should be presumed, nor should any interpretation be indulged, which is at variance with the natural and obvious purpose of the parties. The claimants, in the absence of any expression of a contrary intent, should be presumed to intend no further peril to their homestead than necessity demands, while he who receives a mortgage from them should be regarded as obtaining a mere security for his debt, and not the right to employ that security in such a mode as to needlessly imperil the homestead." 2 Freeman, Executions, 440. This right of the homestead claimants, as we have seen, is one which they may exercise even to the detriment of junior incumbrances of the other lands. This is so, upon the principle that

they have taken their junior incumbrances with knowledge of the existing equities which the homestead carries, amongst which is the important one to direct the senior mortgagee to have recourse first to lands other than the homestead. That the weight of authority supports this view, in accordance with the early enunciation of this court in *McLaughlin v. Hart*, supra, may be seen by an examination of the authorities collated in 26 Cyc. 933; 19 Am. & Eng. Ency. (2d Ed.) 1269; 34 Cent. Dig. cols. 357-359, § 3.

So far as we have proceeded, the question offers no feature of especial difficulty. But the judgment here under consideration leaves the solid ground of the decision in *McLaughlin v. Hart*, and enters an entirely new territory. *McLaughlin v. Hart*, and all other cases which have heretofore been cited, deal with the equities as they arise in favor of or against a junior incumbrancer who has taken his lien with knowledge of an existing homestead. Here we are asked to hold that the debtor, by declaring a homestead after the liens have attached, may as he elects to declare the homestead upon one or the other parcel, protect or defeat a creditor's just claim. Thus in the case at bar *Nolan*, by declaring a homestead upon the *Kennedy* place, and thus forcing a sale of the *Nolan* place to satisfy the demands of the senior mortgagee, leaves the plaintiff stripped of his security and remediless, whereas, if he had declared his homestead upon the *Nolan* place, the *Kennedy* place would first have been sold to satisfy the demand of Mrs. Morgan, and this plaintiff in turn would have had the right to subject the *Nolan* place to sale to satisfy his vendor's lien. The whole doctrine of the marshaling of assets for the protection of the common debtor, as well as of the creditors, is, as we have said, of equitable origin and growth. It will be extended so far as may be necessary to protect the rights of all. But an extension of it will be withheld when the manifest result is to promote a subsequent equity into a position of superiority over a prior equity, to the injury of the holder of the earlier. The rule, like all equitable rules, will not be enlarged, or, if enlarged, will not be enforced, to the displacement of a countervailing equity, or where, for any special facts, it would be inequitable to enforce it. *Miller v. McCarty*, 47 Minn. 321, 50 N. W. 235, 28 Am. St. Rep. 375. And that such would be the result, if the contention of respondent was to prevail, can admit of no doubt.

This precise question was presented in *Abbott v. Powell*, 6 Sawy. 91, Fed. Cas. No. 13, and was learnedly considered by Hoffmann, J. *Bartholomew v. Hook*, supra, and *McLaughlin v. Hart*, supra, were cited in support of the contention. The learned judge declared: "But neither of these cases contains the slightest intimation that, where a person has made a mortgage on two pieces of prop-

erty, and afterwards makes a second mortgage on one of them, the equitable right of the junior mortgagee to compel the first mortgagee to resort in the first instance to the property on which he has an exclusive claim can be taken away or impaired by a [subsequent] declaration of homestead, by either husband or wife, on the property exclusively mortgaged to the first mortgagee. I have been referred to no case which hints at so inequitable a rule. The junior mortgagee, when accepting the security of a second mortgage, had a right to repose upon the protection afforded him by the familiar rule of equity, and to act upon the assurance that the first incumbrancer would be compelled to resort to the property on which he had an exclusive claim, before coming on the property covered by the second mortgage, and that no act of the mortgagor could deprive him of the right to compel him to do so. * * * I can conceive no reason, of justice or policy, why this right, which confessedly existed as between the first and second mortgagees, and which grew out of the contracts of the mortgagor himself, should be destroyed or impaired by the filing, by the latter or his wife, of a declaration of homestead." To the same effect is *Savings Bank v. Harbin*, 18 S. C. 425. Excepting where express legislative declaration gives superiority to the homestead under such circumstances, no case has been called to our attention where a court has done so, saving the one case of *Marr v. Lewis*, 31 Ark. 203, 25 Am. Rep. 553. The judgment in that case was precisely that in the case at bar, and it was held that the junior mortgagee was not entitled to a marshaling of securities so as to compel the senior mortgagee first to resort to the after-declared homestead. But no reason is assigned, the court contenting itself with the declaration that "a court of equity will never displace or impair one equity for the purpose of asserting or upholding another," forgetting that this is essentially what a court of equity is always called upon to do (*Salter v. Barker*, 54 Cal. 140), and what that court itself did, though we think erroneously, when it displaced the equity of the junior mortgage to give preference to the equity of the after-declared homestead. The practical result of upholding such a doctrine in this case merits brief consideration. A father sells to his son his home place, upon terms of great indulgence—a note running for 15 years, with interest at the low rate of 2½ per cent. He holds a vendor's lien upon the land, which, by reason of this same indulgence, is subordinated to the claims of a subsequent mortgagee. During the 15 years the son has occupied and enjoyed the land. When the time for the payment of the note is about due, the note and accumulations of interest remaining unpaid, he causes a homestead to be declared upon an adjoining tract, which is also covered by the mortgage, for

the very obvious purpose, not of protecting his father in his vendor's lien, but of defrauding him out of the security of that lien. This bare statement should be enough to dispel the notion that such an after-declared homestead carries with it an equity superior to such a vendor's lien. It follows herefrom that the plaintiff is entitled to a marshaling of securities, and to a decree declaring that the Kennedy place shall first be sold in satisfaction of the Morgan mortgage, before resort shall be had to the land in which he has the security of his vendor's lien.

Upon the appeal of James Nolan it is ordered that such part of the judgment be reversed, and a judgment be entered in conformity with the foregoing.

We concur: MELVIN, J.; LORIGAN, J.

9 Cal. App. 312

PEOPLE v. MILES. (Cr. 155.)

(Court of Appeal, First District, California.
Nov. 10, 1908. Rehearing Denied
Jan. 7, 1909.)

1. RAPE (§ 22*)—INDICTMENT—NEGATIVE MARRIAGE OF PARTIES—"RAVISH."

Pen. Code, § 261, defines rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator where she resists but her resistance is overcome by force or violence." *Held*, that an indictment for rape under such section, failing to charge that prosecutrix was not defendant's wife was fatally defective, nor was the omission cured by the allegation that defendant "violently did 'ravish' and carnally know" prosecutrix, as those words only described the manner by which the intercourse was accomplished.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. § 26; Dec. Dig. § 22.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 5919-5925; vol. 8, p. 7778; vol. 7, p. 5933.]

2. INDICTMENT AND INFORMATION (§ 15*)—INVALIDITY—RECOMMITMENT.

Where an information is fatally defective, but the offense attempted to be charged is not barred by limitations, the court is authorized, by Pen. Code, §§ 1187, 1188, to recommit accused, or admit to bail anew, to answer a new indictment or information.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 86; Dec. Dig. § 15.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Fred Miles was convicted of rape, and he appeals. Reversed.

Frank L. Rawson and Burton J. Wyman, for appellant. Attorney General Webb, for the People.

COOPER, P. J. Defendant prosecutes this appeal from a judgment convicting him of the crime of rape, and the order denying his motion for a new trial.

It is claimed that the court erred in denying his motion in arrest of judgment, for the reason that the information fails to

charge the defendant with the crime of rape as defined by the Penal Code with reference to this case, to wit, "an act of sexual intercourse accomplished with a female not the wife of the perpetrator * * * where she resists but her resistance is overcome by force or violence." Pen. Code, § 261. The information accuses the defendant of rape committed as follows: "The said Fred Miles, prior to the time of filing this information, and on the 26th day of June, A. D. 1907, at the said county of Alameda, state of California, did then and there, in and upon one Carrie E. Welte, a female, violently and feloniously make an assault, and her, the said Carrie E. Welte, then and there feloniously did ravish and carnally know, against her will and by force." There is no allegation or statement that the female was not the wife of the defendant. Such allegation is necessary, because it is a part of the definition of the crime. The law does not presume any material fact not stated in the information, as all presumptions are in favor of innocence. If the matters and things set forth in the information may be true under certain circumstances, and the defendant under such circumstances and conditions not guilty of any crime, then the information is not sufficient. *People v. Terrill*, 127 Cal. 99, 59 Pac. 836; *People v. Schmitz*, 153 Cal. xviii, 94 Pac. 419, 15 L. R. A. (N. S.) 717. It would not for a moment be contended that in order to convict the defendant it was unnecessary to prove that the female was not his wife. The prosecution recognized the rule, and did make such proof. It is elementary that an essential matter that it is necessary to prove in a criminal case must be alleged. The pleading is the allegation, in proper form, of the material facts constituting the case for the prosecution. It has always been held in this state that, where a crime is defined in the Penal Code, it is necessary to charge the commission of the crime in the language of the Code, or in language substantially the same. It is a rule that has been so often repeated, and is so easily followed, that there is no excuse for departing from it. We can only repeat that in cases where district attorneys disregard this fundamental rule it is our duty to hold the information insufficient. It is much more important that our rulings should be certain and uniform than that some particular case may be affirmed.

The Penal Code states that rape is an act of sexual intercourse "accomplished with a female not the wife of the perpetrator." The information in this case states that the defendant did ravish and carnally know Carrie E. Welte. Conceding that to carnally know means the same as sexual intercourse (*People v. Carroll*, 1 Cal. App. 2, 81 Pac. 680), it is simply alleged that the defendant had sexual intercourse with Carrie E. Welte. It is true that it is alleged that the defendant

"feloniously did ravish and carnally know"; but such words only describe the manner by which the intercourse was accomplished, and do not in any way aid in determining that the female was not the defendant's wife. It was long ago said by eminent authority that, if exceptions are "in the enacting clause, it will be necessary to negative them in order that the description of the crime may in all respects correspond with the statute." 2 Hale's P. C. 170; *Rex v. Jarvis*, 1 Bur. 148. It is said in Bishop's New Criminal Procedure, § 631, that if a criminal statute contains exceptions, "those which are affirmative elements in the offense must be negated in averment."

The precise question here has been passed upon by the Supreme Court of Texas, in several cases, in accord with the views we have expressed. In *Rice v. State*, 37 Tex. Cr. R. 36, 38 S. W. 801, the information failed to state that the prosecutrix was not the wife of the defendant, and it was held that it did not state a public offense. The court, after discussing the rule and the reasons therefor, said: "Applying this rule to the construction of this statute, it will be seen that the words 'other than the wife of the person' occur in the body of the enacting clause. The offense cannot be read without reading this. It does not occur in any proviso or distinct substantive clause, but is a part of the act itself; and, under the rules heretofore laid down, the indictment should negative the fact that the alleged injured female was the wife of the defendant." See further *Bice v. State*, 37 Tex. Cr. R. 38, 38 S. W. 803; *Edwards v. State*, 37 Tex. Cr. R. 242, 38 S. W. 996, 39 S. W. 368; *Dudley v. State*, 37 Tex. Cr. R. 543, 40 S. W. 269.

In a recent case the Supreme Court of Oklahoma have held the same rule in a learned and exhaustive opinion. *Young v. Territory*, 8 Okl. 525, 58 Pac. 724. It is there said: "It is contended that the indictment should contain the averment that the prosecutrix was not the wife of the accused. In order to an intelligent discussion and determination of this question we should go back and examine some of the well-settled and general rules of criminal pleading. At common law 'rape was the carnal knowledge of a woman by a man forcibly and against her will,' and many of the states still adhere to this definition. In this definition there is nothing said as to whether the woman is the wife of the person charged. Also at common law a husband might be guilty of rape on his wife by assisting, aiding, or procuring another to commit the act. *Com. v. Fogerty*, 8 Gray (Mass.) 489, 69 Am. Dec. 264. Hence, under the old definition of the crime of rape, and under old forms of pleading, the fact of whether or not the prosecutrix was the wife of the accused did not necessarily enter into the case. But it will be observed that our statute has introduced the new ele-

ment into the definition of the crime of rape, and such element constitutes one of the essential elements of the offense. The definition of rape as contained in our statute cannot be read and eliminate the clause 'not the wife of the perpetrator.' This new element introduced into the crime is not a matter of excuse for the defendant, to be pleaded and proved by him, but is a necessary and essential element of the crime itself, which must be established by the prosecution in order to make the crime complete; and, if material to prove, then it is required to be charged." The same ruling was adhered to in *Parker v. Territory*, 9 Okl. 109, 59 Pac. 9.

It was said by the Supreme Court of the United States, in *U. S. v. Cook*, 17 Wall. 169, 21 L. Ed. 538: "Offenses created by statute at common law must be accurately and clearly described in an indictment; and, if they cannot be in any case without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient that does not accurately and clearly allege all the ingredients of which the offense is composed. With rare exceptions offenses consist of more than one ingredient, and in some cases of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error."

The question does not appear to have been before our Supreme Court, except in the case of *People v. Miller*, 145 Cal. xviii, 78 Pac. 227, and it was there held that the information in that case did allege that the female was not the wife of the defendant.

Our attention is called to one case, and only one, where a contrary ruling was held under a statute similar to ours, and that is *State v. Williams*, 9 Mont. 179, 23 Pac. 335. It will be seen, however, by an examination of that case that the reasoning of the court and the authorities cited support the rule as we have stated it; but the court seems to have been influenced by the cases decided under the common-law rule and the case of *People v. Estrada*, 53 Cal. 600. In *People v. Estrada* the defendant was not charged in the information with the crime of rape, but with an assault with an intent to commit rape, under an entirely different section of the Code. Pen. Code, § 220. That section reads: "Every person who assaults another with intent to commit rape. * * * Nothing is said as to the party not being the wife of the defendant; and the Legislature intended the definition of rape to be learned by a reference to the statute defining the

crime. It was held, in effect, that the information charged the offense in the language of the statute, and that was sufficient. It was wholly unnecessary to charge that the assault was made with the intent to commit rape, and then to state the elements and circumstances necessary to constitute the crime of rape as defined in another section of the Code; and this is in accord with a principle well settled in this state. Thus, in *People v. Henry*, 77 Cal. 445, 19 Pac. 830, where the defendant was charged with burglary in entering the store of the San Diego & Coronado Water Company, it was held that it was not necessary to state that the company was a corporation or copartnership. So in an indictment for burglary, charging the defendant with entering a building with intent to commit larceny, it is not necessary to state who was the owner of the property, or the other elements of larceny as defined in the Penal Code in a different section. *People v. Shaber*, 32 Cal. 36. And where the allegation in an indictment for burglary charged the entry to be with an intent to commit rape, it was held not to be necessary to allege the circumstances specified in the statute defining rape. *People v. Burns*, 63 Cal. 614. The latter case is the same in principle as *People v. Estrada*. It is thus plainly to be seen that the *Estrada* Case is not in point as to an information charging the crime of rape. The Supreme Court of Montana does not seem to have fully comprehended its meaning. See, also, *People v. Girr*, 53 Cal. 629.

As the offense attempted to be charged is not barred by the statute of limitations, the court may, if there is reason to believe the defendant guilty, order him to be recommitted to the officer of the proper county, or admitted to bail anew, to answer a new indictment or information. Pen. Code, §§ 1187, 1188.

As the case may be tried again, we have not passed upon the sufficiency of the evidence to sustain the verdict. The evidence upon a new trial may be strengthened in the respects where it is claimed to be weak. In case of a new trial the district attorney, as an officer of the law, should be careful to satisfy himself, and the trial judge should be satisfied, that the crime was actually committed, and that the defendant is the party who committed it. The sentence of 35 years' imprisonment in this case is a serious matter, and should not be inflicted unless the evidence shows beyond a reasonable doubt that the defendant is guilty. However, these are matters for the district attorney and the trial judge; and we apprehend that such proceedings will be had that defendant will not be convicted unless he is clearly proven guilty.

The judgment and orders are reversed. The court below may allow a new informa-

tion or indictment, as provided by section 1188 of the Penal Code, if deemed advisable.

We concur: HALL, J.; KERRIGAN, J.

10 Cal. App. 12

PEOPLE v. EVERETT. (Cr. 81.)

(Court of Appeal, Third District, California.
Feb. 4, 1909.)

1. RAPE (§ 34*)—ASSAULT WITH INTENT TO RAPE—INFORMATION.

Under Pen. Code, § 261, defining rape as an act of sexual intercourse accomplished with a female not the wife of the perpetrator, etc., an information for an assault with intent to rape, failing to charge that prosecutrix was not defendant's wife, was fatally defective, nor was the omission cured by the allegation that defendant committed the assault with intent to feloniously ravish and carnally know, which only described the manner in which the intercourse was sought to be accomplished.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 34.*]

2. RAPE (§ 34*)—ASSAULT WITH INTENT TO RAPE—INFORMATION.

It is unnecessary that an information for assault with intent to rape should charge that the assault was made with the intent to rape, and then state the circumstances necessary to constitute rape.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 34.*]

3. RAPE (§ 59*)—TRIAL—MISLEADING INSTRUCTION.

Where, in a prosecution for an assault with intent to rape, prosecutrix testified that defendant took hold of her violently, but nowhere stated that he made any indecent proposal to her, or used any lascivious language, or was guilty of any lewd conduct, but his threats rather indicated a design to kill her, an instruction that there are certain presumptions of law, which are that guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another; that a person is innocent of crime; that an unlawful act is done with an unlawful intent; and that a person intends the ordinary consequences of his voluntary act—was objectionable as misleading.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 59.*]

4. CRIMINAL LAW (§ 419*)—EVIDENCE—HEARSAY.

In a prosecution for an assault with intent to rape, a question asked a witness as to whether K., in a conversation with witness, did not say that prosecutrix was not nervous or excited, and knew what she was talking about, that witness had a brave daughter, and that she was lucky to get off as she did, was objectionable as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. § 419.*]

5. WITNESSES (§ 331½*)—IMPEACHMENT—COMPETENCY OF IMPEACHING TESTIMONY.

Where, in a prosecution for an assault with intent to rape, K. testified to a conversation with prosecutrix's mother in which she had declared she did not know positively it was defendant, but thought it was defendant, a question asked the mother whether she did not have a conversation with K., in which he stated that prosecutrix was not nervous or excited, knew what she was talking about, was a very brave daughter, and lucky to get off as she did, which

the mother answered in the affirmative, was not admissible to impeach K.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 331½.*]

Appeal from Superior Court, Calaveras County; A. I. McSorley, Judge.

Luther Everett was convicted of an assault with intent to rape, and he appeals. Reversed.

See, also, 97 Pac. 175.

Solinsky & Wehe, John Hancock, and Snyder & Snyder, for appellant. U. S. Webb, Atty. Gen., for the People.

BURNETT, J. The information, upon which a verdict was rendered of "guilty as charged," is as follows: "L. Everett is accused by the district attorney of the said county by this information of the crime of assault with intent to commit rape, a felony, committed as follows: The said L. Everett, on or about the 24th day of July, 1907, at the said county of Calaveras, and before the filing of this information, did then and there willfully, unlawfully, feloniously, violently, and forcibly make an assault upon one Edna Leavitt, a female, with the intent then and there feloniously and by force and violence to carnally know said Edna Leavitt and accomplish with her an act of sexual intercourse, against her will and without her consent, contrary to," etc. A motion in arrest of judgment was made, the appellant claiming that the information fails to state an offense of which the superior court has jurisdiction. The specific objection to the information is that there is no allegation that the female upon whom the assault was made is not the wife of the defendant. It is claimed that this is a material part, an essential ingredient, of the crime of rape, and since the district attorney, instead of using the term "rape" in the charging part of the information, has attempted to define it, and has omitted a vital element prescribed by the Code, it must be taken as a case where there is a failure to allege sufficient facts to show an offense triable in the superior court. In other words the contention is that, in consequence of said failure to cover all the material facts constituting the crime of rape, the information is the same as though charging simply an assault—an offense admittedly not within the original jurisdiction of the superior court.

The position of appellant must be sustained. The question quite recently has been under consideration by the Court of Appeal of the First District, in the case of *People v. Miles* (Cal.) 101 Pac. 525, of which the Supreme Court denied a rehearing, and it is therein said, through the learned presiding justice: "The law does not presume any material fact not stated in the information, as all presumptions are in favor of innocence.

If the matters and things set forth in the information may be true under certain circumstances, and the defendant under such circumstances and conditions not guilty of any crime, then the information is not sufficient. It would not for a moment be contended that in order to convict the defendant it was unnecessary to prove that the female was not his wife. It is elementary that an essential matter that it is necessary to prove in a criminal case must be alleged. It has always been held in this state that, where a crime is defined in the Penal Code, it is necessary to charge the commission of the crime in the language of the Code, or in language substantially the same. * * *

The Penal Code, § 261, states that rape is an act of sexual intercourse 'accomplished with a female not the wife of the perpetrator'—and it is declared that this qualification is an essential part of the description of the crime, and that it must appear in the information; or else it is fatally defective. It is also held—in opposition to the contention of the Attorney General here—that the words "feloniously did ravish and carnally know" only describe the manner by which the intercourse was accomplished, and do not in any way aid in determining that the female was not the defendant's wife." In *People v. Gonzales*, 6 Cal. App. 255, 91 Pac. 1013, it is also held that the people must prove that the prosecutrix is not the wife of defendant, and the case was reversed for insufficiency of the evidence in that particular.

People v. Estrada, 53 Cal. 600, is cited as holding to the contrary, but, as pointed out in the *Miles Case*, supra, the defendant in the *Estrada Case* was charged in the language of section 220 of the Penal Code, and it was properly held that this was sufficient. "It was wholly unnecessary to charge that the assault was made with the intent to commit rape, and then to state the elements and circumstances necessary to constitute the crime of rape as defined in another section of the Code." It bears analogy to the crime of burglary. It has always been held sufficient to allege that the defendant entered the building with intent to commit larceny, without setting out the elements constituting the larceny. The question involves an elementary and important principle of criminal pleading and practice, and the error cannot be ignored without doing violence to the constitutional and statutory rights of the defendant.

Among the instructions given by the court were: "There are certain presumptions of law regarding a person's intent by which you should be governed. These are that a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another; that a person is innocent of crime or error; that an unlawful act was done with an unlawful intent; that a person intends the ordinary consequences of his voluntary

act." It is admitted that the foregoing instructions are correct as abstract propositions of law, but it is insisted that they were misleading, in that they might be understood as justifying the inference of intent to commit rape from the commission of the assault. The probability of this construction is emphasized by the positive testimony of the prosecutrix that the defendant took hold of her violently, but she nowhere states that he made any indecent proposals, used any lascivious language, or was guilty of any lewd conduct. In fact, his threats would indicate that his design was to kill her. It may be that the purpose of the defendant was to ravish the prosecutrix, but it certainly should not be conclusively presumed from the deliberate commission of the assault. These instructions are quite proper in the ordinary offense involving a single element, but are liable to be misconstrued in a charge of one offense with intent to commit an entirely different one. It is not necessary to decide whether this was prejudicially erroneous, in view of other instructions that were given; but, in the event of another trial, the danger suggested should be obviated by appropriate qualification of the instructions as to presumption, or else they should be omitted altogether.

Mrs. Leavitt, a witness for the defendant, was interrogated as follows: "Now, Mrs. Leavitt, did J. E. King, in that conversation with yourself, * * * say: 'She [referring to Edna Leavitt] is not nervous or excited, and certainly knows what she is talking about. You have a very brave daughter, and she was lucky to get off as she did?'" An objection to the question was overruled, and the witness answered in the affirmative. We think the objection should have been sustained, as the question called for hearsay testimony. It is contended that it was proper impeachment of the witness King, who had testified as to a conversation he had with the said Edna Leavitt, in which he declared she said: "I don't know positively it was Mr. Everett. I think it was Mr. Everett." This declaration to Mrs. Leavitt does not purport to give any conversation with the daughter, and is not contradictory to King's testimony, but is merely the expression of an opinion which may have been exceedingly prejudicial to appellant.

Appellant earnestly asserts that the evidence is utterly insufficient to justify the conviction. Among other things it is insisted that, "assuming that the story of the prosecutrix is true, it does seem incredible that, if defendant had intended the crime of rape, under all the circumstances he had not done some act which would have evidenced that design." It is indeed a strange case, and the evidence is not very persuasive of defendant's guilt of the offense charged. Still, if he made the assault as testified to by the prosecutrix, it is hard to conceive what other motive he could have had in view, and, con-

sidering all the circumstances, we are not prepared to say that the verdict entirely lacks support.

The judgment and order are reversed. The court below may allow a new information or indictment, as provided by section 1188 of the Penal Code, if deemed advisable.

CHIPMAN, P. J. I concur.

HART, J. I concur in the judgment. I assent to that portion of the opinion in which the information is held to be fatally defective because it omits to state that the prosecutrix is not the wife of the accused, upon the sole ground that the appellate courts of this state have so construed section 261 of the Penal Code as to require such allegation in order to properly state the crime therein defined, and that such construction seems now to be the settled rule in California.

I am of the opinion, however, that the instruction in which the jury were told that "a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another" is prejudicially erroneous. Under the information here it was competent for the jury to return a verdict of simple assault; and, while I agree that there may be evidence sufficient to support the verdict, it is equally true that, under the evidence, the jury would have been clearly justified in returning a verdict of simple assault. The vice of the instruction is that the jury were instructed, in effect, that the mere assault was sufficient to justify the indulgence by them of a conclusive presumption that the accused was guilty of the crime of an assault with intent to commit rape. It is manifest that, under such instruction, the jury could have concluded, even if they in fact did not do so, that, notwithstanding the fact that the evidence was not of sufficient probative strength to persuade a conviction that the specific crime charged was committed, they were nevertheless required to conclusively presume it to have been committed from the fact of the commission of the assault under the circumstances disclosed by the record. These circumstances are sufficiently referred to in the opinion of Justice BURNETT to show that such an instruction could have had none other than a highly prejudicial effect.

10 Cal. App. 162

In re MCPHEE'S ESTATE.

MCPHEE v. CORRIGAN. (Civ. 561.)
(Court of Appeal, Third District, California.
March 1, 1909.)

1. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS—CORRECTNESS OF LOWER COURT'S ACTION.

On appeal, every intendment will be indulged in support of orders of the lower court requiring an administrator to furnish additional

security, and revoking his letters for failure to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

2. EXECUTORS AND ADMINISTRATORS (§ 26*)—BONDS—DISCRETION OF COURT.

Though Code Civ. Proc. § 1388, expressly requires that an administrator's bond shall be at least twice the value of the personal property, and twice the value of the annual rents and profits of real estate, the court has a discretion which the statute does not control further than to prescribe the minimum limit; and, the bond being given conditioned on the administrator's faithful discharge of duty, the court must determine to what extent security is necessary to give assurance of such performance of duty.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 152; Dec. Dig. § 26.*]

3. EXECUTORS AND ADMINISTRATORS (§ 26*)—BONDS—ADDITIONAL SECURITY—POWER OF COURT.

Where the court settled the account of an administrator, finding a sum due the estate which was not adequately secured by the administrator's bond, it could require an additional bond to be given, though an appeal was pending from the order settling the account, and could revoke the letters upon refusal to comply with the order.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 26.*]

4. EXECUTORS AND ADMINISTRATORS (§ 26*)—BONDS—ADDITIONAL SECURITY—POWER OF COURT.

Code Civ. Proc. §§ 1397-1400, relating to the requiring of additional security from an administrator, do not depend upon any other proceedings, and devolve the duty to require such security upon the court, whose decision can only be reviewed by certiorari; no appeal being given.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 26.*]

5. EXECUTORS AND ADMINISTRATORS (§ 32*)—REVOCATION OF LETTERS—MISMANAGEMENT OF ESTATE.

Under Code Civ. Proc. § 1626, providing that, when an exhibit is rendered by an administrator, any interested person may appear, and by objection in writing contest any account therein contained, and that the court may examine the administrator, and if he has been guilty of neglect, or has embezzled or mismanaged the estate, his letters must be revoked, the court may revoke the letters, where it appears, on the filing of the administrator's account, that he has been guilty of such misconduct.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 198; Dec. Dig. § 32.*]

6. EXECUTORS AND ADMINISTRATORS (§ 26*)—REVIEW—DISCRETION OF COURT—REQUIRING ADDITIONAL BOND FROM ADMINISTRATOR.

The discretion of the court in requiring an administrator to give an additional bond for the security of the estate should not be disturbed on appeal, except for its abuse.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 26.*]

Appeal from Superior Court, Mendocino County; Emmet Seawell, Judge.

Proceedings for settlement of the estate of George S. McPhee. Petition by Alta McPhee to require J. S. Corrigan, administrator, to furnish additional security. There was an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

order revoking the administrator's letters for failure to file an additional bond, and he appeals. Affirmed.

Weldon & Held and Myrick & Deering, for appellant. Chas. E. Wilson and J. W. Preston, for respondent.

CHIPMAN, P. J. Appellant was administrator of said estate, having been appointed as such, June 9, 1899. He had neglected to file his annual account, and on August 21, 1906, he was cited to render an account of his administration. On September 24, 1906, he filed an account, which being objected to by respondent, Alta McPhee, contestant and heir of deceased, was referred to a referee to take and state the account, and on May 27, 1907, he rendered his decision; and, exceptions having been taken thereto, the matter was submitted to the court for decision on September 27, 1907, and on January 8, 1908, the court settled said account, adjudging the sum of \$21,475.67 to be due from said administrator to said estate. On August 10, 1907, respondent filed her petition in said matter, setting forth the above facts up to and including the reference of said account, and stating that by his report the referee had found the administrator indebted to the estate in the sum of about \$25,000; that the administrator had given the Pacific Surety Company as his bondsman in the sum of \$22,500, and no more; that the said bond is insufficient, and "petitioner further alleges that said Pacific Surety Company denies its liability to a large extent upon the said bond, claiming that Matie McPhee, the widow of said George S. McPhee, deceased, released the said surety company in so far as she could do so from all liability upon the said bond; that the bond of said administrator is therefore an unsatisfactory, insufficient, and doubtful one; that J. S. Corrigan, the said administrator, is wholly insolvent, and unable to respond to any damages to this petitioner, or to any of the persons interested in said estate to any amount whatever; * * * that for the reasons above set forth the said bond of the said administrator is insufficient." Wherefore petitioner prayed that citation issue, a hearing be had, and that said administrator be required to file such additional bond as the court may direct.

This petition was heard with the petition for an accounting; and, on the same day that the court made its order settling the account, to wit, January 8, 1908, it made a further order "pursuant to a petition therefor by Alta McPhee, and for the reason appearing in said petition and in the order settling the said account as aforesaid, to wit, that the sum of \$21,475.67 was then due from said administrator to said estate," and reciting also that, "in addition thereto the annual rental value of the real property on hand belonging to said estate is at least \$300, and that the present bonds of said administrator are insufficient,"

and decreed that the administrator file an additional bond of \$21,000 "within 10 days after notice of the entry of the order and decree requiring the same, and that if not so filed that the letters of administration of the said J. S. Corrigan upon the said estate be revoked." On February 6, 1908, said administrator having failed and neglected, after due notice of said order, to file any further bond, the court filed an order revoking his letters, and removing him as such administrator, and purporting to be "pursuant to sections 1399 and 1400 of the Code of Civil Procedure." On April 3, 1908, said administrator served and filed his notice of appeal to the Supreme Court from said order revoking his said letters, and filed his appeal bond in the sum of \$300, as provided by section 941, Code Civ. Proc. "No stay of proceedings in the matter of the appeal from the order settling the final account of J. S. Corrigan was ever asked or granted, and the security required by law was not limited or dispensed with as provided by section 946 of the Code of Civil Procedure, at all." It appears from the bill of exceptions that the administrator proceeded under sections 953, 953a, 953b, 953c, Code Civ. Proc. (as added by St. 1907, p. 750, c. 408), to perfect his appeal from the order and decree settling his said account, and from the order and decree requiring security, and the transcript contains a notice enumerating the papers, documents, records, and testimony taken before the referee, and other matters specifically designated. This appeal is now pending before the Supreme Court.

Appellant's contention is that "the order settling his account—which was appealed from—could not, before the 60 days, be made the basis of an order revoking the administrator's letters"; that the order revoking appellant's letters was prematurely made, inasmuch as the order of January 8, 1908, had not become final; that he was not in default, and could not so be held until the order of January 8th had become conclusive evidence of the amount due the estate; that under section 1049 of the Code of Civil Procedure, the action or proceeding "is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for an appeal has passed, unless the judgment is sooner satisfied." Appellant relies upon *Cook v. Ceas*, 143 Cal. 221, 77 Pac. 65, where an action was commenced on a guardian's bond before the expiration of 60 days allowed by law to take an appeal from an order settling the guardian's account. The court held that the action would not lie, either against the guardian or the sureties, until the time for appeal had run, and the order had become final. Respondent's contention is that the petition for further security, though heard at the same time and with the account, was a separate and independent proceeding, and had no connection with the proceedings in regard to the account; that

the petition did not rest alone upon the fact that the referee had reported a large balance due the estate from the administrator, but was based upon other considerations as well, namely, that the surety company had denied its liability upon the bond; that the administrator was insolvent, and that he still had income-producing real property in his hands belonging to the estate. It is conceded that no appeal lies from the order requiring further security, but it is claimed that this order may be reviewed in the appeal from the order revoking his letters, which is an appealable order, and that, as the order settling the account is still pending, there is no basis for the order of revocation.

The evidence taken at the hearing of the referee's report, or by him, upon the petition for an accounting, is not before us, nor is the evidence taken on the petition for further security. That these petitions were heard together, and an order made in respect to both on the same day, does not necessarily imply that they are inseparable, and that the order for further security is necessarily dependent upon the order settling the account. Evidence may have been taken on one petition which had no bearing upon the other, and yet both be heard together, as matter of convenience. Every intendment is to be indulged in support of the order revoking appellant's letters, and this rule applies to the order requiring further security as well. The issue presented was the sufficiency of existing bonds, and this would not depend alone upon the amount of the administrator's indebtedness to the estate; there may be other considerations. The statute requires that his bond shall not be less than "twice the value of the personal property and twice the value of the annual rents, profits and issues of real property." Section 1388, Code Civ. Proc. But the court has a discretion in this matter which the statute does not control further than to impose a duty to fix the bond at not less than a certain amount. The bond is given conditioned on the faithful discharge of duty, and the court must determine to what extent security is necessary to give assurance of such performance of duty. Furthermore, we think the court has the right and the power to fix the bond upon the amount it finds to be in the hands of the administrator, even though an appeal be pending from its judgment as to the justness of that judgment. There is no other way to protect the estate pending the appeal; there being no bond beyond sufficient to cover costs of the appeal. Suppose appellant's bond previously given had turned out to be worthless as security, or had been given for a much less sum than required by the statute, and when the account was settled the court had discovered that there was insufficient or no security at all, would the appeal from the order settling the account take from the court the power to

require security to be given pending the appeal? We do not think the law is so lame and impotent as to lead to such conclusion.

The provisions of the statute relating to the giving of bonds (sections 1397 to 1400, Code Civ. Proc.) seem not to depend upon any other proceedings, and devolve the duty upon the court, and its discretion cannot be disturbed by appeal, for no appeal is given from its order, and can only be reviewed by certiorari. *Barrett v. Superior Court*, 111 Cal. 154, 43 Pac. 519; *Id.*, 47 Pac. 592, 115 Cal. xvii; *Dahlgren v. Superior Court* (Cal. App.) 97 Pac. 681. The court may upon its own motion make inquiry into the sufficiency of the bond. Section 1402. And the court may revoke the letters of an administrator when upon filing his account it shall appear that "he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate." Code Civ. Proc., § 1626. In the case of *Cook v. Ceas*, supra, the action was against the sureties of the bond. Clearly, no liability accrued until there was a final judgment fixing the liability of the principal. Their liability was dependent upon his. But the question here is not one of liability; it is one of security to the estate, and can in no wise affect anybody's, not even the administrator's, ultimate liability. The court is called upon to exercise a wise and salutary discretion for the protection of the estate, and we do not think such discretion should be disturbed except for its abuse.

Appellant having refused to obey the order of the court to furnish additional security, the only course open to the court was to revoke his letters. This latter order, we think, the court had the power to make, and as no sufficient cause is shown for setting it aside, it is therefore affirmed.

We concur: HART, J.; BURNETT, J.

10 Cal. App. 154
MAGEE v. SUPERIOR COURT OF SOLANO COUNTY. (Civ. 534.)

(Court of Appeal, Third District, California.
March 1, 1909.)

1. APPEAL AND ERROR (§ 82*)—DECISIONS REVIEWABLE—ORDERS MADE AFTER JUDGMENT—"SPECIAL ORDER AFTER FINAL JUDGMENT."

Certain persons obtained a judgment in the superior court against petitioner in a partnership accounting, and on August 5th a final judgment was rendered in partition proceedings confirming the sale of the property involved therein, and directing that petitioner herein and others be paid a certain sum, but the referee, without any order of court, delivered the money to the clerk of court, who gave it to the county treasurer. On August 18th G. had execution issued under the judgment in the partition proceeding which was levied upon petitioner's interest in the money deposited with the county treasurer, and his interest therein was sold to G. for the value of the money, but the treasurer refused to deliver the money to him without an order of court, whereupon G. filed a petition in the su-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

perior court praying an order directing the treasurer to pay over the money, and, on the hearing, an order was issued directing the treasurer to pay over the money as required; the order being made without notice to petitioner. Held that, since the order concerned and affected the judgment against petitioner, it was appealable as a special order after final judgment within Code Civ. Proc. § 939, subd. 3, and it was immaterial whether the execution should have issued on the judgment in the accounting action or in the suit for partition, or that G. and the county treasurer were strangers to both actions, or that the two actions were entirely unrelated.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 82.*]

For other definitions, see Words and Phrases, vol. 7, p. 6585.]

2. CERTIORARI (§ 5*) — RIGHT TO WRIT — APPEALABLE ORDER.

Under Code Civ. Proc. § 1063, authorizing a writ of review where an inferior tribunal exceeds its jurisdiction and there is no appeal, etc., the writ will not lie to review an appealable order.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

3. APPEAL AND ERROR (§ 82*)—DECISIONS REVIEWABLE—ORDER AFTER JUDGMENT.

Any special order made after final judgment which affects such judgment, though not dependent upon it, is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 381, 478, 517-522; Dec. Dig. § 82.*]

Appeal from Superior Court, Solano County; L. G. Harrier, Judge.

Petition for a writ of review by James Magee, Jr., against the Superior Court of Solano County. Demurrer to petition sustained, and order to show cause discharged.

Theo. A. Bell, for petitioner. T. T. C. Gregory, for respondent.

HART, J. This is a petition for a writ of review, the object of which is to annul and vacate a certain order made by the respondent; the claim being and the petition declaring that the respondent acted in excess of its jurisdiction in making said order, that there is no appeal therefrom, and that there is no other plain, speedy, and adequate remedy.

The facts alleged in the petition are as follows: On the 27th day of April, 1908, Ellen Magee, Catherine Magee, and James Magee, Sr., as plaintiffs, in an action for a partnership accounting, obtained a judgment against James Magee, Jr., as defendant therein, for the sum of \$4,877.82, together with costs amounting to \$12.15. On the 11th day of May, 1908, and before notice of said judgment had been served upon or given the defendant, James Magee, Jr., the latter served and filed in said action "a notice of motion for a new trial, and at the same time served upon plaintiffs a proposed statement on said motion, and said motion and said statement are now pending in said court." On the 19th day of September, 1908, "the defendant served upon the plaintiffs in said action a notice of appeal from said judg-

ment and the whole thereof" and on the 21st day of September, 1908, filed with the clerk of said court said notice of appeal. On the 19th day of September, 1908, after the service of the notice of appeal, the defendant filed an undertaking on appeal in the sum of \$300 and a further undertaking in the sum of \$10,000 to stay all proceedings in said action. The petition proceeds to state that on August 5, 1908, in an action for the partition and sale of certain real property situated in the city of Vallejo, and in which the parties thereto had common interests, said action having been instituted by Catherine Magee and Ellen Magee Murphy (née Ellen Magee) against James Magee, Jr., "a final judgment was duly made and entered therein approving the proceedings of the referees theretofore appointed in said action and confirming the sale of the real property involved therein, and directing said referees, after the payment of the costs, expenses, commissions, and attorney's fees incurred and disbursed in said action, to divide the balance of the proceeds then remaining in their hands amounting to \$9,750, and forthwith deliver the same to the respective parties entitled thereto, in the following proportions: To Catherine Magee one-fourth thereof, or \$2,437.50; to Ellen Magee Murphy one-fourth thereof, or \$2,437.50; and to James Magee, Jr., one-half thereof, or \$4,875.00."

It further appears from the petition that the referees, after the notice of the entry of said judgment and the directions therein contained as to the disposition of the moneys in their hands, and "without any further order or direction of court or any authority so to do, delivered said sum of \$9,750 to G. G. Halliday, clerk of the superior court of Solano county, and, without any order or direction of the court, the said G. G. Halliday delivered said moneys to George Weniger, county treasurer of Solano county, and said Weniger continued to retain said sum in his possession until the order of the court herein complained of."

On the 28th day of August, 1908, one T. T. C. Gregory filed a verified petition in the superior court, asking that "this court make its order and decree directing said treasurer (Weniger) to pay to petitioner said amount of \$4,875," etc. This petition, after reciting the history of the action as already herein given, proceeds: "That thereafter, and upon the 18th day of August, 1908, an execution in the above-entitled action was duly issued out of the superior court above named, and was thereafter duly levied upon all of the right, title, and interest of said defendant in and to the moneys so deposited in the hands of said treasurer; that thereafter and upon the 26th day of August, 1908, after due proceedings had, the interest of said defendant in and to said moneys and credits was sold to petitioner for the sum of \$4,875, he

being the highest and best bidder therefor, and the sheriff of Solano county thereafter executed and delivered to petitioner a certificate of such sale; that a copy of such certificate has been duly served upon said treasurer and demand made for the delivery to petitioner of the amount of said credit." It is further shown by said petition "that said treasurer has refused, and still continues to refuse, to deliver to petitioner said moneys without an order of court first had and obtained directing him thereto"; that on the 28th day of August, 1908, the sheriff "duly filed his return upon said execution and sale." The respondent, upon said petition, made an order directing said treasurer to appear before it on the 31st day of August, 1908, at 10 o'clock a. m., to show cause, "If any he has, why such order should not be made as prayed for in said petition."

The matter of the petition of said Gregory having been continued for hearing to the 21st day of September, 1908, the respondent on that day, finding the facts as stated in the petition to be true, made and caused to be entered an order directing said treasurer to pay to the petitioner, said T. T. C. Gregory, out of the moneys so deposited with said treasurer and arising out of the sale of the real property involved in said action for partition, the sum of \$4,875. It is alleged in the petition here for the issuance of a writ of review that said order directing the treasurer of Solano county to pay said sum of \$4,875 to said T. T. C. Gregory was made without notice to the petitioner here (James Magee, Jr., defendant in said partition suit) "and neither he nor his attorney was present at the time said order was made and entered."

It is the claim of petitioner, as must be apparent from the nature of this proceeding, that the order made by the respondent directing the county treasurer to pay to said Gregory the sum of \$4,875 out of the moneys deposited with that official by the county clerk was in excess of the jurisdiction of the court. I think the contention of the petitioner here is sound, and must be sustained. I do not base my conclusion upon the fact alleged in the petition that an appeal was taken from the judgment in the action for an accounting, for it further appears from the petition that said appeal was not taken nor the stay bond filed until after the levy upon the money under the writ of execution. But I found my conclusion upon the ground that I know of no authority of law for such a proceeding as the one leading to the making of the order to which objection is here made.

It is claimed by the respondent that the proceeding was one supplementary to execution. I have examined all the provisions of the Code of Civil Procedure relating to and authorizing proceedings supplementary to the execution (section 714 to section 721, inclusive), and I have been unable to find a single line or sen-

tence therein either expressly authorizing any such proceeding as the one complained of, or which, by any sort of reasonable analogy, could be construed as authorizing any such proceeding.

There can be no doubt that it was the duty of the sheriff upon making the levy to have taken actual possession of the money; it being the identical money deposited with the treasurer for safe-keeping, and not delivered to him in his official capacity, and the same not being in custodia legis. It was, of course, equally the duty of the treasurer to have turned the money over to the sheriff upon the levy thereupon being made. But, the treasurer having refused to deliver the money to the sheriff, it was the duty of the latter to return the execution unsatisfied or hold it up without making return thereon until the judgment creditor could have taken such steps, in the nature of supplementary proceedings, as might be necessary to bring the treasurer before the court and answer concerning such money or other property as he might have in his possession belonging to the judgment debtor. Section 717, Code Civ. Proc. But the sheriff, in the place of taking either of the courses suggested, proceeded upon the theory that the money in the custody of the treasurer was to be treated as any other kind of personal property capable of manual delivery, gave notice of the sale of the same under the execution, and on the day fixed for the sale sold it to Gregory, to whom he issued a certificate of sale. The sum for which the money was sold equalled in amount the money so sold, and the sheriff, having been paid the full amount by the purchaser, returned the execution as satisfied. I am of the opinion that, when the execution was returned satisfied, the court lost further jurisdiction of and over the action, and that, therefore, any order it might have made to protect the purchaser or to secure to him the possession of the money was coram non iudice. If this proposition be unsound, then it may pertinently be inquired: When does a court's jurisdiction of an action cease to exist? May it continue indefinitely or be revived after the judgment, the object of the action, has been satisfied, upon the motion of some third party, who, perchance, has not been given possession by the sheriff of property sold to satisfy the judgment, and thus open up the litigation therein of questions which in no manner or degree can affect the judgment?

The sale of money is an anomalous proceeding, and I confess that I have never before heard of such a proposition. But such was undoubtedly the proceeding here; for, as seen, the money levied upon was the identical money growing out of the sale of the property under the decree in the partition suit. It was neither a debt nor a credit within the meaning of section 542, subd. 5, Code Civ. Proc. If, therefore, the sheriff has failed to deliver to the purchaser the property

sold, then, it seems to me, the purchaser must look to the sheriff for the delivery to him of such property. There appears to me to be no distinction between the proposition here and where the property sold is in the form of ordinary personal property capable of manual delivery. If, for illustration, the sheriff had sold to Gregory under the writ live stock or wheat or barley or goods of any description, could the contention be sustained that the failure of the sheriff to deliver the property to the purchaser after the receipt of the money therefor and the return of the writ satisfied would amount to a sufficient reason upon which the court in the action out of which the writ issued could open up an inquiry of why the sheriff had not performed a duty incumbent upon him under the law? Could it be said that the duty of the sheriff to deliver the property to the purchaser could be litigated in an action which could not in any conceivable way concern the duty of that officer after he had fully executed his duty under the writ? I think the reply is obvious.

The authorities cited by the respondent do not sustain its contention. In fact, I do not consider them in point.

As I have said, there is no warrant in any statutory rules to which my attention has been directed for the proceeding resulting in the making of the order which this proceeding is instituted to annul. Nor do I find anything in the text-books authorizing such a proceeding. The proceeding is a nondescript, having authority neither in express terms nor by analogy to any other authorized proceeding of which I have any knowledge for its institution and prosecution, and could only be sustained upon "general principles," having, indeed, in such case, a remote application.

But I think the order complained of is appealable as a "special order made after final judgment" (section 939, subd. 3, Code Civ. Proc.), and for this reason the writ prayed for must be denied. Section 1068 of the Code of Civil Procedure provides: "A writ of review may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." "From this provision it is made manifest that three concurring requisites are essential to the issuance of the writ of review, viz.: (1) An excess of jurisdiction by the inferior tribunal, etc., exercising judicial functions. (2) That there is no appeal. (3) That there is no other plain, speedy, and adequate remedy." *Noble v. Superior Court*, 109 Cal. 526, 42 Pac. 155. But it is argued by the petitioner that the execution under which the sale of the money involved here was had was issued upon the judgment in the partition suit between which and the action for an accounting, in

which the judgment was rendered and entered against the defendant for the amount found to be due the plaintiffs, there is absolutely no relation; that, in other words, the partition suit is wholly unconnected with the suit for an accounting, and that the party in whose favor the order complained of was made and the treasurer to whom it was addressed are third parties not connected with or interested in either action, and, therefore, the order was one altogether dehors the suit in which judgment was rendered and entered against the defendant. Hence it is insisted said order is not appealable as "a special order made after final judgment" in said action. The position, as thus stated, is not, in my opinion, tenable. It seems to be now the settled rule in this state that any special order made after final judgment affecting such judgment, although not dependent upon it, is an appealable order. *Calderwood v. Peyser*, 42 Cal. 111. In the case just cited, in overruling the prior adjudications of the court upon the question under review—notably the doctrine as laid down in *Quivey v. Gambert*, 32 Cal. 304, in which it was held that an order striking a statement on motion for a new trial from the files was not appealable—the Supreme Court says: "Upon considering the case of *Quivey v. Gambert*, this court arrived at the conclusion that the court below had erred in striking the statement from the files; but, on the authority of *Leffingwell v. Griffin*, 29 Cal. 192, and *Ketchum v. Crippen*, 31 Cal. 365, etc., and because the erroneous order striking out the statement was not entered in the ordinary line of proceedings had on motion for a new trial, it held that it had no jurisdiction to correct this demonstrated error, because it could not entertain an appeal for that purpose. This court, however, in dismissing the appeal for the supposed want of jurisdiction, advised the court below to set aside its order striking out the statement, and to allow the motion for a new trial to proceed. This advice the court below was of course at entire liberty to disregard; and, if it had chosen to do so, the consequence would have been that *Gambert* would as the result of an erroneous order entered in the court below have been deprived of the benefit of his motion for a new trial, and placed beyond the power of this court to relieve him from the consequences of that error." Whether the execution should have been issued on the judgment in the action for an accounting or upon that in the suit for partition is immaterial. Nor does it affect the proposition under discussion that Gregory and Weniger were strangers to both actions, or that the proceedings culminating in the order complained of did not depend upon or follow the judgment in the same line of proceeding. The important fact remains that the order to which objection is here made concerned and affected the judgment against the defendant. If such an order is not one

made after final judgment from which an appeal will lie, then it is not difficult to conceive how a trial court could in cases of which this court has appellate jurisdiction make many different kinds of erroneous orders of the most oppressive and ruinous character from which the law would afford absolutely no relief.

The demurrer to the petition is sustained, and the order to show cause discharged.

We concur on the ground that the order discussed in the opinion is appealable: CHIPMAN, P. J.; BURNETT, J.

10 Cal. App. 203

BLANCHARD v. BLANCHARD. (Civ. 553.)
(Court of Appeal, Third District, California.
March 9, 1909.)

1. DIVORCE (§ 127*)—EVIDENCE—CORROBORATION.

Where the cruelty alleged consists of successive acts of ill treatment, it is sufficient corroboration if a considerable number of material facts are testified to by other witnesses or there is any evidence which strongly tends to strengthen the statements of plaintiff.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 407; Dec. Dig. § 127.*]

2. DIVORCE (§ 127*)—EVIDENCE—CORROBORATION.

Testimony that defendant exhibited towards plaintiff austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, sallies of passion, though not in themselves sufficient to justify a divorce, is a sufficient corroboration of plaintiff's testimony as to cruel treatments to justify such decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 407; Dec. Dig. § 127.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action for divorce by Lillie E. Blanchard against Martin Blanchard. From a judgment for plaintiff, defendant appeals. Affirmed.

Budd & Thompson, for appellant. Ashley & Neumiller, for respondent.

BURNETT, J. Plaintiff was granted a divorce on the ground of cruelty. Many specific acts are alleged in support of the general conclusion that for years defendant has pursued "a course of cruel treatment of plaintiff and has caused her grievous mental suffering." These allegations are denied by the answer, and the testimony of the parties is sharply conflicting. As stated by him, "the main point relied upon by appellant is that there is a total want of corroboration of plaintiff's testimony to justify the judgment and findings of the court."

In the determination of the question the following considerations are important: In the nature of the case no rule can be laid down as to the degree of corroboration required. The statute requires only some

corroborative evidence. *Evans v. Evans*, 41 Cal. 103; *Cooper v. Cooper*, 88 Cal. 45, 25 Pac. 1062; Civ. Code, § 130. Again, while the courts are bound by the terms of the statute in determining the sufficiency of the corroboration, it is proper to consider the purpose of the Legislature in exacting it. The purpose mainly was to prevent collusion. *Andrews v. Andrews*, 120 Cal. 186, 52 Pac. 298. And, where the cruelty consists of successive acts of ill treatment, it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the statements of the plaintiff. *Andrews v. Andrews*, supra. It is to be remembered, also, that, while incompatibility of temperament furnishes no ground for divorce in this state, it may properly be taken into consideration as explaining the course of conduct of defendant. And taken into consideration for that purpose it may afford a reasonable explanation not only of defendant's general course of conduct towards the plaintiff, as testified to by herself, but as a circumstance tending to corroborate and confirm the charges made by plaintiff as constituting his general course of conduct towards her, even as to those testified to by plaintiff alone. *Avery v. Avery*, 148 Cal. 244, 82 Pac. 967.

There is no pretense here of collusion. The defendant, indeed, stoutly resisted the effort of plaintiff to secure a divorce. He positively denied for the most part any acts of cruelty, although his answers in relation to some of the specific charges were somewhat evasive and equivocal. His anxiety to prevent a dissolution of the marital union is shown by his conduct at the trial and also by his successful efforts to secure the dismissal of two former actions for divorce brought by the plaintiff. For this opposition, of course, evil is not to be imputed to defendant, but it renders it less difficult to find sufficient corroboration to support the trial court's determination. Incompatibility of temperament is disclosed by the record also, and that mutual confidence and affection essential to conjugal happiness and the proper maintenance of the marriage state seem to have been entirely wanting. There is, however, no direct corroboration of plaintiff's testimony as to the specific acts of cruelty charged in the complaint.

To bring the case, though, within the principles hereinbefore announced, plaintiff relies largely upon the testimony of the witnesses Amelia Curry and Mrs. M. A. Fields, who testified to acts of defendant exhibiting what Lord Stowell, in *Evens v. Evens*, 4 Eng. Ecc. 310, characterizes as "austerity of temper, petulance of manners, rudeness of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

language, a want of civil attention and accommodation, sallies of passion," not of themselves sufficient to justify a divorce, but adding strength to the contention of plaintiff of a uniform course of ill treatment. Appellant urges that this is not in support of the specific acts alleged in the complaint, but we think it is brought within the rule announced in the quotation from *Briggs v. Briggs*, 20 Mich. 34: "The complainant, it appears, has not confined her evidence to the specific acts of cruelty charged in the bill, but has given testimony of other instances, none of them regarded by itself very serious in character, but all tending to show that the general conduct of the defendant was such as to render her life miserable. For this purpose, and to characterize and explain the particular acts charged in the bill, evidence of this description was competent and proper." It is true, as held by that court as well as others, that an act which standing alone might be regarded as a mere ebullition of passion or ill humor and insufficient to justify the interposition of the court when observed in the light of the general behavior of the party becomes indicative of a malignant intent to render the life of the object unendurable.

The appellant also challenges the findings as to certain particular acts as not within the issues made by the pleadings, but this circumstance becomes immaterial, as the other findings are sufficient to support the judgment.

We conclude, therefore, that, considering the acts, declarations, and testimony of the parties and the testimony of other witnesses, there is sufficient corroboration to justify the findings of the court below as to the material allegations of the complaint, and that, as a matter of law, we cannot say the judgment is unwarranted.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

7 Cal. Unrep. 363

LUCAS v. REA et al. (Civ. 568.)

(Court of Appeal, Third District, California.
March 9, 1909.)

1. MECHANICS' LIENS (§ 271*)—ENFORCEMENT OF MATERIALMAN'S LIEN—COMPLAINT—SUFFICIENCY.

A complaint in an action by a materialman against the owner for materials furnished for a building, which alleges that the materialman agreed with the owner to furnish the materials, and that the owner agreed to pay a specified sum therefor on the completion of the work, followed by appropriate averments for the foreclosure of a materialman's lien, states a good cause of action.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 494; Dec. Dig. § 271.*]

2. MECHANICS' LIENS (§ 271*)—ENFORCEMENT OF MATERIALMAN'S LIEN—COMPLAINT—SUFFICIENCY.

Under Code Civ. Proc. §§ 1183, 1184, providing that, where the contract between the owner and contractor is void because not in writing and not recorded, materials furnished by materialmen shall be deemed to have been furnished at the personal instance of the owner, and they shall have a lien for the value thereof, etc., a materialman furnishing materials to a contractor may aver a direct agreement with the owner if the contract between the owner and contractor is void.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 494; Dec. Dig. § 271.*]

3. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—PLEADING—UNCERTAINTY.

Where the suit by a materialman against the owner to establish and foreclose a lien for materials for the construction of a building was tried on the theory that the law made a contract between the materialman and the owner for the materials, the uncertainty in the complaint arising from the fact that it alleged that the contract was made with the owner, while the recital in the notice of lien showed that it was made with the contractor, did not justify a reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4075; Dec. Dig. § 1039.*]

4. MECHANICS' LIENS (§ 277*)—ENFORCEMENT—ISSUES AND PROOF.

One seeking to establish and foreclose a lien for materials furnished for the construction of a building must prove the contract substantially as set out in his notice of lien, where the terms thereof are controverted.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 554; Dec. Dig. § 277.*]

5. MECHANICS' LIENS (§ 277*)—COMPLAINT—PROOF—VARIANCE.

The variance between the complaint in an action to foreclose a materialman's lien which alleges a demand for \$780.70 and the proof showing a value of \$859.67 and a payment of \$60 is immaterial.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 553; Dec. Dig. § 277.*]

6. MECHANICS' LIENS (§ 277*)—COMPLAINT—NOTICE OF LIEN—VARIANCE.

The variance between the complaint in an action to foreclose a lien for materials which alleges a demand for \$780.70, and the notice of lien demanding a lien for \$19 more, is unimportant, in the absence of evidence of fraud.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 553; Dec. Dig. § 277.*]

7. MECHANICS' LIENS (§ 122*)—NOTICE OF LIEN—SUFFICIENCY.

A notice of a lien by a materialman for materials furnished in the construction of a building which alleged that the amount of the demand was \$799.97 over and above legal set-offs, that the name of the person by whom claimant was employed and to whom he furnished the material was the contractor, and that the contractor agreed to pay a specified sum on completion of the work showed an agreement to pay a definite sum for the materials.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 165, 167; Dec. Dig. § 122.*]

8. MECHANICS' LIENS (§ 281*)—COMPLAINT—EVIDENCE—SUFFICIENCY.

A complaint in an action to establish and foreclose a materialman's lien which averred, in reference to the notice of lien, "a copy of which is hereto attached marked 'Exhibit A,' and made a part of the complaint," that the

claimant had in his verified notice of lien stated that the recitals therein were true, and where the contract to pay a specified sum for the materials set forth in the notice of lien was denied, evidence of an agreement to pay the correct price was insufficient to justify a recovery.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 565; Dec. Dig. § 281.*]

9. APPEAL AND ERROR (§ 171*)—THEORY BELOW—CONSTRUCTION OF PLEADINGS—ISSUES.

Where a party believed that evidence admitted without objection was within the issues, and there was an attempt to deny the contract sued on, the existence of the contract must be treated after trial as in issue.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1053-1060; Dec. Dig. § 171.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by R. R. Lucas against S. L. Rea and another. From a judgment for plaintiff, defendants appeal. Reversed.

McNab & Hirsch, for appellants. J. W. Preston, for respondent.

BURNETT, J. The judgment in favor of plaintiff established and decreed the foreclosure of a lien for materials used in the construction of a residence belonging to defendant Rea, and which was mortgaged to the said Bank of Ukiah.

1. The complaint states facts sufficient to constitute a cause of action. The cases cited to the contrary by appellants are not in point. For instance, in *Nason v. John*, 1 Cal. App. 540, 82 Pac. 566, it is stated: "The action is by a materialman against the owner (appellant) for the value of material furnished the contractor for the painting of the house of appellant. There is in the complaint no attempt to allege that at the time of filing the notice of lien or of bringing the action there was anything owing from the owner to the contractor, nor is any attempt made in the complaint to allege any fact, such as a premature payment by the owner to the contractor, or the like, that under section 1184 of the Code of Civil Procedure might be claimed to give the materialman a lien against the property of the owner for the value of his material." It was rightly held in line with many authorities that the complaint failed to state a cause of action. Here, however, it does not appear from the complaint that the material was furnished to the contractor. On the contrary, the allegation is: "That on or about the 6th day of July, 1906, R. R. Lucas and T. A. Lucas, comprising the firm of Lucas Bros., entered into an agreement with the defendant S. L. Rea wherein and whereby the said R. R. Lucas and T. A. Lucas agreed to furnish, * * * and the defendant pursuant to said contract agreed to pay to the said Lucas Bros. for the said material so furnished as aforesaid the sum of \$780-

70 upon the completion of said building."

Thus it is seen that the complaint shows a contract directly between the materialman and the owner, and it presents an action in assumpsit with additional appropriate averments for the establishment and foreclosure of a materialman's lien. The material was actually furnished, however, to the contractor and under a contract with him, and not by virtue of any agreement between the Lucas Bros. and defendant Rea, the owner of the building. This appears from the evidence and also from the notice of lien, which recites: "That the name of the person by whom claimants were employed and to whom they furnished the material is A. S. Howell, the original contractor with S. L. Rea for the erection of said building, and said A. S. Howell agreed to pay said sum of seven hundred and ninety-nine and ⁹⁷/₁₀₀ dollars," etc. Wherefore appellants make the further contention that there is a variance between the proof and the allegations of the complaint, and that the complaint was rendered ambiguous and uncertain by reason of said notice of lien which was attached to and made a part of said complaint. The evidence, though, shows, further, that the contract between the owner and the contractor was and is void because, being for more than \$1,000, it was not recorded until after the work was begun, and the plans and specifications, which were made a part of the contract, were not recorded at all. Section 1183, Code Civ. Proc.; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111; *Burnett v. Glas* (Cal. App.) 99 Pac. 856. Therefore the materials furnished as aforesaid are deemed to have been furnished at the personal instance of the owner, and a lien can be maintained therefor. Section 1183, Code Civ. Proc. The result is that by operation of law the contract of the Lucas Bros. with the contractor is considered a contract with the owner, and the Supreme Court has held that it may be so alleged, although not in accordance with the actual transaction.

In *Yancy v. Morton*, supra, it is said: "The complaint in this case is upon a contract for the value of goods sold at the special instance and request of defendant (the owner). Sections 1183 and 1184 of the Code of Civil Procedure provide that when the contract between the parties, for any of the reasons therein enumerated, is void, materials shall be deemed to have been furnished at the special instance and request of the owner, and the building is subject to a lien for the same. In support of his complaint, plaintiff introduced the contract in evidence for the purpose of showing that it was void. The court found such to be the fact, and the evidence and findings were justified under the complaint. No substantial reason is suggested to us why the ne-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

cessity existed for plaintiff to set out the contract and then allege its invalidity. Such matters were matters of evidence, and the completeness of the pleading did not demand it." See, also, *Lumber Co. v. Gottschalk*, 81 Cal. 646, 22 Pac. 860; *Reed v. Norton*, 90 Cal. 598, 26 Pac. 707, 27 Pac. 426; *McClain v. Hutton*, 131 Cal. 135, 61 Pac. 273, 63 Pac. 622. In the *McClain* Case it is stated that "Mrs. Hutton [the owner] was properly named as the person by whom the claimant was employed, * * * and there is no objection to the use of this form of statement." It seems to be the better practice to allege the facts as they occur, and leave the court to draw the conclusion that the property is subject to the lien; but it is settled that, where the original contract is void, plaintiff may pursue that course or aver a direct agreement with the owner.

This is conceded by appellants in their closing brief, but it is insisted that the notice of lien renders the complaint subject to the special demurrer for uncertainty and ambiguity. An allegation that the contract was made with the owner is certainly inconsistent with a recital that it was made with the contractor; but, admitting that the special demurrer should have been sustained on that ground, it is clear that appellants have not been prejudiced by the error. At the beginning of the trial, an objection was made to the evidence on the ground of variance between it and the complaint and of the uncertainty growing out of the recitals of the notice of lien, but the objection was overruled; the court justifying its ruling "on the theory the law makes the contract between the plaintiff and Rea." The case was tried upon that theory. No doubt counsel for appellants upon the argument of the demurrer were informed of plaintiff's contention in that regard, and it would be inexcusable now to reverse the case and impose the additional cost of a new trial simply because of the said apparent uncertainty.

2. If controverted, the terms of the contract must be proved by the claimant substantially as set out in his notice of lien. Appellants complain of a variance, inasmuch as while the notice states that the amount due over and above all set-offs is \$799.97, and that Howell agreed to pay the same on completion and there was no other condition, the proof shows that the amount of the bill was not the sum stated either in the complaint or in the notice, and that there never was an agreed sum to be paid nor any agreement as to the time of payment. It is true that the complaint alleges a demand for \$780.70 and the proof shows a value of \$859.67 and a payment of \$60. We agree, however, with respondent, that there is no material difference between a statement of the amount due after deducting credits and the statement of the whole amount with the credits. *Star Mill & Lumber Co. v. Porter*, 4 Cal. App. 470, 88 Pac.

497. As there is no evidence of fraud, it is likewise unimportant that the complaint is for \$19 less than the amount called for in the notice. *Barber v. Reynolds*, 44 Cal. 519; *Malone v. Big Flat Gravel M. Co.*, 76 Cal. 578, 18 Pac. 772; *Harmon v. S. F.*, etc., R. Co., 86 Cal. 617, 25 Pac. 124.

The second point is more serious. Respondent answers that: "No agreed price is stated in the claim of lien at any place. 'The amount of claimant's demand is \$799.97 over and above all legal set-offs.' Is this a statement of an agreed price?" Certainly not; but reading a little further we find this in the said notice: "That the name of the person by whom claimants were employed and to whom they furnished the material is A. S. Howell, the original contractor with S. L. Rea for the erection of said building, and said A. S. Howell agreed to pay said sum of seven hundred and ninety-nine and $\frac{97}{100}$ dollars, so due upon completion of the work." The notice, therefore, sets forth an agreement to pay a definite sum as clear as language can make it. The evidence is equally clear that there was no agreement as to the amount to be paid. The plaintiff himself testified that: "I don't think that there was any terms. My recollection is Mr. Howell would come down and want to know about the prices of lumber; was nothing specified about any particular price. He left that to us to give him the correct price of whatever he required of us." He further said that there was no arrangement whatever as to price, and that the firm charged Howell the market rate as the lumber went out of the yard.

In *Malone v. Big Flat Gravel M. Co.*, supra, it is said: "As we understand the law, the plaintiff can recover only upon the contracts stated in the notices of lien. We do not mean to say that a difference in the amounts stated and the amounts proved would be fatal; and it is possible that there may be other differences which would not be material. But we think in all essentials the contracts must be the same." In *Reed v. Norton*, supra, it is held that: "A finding that a notice of claim of lien filed by a materialman was 'in due form as required by law' is not sustained by the evidence when the notice stated that the materials were to be paid for on the basis of what they were reasonably worth, and the evidence shows that part of them were furnished at an agreed price, and the remainder without any agreement as to price, though it is testified that they were all reasonably worth the amount charged; nor does such evidence sustain a finding of an agreement to pay for them all at what they were reasonably worth." In *Wagner v. Hansen*, 103 Cal. 107, 37 Pac. 195, it is said: "On the trial plaintiff testified that except as to one item, amounting to only \$18, there was no agreed price for any work done; that there was no agreement to pay

for plaintiff's labor or for labor and materials \$163 or any other specific sum. No other evidence was given upon the subject. Defendants moved for a nonsuit on the ground that there was a fatal variance between the evidence and the statement in the complaint and in the claim of lien, in both of which it was stated that the work was done under a contract by which he was employed to do specified work at a price agreed upon. The nonsuit should have been granted. This was not only a variance, but it showed that the statute had not been complied with, and that plaintiff had acquired no lien." In *Wilson v. Hind*, 113 Cal. 357, 45 Pac. 695, it was held to be a material variance where the notice set forth a contract to pay what the goods were reasonably worth and the evidence disclosed that they were bought at a fixed price. *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008, *Buell v. Brown*, 131 Cal. 158, 63 Pac. 167, and *Nofziger Bros. Lumber Co. v. Shafer*, 2 Cal. App. 219, 83 Pac. 284, are to the same effect. In view of the foregoing decisions, it is impossible to uphold the judgment here except upon the theory advanced by respondent that there was no denial of the terms of the contract as set forth in the complaint, and therefore the evidence cannot be considered. The contention is made upon the ground that "the complaint does not state in the body thereof the 'terms, time given and conditions' of the contract, but refers to the claim of lien attached to the complaint," and therefore it is argued that this is equivalent to an averment of those terms, and, since they are not specifically denied, no evidence is admissible to contradict them.

But respondent has misconceived the significance of the following averment in reference to the notice of lien: "A copy of which is hereto attached and marked 'Exhibit A' and made a part of this complaint." This is not equivalent to an allegation that the recitals therein are true, but it is tantamount to an averment that claimant has in his verified notice of lien stated them to be true. If the written instrument attached and made a part of the complaint had been signed by the parties sought to be charged, and it was the basis of the action, it might be sufficient to allege that they executed it without averring specifically the verity of the recitals therein contained, but no such case is presented. In an action brought upon a promissory note, for instance, if the note itself is made a part of the complaint, it is unnecessary to allege that defendant promised to pay, because it follows from the allegation that he executed the note, which contains his promise. If in pursuance of the terms of the note a written demand were made upon the maker by the payee in which it was recited that a certain amount was due and this demand were made a part of the complaint, it would hardly be claimed that plaintiff is thereby released from the duty of alleging in his complaint

that the amount is unpaid. With this obvious distinction in view, it is easy to understand the cases cited upon the subject. In *City of Los Angeles v. Signoret*, 50 Cal. 298, the notice of lien was annexed to the complaint and made a part thereof and the same contention was made as here, but the Supreme Court properly said: "Several matters of substance are lacking in the averments found in the complaint which are sought to be supplied only by reference to the recitals found in an exhibit annexed to the complaint, 'and to which for all particular allegations therein contained reference is hereby made,' etc. This is not sufficient in pleading." In *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327, the action was based upon an undertaking executed by the parties sought to be charged. It was there declared that it was proper to set forth the instrument in full, but that this does not involve an assertion of preliminary or collateral matters recited in the instrument. "Whatever may be the effect of such recitals as evidence, they cannot serve as allegations in pleading. The facts of the case relied upon well illustrate this. The action (*Los Angeles v. Signoret*, *supra*) was upon a street assessment. The street law required certain preliminary steps to be taken to give the municipal authorities jurisdiction to make the assessment. The complaint was silent as to the taking of these steps. The only thing to show that they had been taken was the fact that they were recited in the assessment. This did not amount to an assertion by the pleading that the steps had been taken. It was at most an assertion that the officer who made the assessment had asserted that they had been taken, which was clearly insufficient." *Ward v. Clay*, 82 Cal. 506, 23 Pac. 50, 227, an action upon a promissory note, cited with approval the foregoing cases. There is nothing inconsistent therewith in *Georges v. Kessler*, 131 Cal. 183, 63 Pac. 466. The point made there was that the complaint did not allege that the notice of lien described the property, nor the terms, time given, and conditions of the contract. But the notice was made a part of the complaint, as here, and it seems quite obvious that it is not necessary to allege what a written instrument contains when the instrument is set out in *hæc verba*. The court, moreover, held that the complaint independent of the exhibit stated a cause of action.

Again, plaintiff, proceeding upon the theory, as we have seen, that the contract with Howell was equivalent to a contract with Rea, alleged in his complaint that the defendant Rea, "pursuant to said contract, agreed to pay to the said Lucas Bros. for the said material so furnished as aforesaid, the sum of \$780.70 upon the completion of the said building." This is specifically denied in the answer of each appellant. There was only one contract referred to in the complaint and the notice of lien, and, although made with

Howell by operation of law, since the original contract was invalid, he is deemed in the transaction to be the agent of the owner. Hence the issue suggested as to the agreement to pay a stipulated price is squarely presented, and the allegation of the complaint is not supported by the evidence.

Again, the evidence to which we have referred was admitted without objection on the part of respondent. Appellants undoubtedly believed that it was within the issues, and, since there was certainly an attempt to deny the contract, it should be treated after trial as though in issue.

We find no other error, but for the reason stated the judgment and order are reversed.

We concur: CHIPMAN, P. J.; HART, J.

10 Cal. App. 197

STOCKTON LUMBER CO. v. CALIFORNIA
NAVIGATION & IMPROVEMENT
CO. (Civ. 549.)

(Court of Appeal, Third District, California.
March 9, 1909.)

1. CUSTOMS AND USAGES (§ 15*)—CONTRACTS—
EXPLANATION.

Where a shipper of lumber, which a carrier undertook to take from a schooner and place it on a barge and convey it to a designated point, had nothing to do either with the acts of the crew of the barge or schooner or with the manner of securing the barge to the schooner or the way in which the lumber should be taken from one to the other, or the manner in which the carrier should discharge its duty as a carrier, evidence of a usage as to the lashing of barges to discharging vessels and as to leaving barges while receiving cargo without a watchman on board, was inadmissible under Code Civ. Proc. § 1870, providing that usage to explain a contract is admissible as an instrument of interpretation.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15.*]

2. CARRIERS (§ 108*)—CARRIAGE OF GOODS—
LIABILITY.

As between a carrier and the owner of freight, the negligence or misconduct of a third person resulting in loss to the freight does not excuse the carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 108.*]

3. CARRIERS (§ 108*)—LOSS OF GOODS—LIA-
BILITY.

Where a loss occurred after property had been delivered to a carrier on its barge to convey it to a designated point, the carrier was responsible unless the loss was attributable to the shipper or unless the carrier showed the happening of one or more of the causes specified in Civ. Code, § 2194, providing that a carrier is liable for loss of freight except in specified cases.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 108.*]

4. CARRIERS (§ 119*)—LOSS OF GOODS—LIA-
BILITY.

The destruction by the elements of property in the possession of a carrier does not relieve the carrier from liability therefor unless the destruction was caused by some irresistible superhuman cause.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 523; Dec. Dig. § 119.*]

5. SHIPPING (§ 127*)—LOSS OF GOODS—LIA-
BILITY.

A carrier undertaking to take lumber from a schooner and place it on its barge and convey it to a designated point, cannot relieve itself from liability by showing that a loss occurred because of the act of the crew of the schooner in an honest though mistaken effort to save the barge which had been left by the carrier for the night without a watchman.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 465; Dec. Dig. § 127.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Stockton Lumber Company against the California Navigation & Improvement Company. From an order granting a new trial after verdict for defendant, it appeals. Affirmed.

A. L. Levinsky, for appellant. H. O. Beaty and A. R. Baldwin, for respondent.

CHIPMAN, P. J. This is an appeal by defendant from an order granting plaintiff's motion for a new trial. The action was to recover the value of certain lumber received by defendant to be transported by defendant's barge, under tow by steamer, from the bay of San Francisco to the city of Stockton. The lumber was in the schooner Georgina lying off the shore of the bay. Defendant moored its barge Era alongside of the schooner, and defendant had received on board the Era about 200,000 feet of lumber, when the barge parted from the schooner and a loss of 138,000 feet, valued at \$2,723.26, resulted, and hence this action.

That defendant was a common carrier and as such had agreed to carry the lumber from the schooner Georgina to its point of destination appears without conflict, and nothing in the agreement appeared which changed its liability as a common carrier as defined by section 2194 of the Civil Code. The agreement was oral, by which defendant agreed to deliver the lumber at Stockton for a stated compensation, but no bill of lading was issued. The considerations which moved the learned trial judge to grant the new trial are clearly stated by himself, and we quote from his written opinion found in respondent's brief. A very satisfactory conception of the points in the case will also thus appear:

"The case was tried before a jury, and a verdict was rendered for defendant. The plaintiff now moves for a new trial, and I think its motion should be granted upon the ground that the verdict is against law. The defendant, as a common carrier, had undertaken to carry and deliver the lumber of the plaintiff to its point of destination. Under the provisions of the Civil Code the defendant, as such carrier, could only excuse the performance of this undertaking by proof that the loss in question resulted from an inherent defect in the article shipped or by the

act of a public enemy of the United States, or of the state, or an act of the law, or from any irresistible or superhuman cause. The defendant's answer in substance pleads, first, that the barge which had been attached to the schooner had been cut adrift; second, that the southeasterly wind came up and caused the barge to part from its moorings and drift; and, third, that without fault of defendants, but in consequence of the fault of the crew of the Georgina, the lumber in question was lost. In my opinion the point upon which this case must turn is the defense of 'irresistible or superhuman cause.' It will be observed that plaintiff, under his contract with defendant, had nothing to do either with the acts of the crew of the barge or schooner, or with the manner in which the barge might be secured to the schooner, or the way in which the lumber should be taken from one to the other, or the manner in which the defendant herein should discharge its duty as a common carrier. The defendant undertook to take lumber from the schooner and place it upon the barge, and to convey it to the point of destination; and, failing to do so, it results that, unless the failure is excused by one of the above excepted causes, the carrier is liable. Upon the trial of the case I admitted evidence concerning the manner in which the barge had been moored to the schooner, and evidence relating to the tackle and apparel of each, and also in respect to what occurred on the night in question when the barge went adrift. This testimony, otherwise irrelevant, was only admitted for the purpose of ascertaining how far and to what extent defendant's failure was or might be attributed to an irresistible or superhuman cause.

"So far as the storm upon which the defendant relies is concerned, it appears that it was not of an unusual character or of abnormal violence. Indeed, there is no testimony tending to show how far, or to what extent, the action of the wind actually could or would have caused the vessels to part. The only witness who testified upon that subject was the captain, who was ashore at the time, and he testified to the effect that his barometer fell, and that the windstorm was violent in the vicinity of his residence in this city. No testimony was offered to show the effect of the windstorm upon the bay, or at a point where the vessels were moored, on the night in question. There was no sudden and unlooked-for physical event against which no prudence could prevail; and, so far as the storm may have affected the waters of the bay or the security of the moorings, it only appears from the witness Bloomfield that, on the following morning, about 5 o'clock, 'it was blowing hard, and the bay was choppy.' Thus there is an entire failure of evidence to show that no amount of vigilance or caution or good seamanship on the part of the crew of the schooner, or of the owners of the barge, could have avert-

ed the result. Furthermore, there is evidence of neglect, at least upon the part of the owners and crew of the barge. The barge was not anchored, although it had an anchor and chain seemingly good and efficient; and, if the anchor had been dropped, the barge would not have drifted even after the lines had parted. Whether, therefore, the bow line, or lines which attached the barge to the schooner, were out, or whether they parted in the stress of the storm, in any event, there is evidence of neglect and omission at least upon the part of the owners of the barge in failing to place a watchman on board of her. Defendant as a common carrier in performing its contract was not excused by any of these causes which exempt a common carrier from liability.

"For these reasons, I am of opinion that a new trial herein should be granted; and it is so ordered. J. Hunt, Judge.

"April 9, 1908."

As the case must go back for a new trial, it may be proper to notice one or two errors assigned by respondent, which, it is claimed, should call for a new trial.

Over plaintiff's objection, evidence was admitted as to a custom or usage existing at the bay of San Francisco in regard to the lashing of barges to discharging vessels and in regard to leaving barges while receiving cargo from such vessels without a watchman on board. This evidence was offered to relieve defendant from implied negligence for failure in these regards. Evidence may be given of the following facts: "Usage, to explain the true character of an act, contract or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation." Code Civ. Proc. § 1870, subd. 12. In *Burns v. Sennett & Miller*, 99 Cal. 363, 33 Pac. 916, it was held that "usage cannot be given in evidence to relieve a party from his express stipulation, or to vary a contract certain in its terms." See cases to the point cited in *Leonhart v. Cal. Wine Ass'n*, 5 Cal. App. 19, 89 Pac. 847; *Ames v. Southern Pacific Co.*, 141 Cal. 728, 75 Pac. 310, 99 Am. St. Rep. 98; *Hale Bros. v. Milliken*, 5 Cal. App. 344, 90 Pac. 365. As shown in the opinion of the trial judge, plaintiff, under the contract, had nothing to do either with the acts of the crew of the barge or schooner, or with the manner in which the barge might be secured to the schooner, or the way in which lumber should be taken from one to the other, or the manner in which the defendant herein should discharge its duty as a common carrier. Such being the contract, the usage allowed to be proven was immaterial, and might have been prejudicial. The contract was simple, express in its stipulations, and certain in its terms.

There were certain instructions given to which plaintiff objected, which seem not to be consistent with the view of the case expressed by the trial judge in the opinion

filed by him. These instructions apparently attached undue significance to the combat of the Georgina's crew as a contributing cause of the damage to plaintiff. The jury might have been led to believe that, if the crew of the Georgina contributed to the loss, it would relieve the defendant. But the law is: "As between the carriers and the owners of goods, the negligence or misconduct of a third party will not excuse the former since a remedy lies over against the party so offending." *Mershon v. Hobensack*, 22 N. J. Law, 372, 381. It was said in *Howe v. Oswego*, etc., Ry. Co., 56 Barb. (N. Y.) 121, 124: "The law holds the carrier responsible to the owner for all loss and damage of the property intrusted to his care, whether it arise from his own negligence or that of his servants or of third persons, or whether it be caused by the tortious acts of himself or of others, who are not public enemies, or whether it be by unavoidable accident, not caused by the act of God." The loss occurred after the lumber had been delivered to defendant on its barge. Nothing after delivery, not attributable to plaintiff, could relieve defendant of its liability except the happening of one or more of the causes specified in section 2194 of the Civil Code; and the negligence of some third party acting conjointly with defendant, in caring for the property, is not among these causes, even the larceny of the lumber would not relieve defendant (*Schiefelin v. Harvey*, 6 Johns. [N. Y.] 170, 5 Am. Dec. 206); nor would its utter destruction by the elements, unless by "some irresistible superhuman cause." Much less would the act of the crew of the Georgina in an honest, though mistaken, effort to save the barge which had been left by the defendant for the night without a watchman.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

10 Cal. App. 175

UNITED INV. CO. v. LOS ANGELES
INTERURBAN RY. CO.

et al. (Civ. 607.)

(Court of Appeal, Second District, California.
March 5, 1909.)

1. APPEAL AND ERROR (§ 1008*)—ALTERNATIVE METHOD — REVIEW OF FINDINGS OF FACT.

The rule as to conclusiveness on appeal of the trial court's findings of fact is the same under the "alternative method" of appeal, as otherwise.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1008.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS OF FACT—CONFLICTING EVIDENCE.

Evidence, in an action to rescind an escrow and for return of deeds on the ground that their execution and deposit were obtained by false representations that another had agreed "in writing" to give land, held conflicting, so

that the finding thereon was conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

3. RAILROADS (§ 67*)—RIGHT OF WAY—CONVEYANCES.

If it be necessary to find consideration for right of way deeds executed and delivered pursuant to an agreement to make them without consideration, the enhancement of the value of property in the neighborhood by construction of the road is sufficient.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 67.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the United Investment Company against the Los Angeles Interurban Railway Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Stephens & Stephens and D. K. Trask, for appellant. Gibson, Trask, Dunn & Crutcher (E. E. Bacon, of counsel), for respondents.

TAGGART, J. This action was brought to enjoin the delivery of three deeds of right of way deposited in escrow by the plaintiff, to rescind the escrow and for the return of the deeds, upon the ground that the execution and deposit of the deeds were procured by false and fraudulent representations made by one of the defendants. The condition of the escrow was the construction of a railroad from the city of Los Angeles to the city of Covina over the right of way conveyed by said deeds.

The misrepresentations as alleged in the original complaint were: (1) That the defendant Lahee had represented to A. W. Rhodes, the secretary and manager of the plaintiff, that C. H. Ruddock, the predecessor in title of plaintiff, and the owner of more than 40 per cent. of the stock of that corporation, had agreed to give the strip of land, covered by said deeds, for railroad purposes without any compensation therefor, whereas, in fact, Ruddock had agreed to give the right of way upon condition that he be paid the sum of \$2,157.50, and that Lahee knew this fact and concealed it from Rhodes, to whom it was unknown at the time of the making of the deeds. (2) That Rhodes on behalf of plaintiff informed Lahee that plaintiff would not execute or deliver the deeds mentioned unless plaintiff could acquire a certain 30-foot strip of land across the southern boundary of two lots designated as lots 33 and 34, and the railroad company would enter into an agreement to keep the water course on the north side of the right of way so that it could not cut a channel through a certain lot which plaintiff had agreed to sell to third persons, that plaintiff procured an agreement from the owners of the 30-foot strip to sell the same to him, but that some of the other defendants and the railroad company, for the purpose of preventing plain-

tiff obtaining title thereto, procured and caused a conveyance of said strip to be made to the said railroad company. (3) That at the time of the delivery of said deeds it was represented to plaintiff by the committee who were to secure a right of way for the road (of which the individual defendants were members) that the railroad had acquired all the rights of way necessary to the construction of the railroad except those mentioned in the said deeds, and that the railroad would begin construction of its system of railroad along said line within 20 days after April 24, 1906. All of which representations are alleged to be untrue and to have been the reasons moving plaintiff to execute and deliver the deeds to the First National Bank as stated, and without said representations having been made the deeds would not have been so deposited, etc. By a supplemental complaint it is alleged that after the commencement of the action the railroad defendant entered upon the lands described in the deeds and constructed its railroad thereon, and in so doing destroyed a reservoir and injured other improvements of plaintiff on the strip of land to the damage of plaintiff in the sum of \$8,000. While purporting to state only a supplemental cause of action, by this pleading some of the allegations of the original complaint are amended somewhat; for instance, the one relating to the first misrepresentation is restated so as to allege that the representation of Lahee as to the agreement of Ruddock to give the right of way was that Ruddock "had agreed in writing to give said strip of land" (the words "in writing" not appearing in the original complaint), and the allegations as to plaintiff acquiring the 30-foot strip of land are more fully set forth. The prayer of the supplemental complaint is for the rescission of the escrow, for the return of the deeds, and for damages for the trespass. Judgment was for defendants, and plaintiff appealed from the judgment, served the notice required by section 941b (St. 1907, p. 753, c. 410, § 2), and the record was certified up in accordance with the provisions of sections 953a, 953b, 953c (St. 1907, pp. 750, 751, c. 408, §§ 1-3). A reversal of the judgment is asked upon the grounds of the insufficiency of the evidence to justify the findings and because of certain specified errors of law occurring during the trial and excepted to by the plaintiff.

In respect to the facts constituting the alleged misrepresentation, the trial court found: That Ruddock did agree to give the right of way free of charge, but not in writing, and that Lahee did not represent to Rhodes that such an agreement was in writing, but that it was made verbally, and as so made was true. That the committee did not agree to give Ruddock \$2,157.50, or any other sum, in compensation for said strip of land, but that the enhancement in value of the other lands and premises of Ruddock

and plaintiff by the building of the road was the consideration to Ruddock for the agreement. That the acquiring of said 30-foot strip of land by plaintiff for drainage purposes, or the keeping of the surface water on the north side of the railway by the railroad company, or the commencement of work within 20 days, or that all the right of way other than the portion described in the deed had already been acquired, were not conditions of the delivery of the deeds of conveyance by plaintiff; but that the only condition was that the said railroad should be built between the two cities named, over the strip of land described in the said deeds.

The amplified opportunity afforded by the complete detailed statement of the evidence and proceedings at the trial which is furnished by the record under the "alternative method" of appeal, which is here employed, to present to an appellate court the varied shadings of opinion and inferences that may be drawn from the evidence, may well suggest that the rule as to the conclusiveness of the findings of fact by the trial court should be somewhat modified. We cannot help thinking that appellant rests its hope of a reversal of the judgment largely upon this view. However tempting the opportunity to consider such a change may be to counsel for a party appealing from a judgment, from the standpoint of an appellate court, no good reason is apparent why the change of method should affect a rule so well grounded as the one which places with the trial court or jury the determination of the credibility of the witnesses and the weight to be given their testimony, including the selection of one of several reasonable inferences that may be drawn from the evidence shall be made the basis of the judgment of the court. It is true appellant in presenting its specifications of insufficiency of the evidence to sustain the findings disclaims any intention of presenting such an argument and may be unconscious of having done so.

The evidence discloses that, for some time prior to the year 1903, the people of Covina and vicinity had been seeking to induce persons interested in electric railways to construct a line of electric road from Los Angeles to Covina, or to extend some of the lines running out of Los Angeles toward Covina to that place, and in the spring of that year a committee of thirteen persons, of which the defendant Lahee was chairman, on behalf of the people of Covina, with this end in view, entered into negotiations with persons representing the Huntington interests, which then operated such a road as far as San Gabriel, with the result that the latter agreed to construct such a road if the right of way therefor could be had without cost to the constructors. The committee undertook to procure this right of way, and its members and agents canvassed the property owners through whose lands the right

of way was expected to run, obtained contracts to convey the necessary strip of land from such as it could, and ascertained the amount of damages to which each would be entitled according to an estimate made by the committee after considering the valuations put upon their properties by the respective property owners, and also the values at which the committee itself thought the property ought to be sold to the committee for the purpose. A theoretical assessment district was then created for the purpose of determining the benefits which would be derived from the building of the road by the various residents within the radius of its influence, the benefits were fixed, and subscriptions in accordance therewith solicited. As usual in such cases, the aggregate of the valuations of right of way exceeded the subscriptions, and it became necessary to scale the former and swell the latter, or to try to do so; the former being more easily accomplished. The active work of the committee at this time covered but a short time, say, two or three months, beginning in January, 1903, and the contracts obtained were "placed in escrow" with the First National Bank of Covina, until the lands were required for construction of the road, when upon receipt of the amount agreed upon by the committee the deeds of the right of way were to be made to the Pacific Electric Railway Company; such deeds to be delivered when the road was completed. A list of the values estimated by the committee and of the amounts subscribed were also left with the bank.

During this time the land affected by the deeds here in question was owned by C. H. Ruddock, his mother and sisters, and was under the management of Ruddock, and the amount ascertained as a proper compensation for this and other lands owned or controlled by Ruddock as disclosed by the list was \$3,369. The record discloses: That Ruddock Company, by C. H. Ruddock, on March 5, 1903, signed two contracts in the form used by the committee, agreeing to convey two strips of land for the right of way for a road made necessary by the construction of the railroad. That he also gave two promissory notes for the sums of \$3,097.75 and \$2,377.50, signed "Ruddock & Co., by C. H. Ruddock," and dated respectively on March 25, 1903, and April 28, 1903, as subscriptions toward paying for a right of way for the road. Ruddock was one of the active members of the committee and president of the bank in which the contracts were deposited at this time, and on March 28, 1903, he, his mother, and sisters conveyed the lands affected by the deeds here under consideration to the plaintiff, the United Investment Company, a corporation, of which Ruddock owned and still owns one-half of the capital stock, and of which corporation A. W. Rhodes was the secretary and manager and owner of the larger portion of the remainder of the capital

stock. In April, 1906, defendant Lahee, as chairman of the committee, called upon Mr. Rhodes to make deeds for the right of way over the lands described in the deeds under consideration and presented certain deeds to him for signature by him as manager of the plaintiff. Rhodes did not sign the deeds presented, but after some negotiations with the committee and the representatives of the defendant railroad company he executed and delivered to the First National Bank of Covina the deeds here in question; the same to be delivered to the defendant railroad company when the road was constructed. The only direct evidence as to the first alleged misrepresentations made by Lahee to Rhodes is found in the testimony of these two gentlemen themselves. Rhodes says, Lahee "stated that Mr. Ruddock had, in writing, agreed to give the right of way free several years ago, * * * and he had the agreement in the First National Bank at Covina." This was on March 14, 1906, in Los Angeles, after Ruddock had written a letter from Los Angeles under date of February 27, 1906, to the members of the committee, in response to a letter written by them to him dated January 2, 1906, in which he referred them to Mr. Rhodes as being in charge of all business of the United Investment Company. On April 4, 1906, Mr. Rhodes was in Covina, at which time he asked Mr. Lahee if he would "get this agreement that Mr. Ruddock had given for this right of way." He said he would, but the bank was closed. When the deeds were executed, "I asked him * * * where the contract was of Mr. Ruddock, wherein he stated he would give them a free right of way, and he said he forgot to bring it in, but he said, 'It is there, just as I told you it was.'"

It is urged by appellant that the testimony of Mr. Lahee is not in conflict with that of Rhodes in respect to Mr. Ruddock having entered into an agreement in writing to convey the right of way described in the deeds. As quoted in appellant's brief, Lahee's testimony is as follows (in respect to the conversation on March 14, 1906, in Los Angeles): "Q. Did you, during such conversation, state to Mr. Rhodes that Mr. Ruddock had in writing agreed to give this right of way free several years before? A. I said that he had agreed to give the right of way. Q. (By Mr. Crutcher) Did you say that such agreement was in writing? A. I said that we had contracts with Mr. Ruddock. Q. Now, state exactly what you did say. A. Mr. Rhodes asked me what those contracts were. I told him that I hadn't the contracts, I couldn't tell what property they covered, but the contracts were in the bank, and that we would find them and look at them and see what property they covered. Q. Did you tell him what bank? A. The First National Bank of Covina." In respect to going to the bank with Mr. Rhodes, the witness Lahee testified on cross-examination: "Q. What did you go to the bank for?

A. To find the contracts, Mr. Ruddock's. Q. What did Mr. Rhodes say he wanted? A. He said he wanted to see the contracts. Q. What did you tell him the contract said? A. I didn't tell him. Q. You didn't tell him anything about the contents of the contract? A. No, sir. Q. Not a word? A. No, the contract was with reference to the right of way. Of course, that was understood. Q. Answer my question. What did you tell him, if you told him anything? A. I don't know as I told him anything. Q. Will you say whether or not you did tell him anything about the contents of those contracts? A. I couldn't recall the contents of those contracts. I had no recollection of it. I didn't have charge of those contracts, or any of the papers at all. Q. You have not answered my question. What did you tell him? A. I didn't tell him anything." Again on his cross-examination Lahee says: "Q. About Ruddock's agreement being in writing. What is your testimony about that? What did you say to Rhodes, and what did he say to you? A. Well, he asked me, I think, if we had written contracts. I told him that we had. Covering how much of the property I couldn't tell. Q. Did you say that to him? A. Yes, sir; that is my recollection of it, because I didn't know how much—what the contracts covered. The contracts were never in my possession. I knew that he had a bunch of contracts. I didn't know how many, or what they were, until afterwards. Q. Now, state whether you said to Mr. Rhodes that Mr. Ruddock had agreed in writing to give this right of way that you were asking the United Investment Company to deed to the railroad company. A. I did not say that he had agreed in writing to give it. Q. State exactly what you did say. A. I said that he had agreed to give a free right of way. Q. That is all you said about it? A. That is my recollection of it, sir. Q. Nothing was said about any writing? A. No more than the contracts, as just stated. Q. What was said about that? A. As I said before, that we had contracts. I couldn't tell covering what property, nor how many."

We are of the opinion that the statements of these two gentlemen, in respect to whether or not there was any representations made that Ruddock agreed "in writing" to give the right of way, are clearly inconsistent and called for a determination by the trial court of which was true. The inconsistency becomes more apparent when an attempt is made to find evidence to support the truth of the representation made by Lahee. The oral or verbal agreement of Ruddock to give the right of way free is testified to by several other members of the committee, and the two written contracts in evidence corroborate what he said as to having written contracts; but there is no evidence to establish the truth of the statement, as Mr. Rhodes says Lahee made it to him, to wit, that Ruddock agreed in writing to convey the right of way

which was described in the deeds which plaintiff placed in escrow. We are unable to see how a statement in relation to a particular matter, which the evidence shows to be true, can be held to be the same, or consistent with, that which it shows to be false, and we are forced to the conclusion that there was a conflict between the statement of the two witnesses so substantial that this court is bound to accept the finding of the trial court in respect thereto. That Lahee did not testify that Ruddock "verbally" agreed to give the right of way does not materially lessen the apparent support of the finding of the trial court to that effect. Not being made in writing, the court was justified in finding it was verbal.

The question of the alleged concealment by Lahee from Rhodes of the fact that the promissory notes had been given by Ruddock is not material here and is only an incident in the transaction. It was not made a part of the false representations relied upon by plaintiff in making the deeds by either its original or supplemental complaint; and Mr. Lahee's failure to mention it might very properly be attributed to a supposition that Rhodes knew about this, as Ruddock had written to the committee that Rhodes was in full control of these matters. Without going into the detail of the testimony, we are of opinion that there is sufficient evidence to sustain the findings of the trial court in relation to the strip across lots 33 and 34. There is evidence showing that Mr. Rhodes made inquiries of the engineers of the road in respect to this matter, and was informed of the situation before he delivered the deeds. It also appears that the purpose for which he alleges this strip was desired has been substantially accomplished by the railway company's construction. There is also evidence to sustain the court's finding that the delivery of the deeds was not conditioned upon the commencement of the work in 20 days, or that all the rest of the right of way had been acquired.

The enhancement of values in the vicinity by reason of the construction of the road found by the court to be the consideration for Mr. Ruddock's giving the right of way was a proper inference from the testimony in the case, and is a sufficient finding of a consideration for the deeds made by plaintiff, if such finding were necessary after the finding that Ruddock had agreed to make the deeds without consideration, and that the deeds were executed and delivered in pursuance of that agreement. For the same reason the finding of the court that plaintiff was not damaged by the entry of the railroad company to construct the road should be sustained.

The objection urged that the finding that the promise made by Ruddock to give the free right of way was for the purpose of the construction of a railroad by the corporation

defendant, the Los Angeles Interurban Railway Company, while the evidence is that the contracts provided for a deed to the Pacific Electric Company and the notes given by Ruddock recited the latter company as the one which was expected to extend the road to Covina, if it should be considered at all, is not sufficiently material to justify a reversal of the judgment. No such issue is presented by the pleadings, and the representation as to the promise made by Ruddock did not specify any particular company. If it may not be inferred from the acts of the parties that the indefinite statement as to the free right of way promised by Ruddock implied or was understood to be given to the defendant company, it is clear that the gift of the right of way was to be made to the constructing company, whatever the name of the corporation. The defendant company became such, and plaintiff made its deed to that company, and it is now too late to raise this question. Accepting either construction of the promise of Ruddock, it sustains the finding.

The overruling of the objections of appellant to the introduction of the testimony to establish the truth of the representations of Lahee that Ruddock had promised to give a free right of way through his lands, predicated upon the theory that the only representations in this respect before the court were such as related to such an agreement in writing, was proper.

We see no prejudicial error in the record. Judgment affirmed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 185

CALIFORNIA DOMESTIC WATER CO. v. LOS ANGELES COUNTY. (Civ. 595.)

(Court of Appeal, Second District, California. March 5, 1909.)

1. TAXATION (§ 159*)—"REAL PROPERTY"—LINES OF WATER COMPANIES.

Wells, conduits, flumes, and pipe lines affixed and attached to the soil for the purposes of a water company are entitled to be taxed as real estate; Pol. Code, § 3617, providing that the term "real property" includes the possession of, claim to, ownership of, or right to the possession of land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 279; Dec. Dig. § 159.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5939-5951; vol. 8, pp. 7778, 7779.]

2. TAXATION (§ 442*)—ASSESSMENT—PRE-SUMPTION OF REGULARITY.

In the absence of an allegation to the contrary, it will be presumed, on an attack of a tax assessment, that the assessor, as was his duty, under Pol. Code, § 3650, listed property under the proper head in an assessment book with proper headings.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 442.*]

3. TAXATION (§ 412*)—LISTING PROPERTY UNDER WRONG HEADING.

Even if the allegation of the complaint attacking a tax assessment of real property, that the property was assessed as personal property, be considered one of fact, it could only mean that the property was listed under an improper heading on the assessment book, an informality which Pol. Code, § 3885, provides shall not invalidate the assessment.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 412.*]

4. TAXATION (§ 482*)—BOARD OF EQUALIZATION—ORDERING NEW ASSESSMENT—NOTICE.

The notice required by Pol. Code, § 3681, before the county supervisors, sitting as a board of equalization, may direct the assessor to make a new assessment, on the ground that the assessment made is so incomplete as to render the collection of taxes doubtful, is unnecessary where parties appear before the board of equalization invoking its correction of an assessment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 854; Dec. Dig. § 482.*]

5. TAXATION (§ 463*)—IRREGULARITIES—DUTY TO COMPLAIN TO BOARD OF EQUALIZATION.

One knowing, when appearing before the board of equalization to have a reduction in its assessment, that its property was listed on the assessment books under an improper head, or of any other irregularity prejudicial to it, should call the board's attention thereto, that the board may under Pol. Code, § 3681, make proper corrections and cancellations, and remaining silent till too late for correction may not avoid taxation by asserting the irregularity.

[Ed. Note.—For other cases, see Taxation Cent. Dig. § 827; Dec. Dig. § 463.*]

6. TAXATION (§ 412*)—IRREGULARITIES IN ASSESSMENT.

Though property taxable as real property is listed by the assessor under a wrong heading, the owner is not prejudiced thereby; there being no difference in the tax rate of different kinds of property, and the assessment roll showing the character of the property, and under the law the taxes being collectible only in the manner provided for collecting taxes on real property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 412.*]

7. TAXATION (§ 490*)—BOARD OF EQUALIZATION—FINDINGS.

In the absence of fraud or malicious abuse of its powers, the board of tax equalization is the sole judge of questions of fact and of the values of property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 872; Dec. Dig. § 490.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by the California Domestic Water Company against the County of Los Angeles. Judgment for defendant. Plaintiff appeals. Affirmed.

Andrew H. Rose, for appellant. J. D. Fredericks, Dist. Atty., and Hartley Shaw, Chief Deputy, for respondent.

ALLEN, P. J. Action to recover taxes paid under protest. The complaint alleges: The ownership by plaintiff of certain water and water-bearing lands, with wells and pumping machinery thereon, together with rights of way, conduits, flumes, and pipe

lines, by means of which said water is conveyed and distributed to its stockholders, and which conduits, flumes, and pipe lines were, on the first Monday of March, 1906, and long prior thereto had been, immovably affixed and attached to the soil upon said right of way. That prior to the first Monday in July, 1906, plaintiff furnished and returned to the assessor a full and true list of all the property owned by plaintiff in the county of Los Angeles on the first Monday in March, 1906; and the assessor assessed this property to plaintiff at a fixed valuation for each particular kind of property. It is further alleged: That the conduits, flumes, and pipe lines were each of them listed and assessed as personal property and not as improvements upon real estate; that the wells returned as owned by the plaintiff were assessed as personal property; that the same are situate upon and included within a tract of land returned by plaintiff for assessment, which tract of land was assessed against plaintiff for the year mentioned and taxes paid; that on or about the 10th day of July, 1906, the plaintiff made written verified application to the board of equalization of the county for a reduction in the valuation of said pipe lines, conduits, and flumes so assessed by said assessor; that at said hearing before the board of equalization plaintiff offered testimony tending to show that by reason of the fact that the water supplied by plaintiff to its stockholders increased the assessable value of the stockholders' lands, and upon which increased valuation they were required to and did pay taxes upon such increased valuation in excess of that paid by the owners of adjoining lands not so supplied with water. And, further, that other corporations of the same character as plaintiff, organized for the same purposes and similarly situated, had theretofore been treated as a class and their assessments made having in view the increased taxable value of the property upon which the water was used. That by reason of such fact their wells and pipe lines were assessed in a less amount than the assessment returned against plaintiff's property—by reason of all of which the taxes so assessed against plaintiff's property were disproportionate to the value, oppressive, and in excess of the basis of valuation of all other property of like character belonging to similar corporations. That upon said hearing the board of equalization reduced the assessment upon the pipe lines, flumes, conduits, and the wells about 15 per cent. That thereafter plaintiff paid the amount of taxes upon all its property under such reduced assessment under protest, claiming that such assessment against the property above specified was void as being an unconstitutional discrimination against plaintiff and the taking of its property without due process of law, and it prays judgment for the amount of said taxes so paid. To this complaint the defendant inter-

posed a general demurrer, which being sustained without leave to amend, judgment was entered against plaintiff, from which judgment plaintiff appeals.

The property described in the complaint, the assessment against which is attacked, falls within the definition of the term "real estate" as employed in the revenue act. "The term 'real estate' includes the possession of, claim to, ownership of, or right to the possession of land." Section 3617, Pol. Code. It follows that the property was entitled to be taxed as real estate. To the same effect is section 3603 of the Political Code. We find nothing in the complaint alleging facts from which it may be inferred that it was otherwise taxed. It is made the duty of the assessor by section 3650 of the Political Code to prepare an assessment book with proper headings, as directed by the state board of equalization, in which must be listed all property within the county under the proper head. It is not averred that there was any omission of duty in this regard, either by the state board of equalization or by the assessor, and the presumption in support of their action is that they each performed their official duty. This, if true, does not justify the conclusion of plaintiff that the property was assessed as personal property. *Bakersfield, etc., Co. v. Kern Co.*, 144 Cal. 153, 77 Pac. 892. Were we to accept plaintiff's contention that the allegation that the property was assessed as personal property is an allegation of fact, such characterization of the assessment could only be supported by an inference that that particular property was listed under an improper heading upon the assessment book. Such listing by the assessor would be merely an informality which, under section 3885, would not be sufficient to invalidate the assessment, for it could in no wise prevent effective equalization and correction. *Ledoux v. La Bee* (C. C.) 83 Fed. 764. The character of the property was clearly shown upon the list. Its liability for taxation is conceded. The scheme for the correction and equalization of assessments under the various sections of our Political Code comprehends that after notice to the taxpayer, as by the rules of the board established, the supervisors of the county, sitting as a board of equalization, under section 3673, may increase or lessen any assessment contained in the roll so as to equalize such assessment and to make it conform to the true value of the property in money. By section 3679 the board is authorized to require the assessor to enter omitted property, and by section 3681, to make and enter new assessments (at the same time canceling previous entries) when any assessment made by the assessor is deemed by the board to be so incomplete as to render the collection of taxes doubtful. This last section provides that before such action notice must be given by the clerk to the parties interested at

least five days before the taking of such action; but this notice is not requisite where the parties appear before the board of equalization, as is shown by the complaint, and being before the board, invoked its powers and authority to correct the assessment originally entered against it. *Farmers', etc., Bank v. Board*, 97 Cal. 325, 32 Pac. 312; *Savings & Loan Soc. v. San Francisco*, 146 Cal. 673, 80 Pac. 1086. If, as a matter of fact, the plaintiff owned no personal property, and the property which it returned was in fact real estate, and the same was listed upon the books under an improper heading, the time and place for correcting the error, if any, was when plaintiff appeared before the board asking for relief in relation to the assessment. It is apparent from the complaint that plaintiff, when it presented to the board of equalization its claim for a reduction in the assessment, had full knowledge and notice of all that appeared upon the assessment roll. Its property was entitled to bear its share of taxation. If the wells upon the land were not assessed as improvements upon the land, but were in fact listed under the head of personal property, it was incumbent upon the taxpayer when appearing before the board to have its assessment corrected and equalized to call attention to this, or to any other irregularity or informality prejudicial to it, to the end that the board might, under section 3681, make needed and proper corrections and cancellations; and this applies as well to the conduits and pipe lines. Having this notice, being aware of the informality, making no objection thereto other than the objection as to the amount of the assessment, the property being liable for taxation in some way, plaintiff should not be permitted to remain silent and withhold its objection to the irregularity in the manner of the assessment until too late for correction and then seek to avoid taxation by asserting the irregularity in the manner complained of. There is no pretense that any different rate existed as between real and personal property, or any additional burden imposed upon plaintiff by the listing under an improper heading other than that, under the law, if personal property, the taxes were payable in a manner different from those assessed against real estate. It is difficult to see just how or in what manner plaintiff has suffered any prejudice, were it assumed that the assessor failed to perform the duty devolving upon him in the listing of the property under a particular heading. The assessment roll showing the character of the property, and that it was real estate, under the law the taxes levied and assessed against the same were collectible only in the manner provided by law for the collection of taxes upon real estate, and in that manner, and not otherwise, could plaintiff be compelled to pay the same.

The allegation of the complaint that plaintiff's legal obligation was different may be disregarded.

Appellant further insists that the complaint was sufficient in this: That the demurrer admits that the assessor singled out appellant from the other members of the class to which it belonged and assessed its property greatly in excess of the basis of valuation applied to similar property of like corporations, and it was thereby denied the equal protection of the laws guaranteed by the Constitution of the United States. It is sufficient answer to this contention to suggest that the complaint also shows that from the valuation fixed by the assessor plaintiff, under the statutes, made its application to the board of equalization for a correction of what it deemed prejudicial acts upon the part of the assessor; that this board heard and determined the controversy and affixed to the property a diminished valuation. This action of the board of equalization is conclusive. "To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment." *Stanley v. Board of Supervisors*, 121 U. S. 535, 550, 7 Sup. Ct. 1234, 1239, 30 L. Ed. 1000. In the absence of fraud or malicious abuse of its powers, the board of equalization is the sole judge of questions of fact and of the values of property. *La Grange, etc., v. Carter*, 142 Cal. 565, 76 Pac. 241. Nothing in the complaint appears from which fraud or abuse of discretion may be imputed to the board of equalization.

We see no prejudicial error in the record, and the judgment is affirmed.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 212

CITY OF PARIS DRY GOODS CO. v.
SPRING VALLEY WATER
CO. et al. (Civ. 562.)

(Court of Appeal, First District, California.
March 10, 1909. Rehearing Denied by
Supreme Court May 8, 1909.)

LANDLORD AND TENANT (§ 34*)—LEASES—CON-
STRUCTION—"THOROUGHLY DESTROYED."

The lease, under which plaintiff rented five stories of a six-story building from defendant, provide for adjustment of rent if the building was partially destroyed by fire, and that if the building was thoroughly destroyed either the lessor or lessee might cancel the lease. A fire destroyed about 14 per cent of the area of the entire building and destroyed the entire brick wall on one side, the greater part of that on another side, most of the tile partitions on four floors, and practically all of the wood and plaster work, but leaving its foundation, the greater part of the steel frame, and many other parts of the building intact, so that it could be restored for less than one-half of the present cost of building it. *Held*, that the lease contemplated an injury which would not permit the lessee to occupy any part of the building and adjust the rent as to the part occupied, and the building was "thoroughly destroyed," so as to entitle the lessor to cancel the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 34.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the City of Paris Dry Goods Company against the Spring Valley Water Company and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Goodfellow & Eells, for appellant. A. E. Shaw (E. D. Heller, of counsel), for respondent Spring Valley Water Co. Titus & Creed, for respondent Union Square Improvement Co.

HALL, J. This is an appeal from a judgment entered against plaintiff upon the sustaining of defendants' demurrer to plaintiff's third amended complaint.

The action was brought for the purpose of quieting plaintiff's title to a leasehold interest in certain premises situated in the city and county of San Francisco. As appears from the complaint, the Spring Valley Waterworks, a corporation, in 1897 leased for the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

period of 20 years a portion of a building to Gaston Verdier and Auguste Justin Georges Fusenot. Subsequently the lessees assigned their interest in the leased premises to plaintiff, with the consent of the lessor, and the lessor transferred its interest to the defendant Spring Valley Water Company. The premises consisted of all the second, third, fourth, and fifth floors of a six-story building, and also all of the basement and first floor of said building, except one office, an elevator shaft, and vestibule on the first floor, and the southeast quarter of the basement. The lease contains the following provision: "It is understood and agreed that if any portion of the demised premises shall be destroyed by fire, earthquake, explosion, or any cause beyond the control of the lessees, or shall be so damaged thereby as to be untenable, then, and in that event, the lessor agrees at its own cost and expense to immediately restore the portion so injured or destroyed, and that during the time required to restore the same, and for thirty (30) days after the same shall have been fully restored, a fair and equitable allowance shall be made and deducted from the monthly rent of the demised premises. If the building shall be thoroughly destroyed by fire or other cause, then it shall be optional with the lessor or lessees to cancel this lease, and the same may be canceled by either one." It is the construction of the latter clause in the foregoing provision that is involved in this action.

It is alleged in the complaint: "That on the 18th day of April, in the year 1906, a conflagration occurred in San Francisco, which burned the adjoining buildings, and set fire to and consumed plaintiff's stock of goods in said demised premises, and the woodwork and other inflammable articles therein, and thereby destroyed certain portions of said demised premises. And in that behalf this plaintiff avers that said building as originally constructed was 137 feet and 6 inches square, and 101 feet high, having inside courts and light wells of 166,700 cubic feet contents; the net cubical contents of the said building, after deducting said courts, being 1,742,800 cubic feet. Said building was of steel frame, with concrete foundations, and brick and masonry outside walls, and with floors, partitions, and column protection made of hollow tiles. The said fire destroyed a portion of said building in the southeast corner thereof, containing 250,000 cubic feet, and extending from the foundation to the roof; the portion so destroyed being in area about 14 per cent. of the entire building. In addition, the said fire either destroyed or compelled the removal of the entire brick wall of the building on the east, and of that part of the brick wall on the south which was above the level of the second floor, and also destroyed or compelled the removal of most of the vertical tile partitions on the first, second, fourth, and sixth floors, the covering of the roof, and about three-fifths

of the interior finish, and about four-tenths of the machinery and plumbing, and practically all the woodwork and plaster. That the following portions and parts of said building are substantially uninjured, and remain in place and capable of being safely utilized in restoring said building to the condition in which it was before the fire, and the defendants are in fact utilizing the same in restoring said building, to wit: The foundations of the building and its steel frame (except that portion of the frame of the southeast corner of the building which was destroyed as aforesaid), the elaborate and expensive walls of masonry, tile, and brick facing on Stockton and Geary streets, the roof trusses and columns, the floor arches of the fourth, fifth, and sixth floors, most of the stairways, the vaulted sidewalk on Stockton street, and many other parts of said building." It is further alleged that the original cost of the uninjured portion of the building was not less than one-half the total cost of the building, and that the building can be restored by using the standing and uninjured portions for much less than one-half the entire cost of construction of such a building under existing conditions and prices of labor and materials. It is further alleged: "That by reason of said injury to said leased premises by said fire, all said premises were rendered untenable until the same should be restored and repaired, and they still remain untenable, and are and will be entirely unfit for plaintiff's use until they shall be so restored and repaired, and plaintiff was thereby compelled to remove and did remove its business from said premises, and has never been able to use said premises, or any part thereof, since said fire."

There is no allegation in terms that the leased premises were not totally destroyed, or that they were totally destroyed. The pleader has pleaded various particulars of the injury and destruction, and thus invoked the judgment of the court on the facts pleaded as to whether there was a "thorough destruction" of the leased premises within the meaning of the lease such as would authorize either party to cancel the lease. In construing the language of the lease, it must be borne in mind that the right to cancel is mutual. The right exists in either party to the lease under the same conditions. As throwing light upon the meaning of the words "thoroughly destroyed," we have been cited to various insurance cases where the meaning of such words as "totally destroyed" and "wholly destroyed" have been considered. There does not seem to be entire uniformity in the cases as to what is the true test of total destruction under a policy of insurance, and in considering such cases it must be remembered that the primary object of insurance is to indemnify the owner against pecuniary loss from the destruction of the property. On the other hand, the primary purpose of a lease is to secure to the lessee the use and occupa-

tion of the demised premises, for a given time, in consideration of a stipulated rental. In this case the lease covered almost the entire portion of five stories of a six-story building, manifestly adapted for the carrying on of a large and extensive business.

The "destruction" clause of the lease may be logically divided into two parts. In the first part it is provided "that if any portion of the demised premises shall be destroyed by fire, * * * or shall be so damaged thereby as to be untenable, then and in that event the lessor agrees, at its own cost and expense, to immediately restore the portion so injured or destroyed, and that during the time required to restore the same, and for thirty days after the same shall have been fully restored, a fair and equitable allowance shall be made and deducted from the monthly rental of the demised premises." The contracting parties evidently had in mind in framing this clause the injury or destruction of such a portion only as would still leave the tenant in the occupation and use of a portion of the demised premises. They did not contemplate in this clause a destruction going through and through the building to such an extent that no portion could be used and occupied by the lessee, even though a portion of the four walls, roof trusses, and the like remained uninjured and in position. They evidently intended by this clause such a condition as would not necessitate the vacating of the entire demised premises for any period of time by the lessee. This is manifested by the provision for a "deduction from the monthly rental." There is nothing in the language of this part of the lease to indicate a cessation of rental for any time, with the lease still surviving. The "portion of the demised premises" which the parties contemplated might be destroyed or injured was a portion for the loss of the use of which compensation might be made by a deduction in the monthly rental, and the destruction of which would not compel the tenant to either abandon its business for a time, or seek other quarters elsewhere in which to carry on its business until a restoration of the entire premises could be effected.

An accurate understanding of the first part of the "destruction" clause is essential to a proper interpretation of the second portion thereof, for it is reasonable to believe that the contracting parties intended to cover every contingency that might arise from destruction of a portion or the whole of the demised premises. The second part is: "If the building shall be thoroughly destroyed by fire or other cause, then it shall be optional with the lessor or lessees to cancel this lease, and the same may be canceled by either one." This clause we think is antithetical to the first clause. Having provided for the results to flow from such a de-

struction or injury to a portion of the demised premises as would admit of an adjustment of equities by a deduction from the monthly rental, and would not necessitate the vacating for any time of the entire premises, the parties proceeded to provide for a condition that would admit of no such adjustment or occupation or use of any portion of the building. This was the condition that they had in mind when they used the words "if the building shall be thoroughly destroyed." While it may be conceded that in a literal sense a building is not totally destroyed when any considerable portion remains so far intact that it may be prudently used, in place, in restoring the building, yet such meaning must be given to the words "thoroughly destroyed" as it is apparent that the parties had in mind when they used the words. This may best be arrived at by considering the words in connection with the other provisions concerning destruction of a portion of the premises, and the primary purposes of the lease. That the parties intended by the words, "if the building shall be thoroughly destroyed," such a destruction as is shown by the pleading in this case, is further strengthened by the consideration that the entire building was not demised. The sixth floor, the southeast quarter of the basement, and a portion of the first floor are not leased. The landlord bound himself to restore "if any portion of the demised premises shall be destroyed," and reserved the right to cancel "if the building shall be thoroughly destroyed."

Further, this lease must be read with the same effect as though the fire that burned the premises in question had not swept the entire business portion of San Francisco. If it had been the only building burned at that time, we hardly think the lessee would be contending for a construction that would have deprived it of the right of canceling the lease on being burned out of the demised premises so thoroughly that it would have been compelled to go out of business until the premises could be restored, or seek temporary quarters elsewhere, with the obligation to return on the restoration of the building, or at least to pay rental therefor.

We have examined all the cases to which we have been cited, growing out of leases. *Wall v. Hinds*, 70 Mass. 256, 64 Am. Dec. 64, *Spalding v. Munford*, 37 Mo. App. 281, and *Chamberlain v. Godfrey's Adm'r*, 50 Ala. 530, are all clearly cases of destruction or injury to a well-defined and separate portion of the demised premises only. In *Einstein v. Levi*, 25 App. Div. 565, 49 N. Y. Supp. 674, the lease contained a provision for a partial damage, a provision for damages so extensive as to render the building untenable pending repairs and a provision for a total destruction of the premises. The tenant claimed total destruction, but the evidence clearly showed untenability only.

The remaining case cited by appellant (N. Y. Real Est., etc., Co. v. Motley [City Ct. N. Y.] 16 N. Y. Supp. 209) gives us no light on the question at all. On the other hand, in *Corbett v. Spring Garden Ins. Co.*, 40 App. Div. 628, 58 N. Y. Supp. 148, affirmed in 155 N. Y. 390, 50 N. E. 282, 41 L. R. A. 318, an insurance case, but depending on the effect of the destruction clause of a lease, a verdict of total destruction was sustained on facts quite like the facts in the case at bar.

We are of the opinion that the demurrer was properly sustained, and the judgment is therefore affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 245

PEARSON v. M. M. POTTER CO. (Civ. 614.)

(Court of Appeal, Second District, California. March 16, 1909. Rehearing Denied May 10, 1909; Denied by Supreme Court May 13, 1909.)

1. CONTRACTS (§ 176*)—CONSTRUCTION.

The interpretation of a written contract is a question of law for the court.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 776-770; Dec. Dig. § 176.*]

2. MASTER AND SERVANT (§ 316*)—CREATION OF THE RELATION—INDEPENDENT CONTRACTORS—HOTEL PORTER.

A written contract between defendant hotel company and one D. provided that D. and five men should be employed by defendant, D. to be head porter, at a certain salary, and to comply with all instructions given him by defendant's manager. *Held*, that D. was a servant, and not an independent contractor, and that defendant was liable to one injured through the negligence of D. or of a porter employed by him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

3. MASTER AND SERVANT (§ 316*)—CREATION OF THE RELATION—"INDEPENDENT CONTRACTOR."

An "independent contractor" is one who in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3542, 3543; vol. 8, p. 7686.]

4. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR.

In a personal injury action, the exclusion of evidence that plaintiff had for a number of weeks received sick benefits from a fraternal organization, if erroneous, was not prejudicial to defendant, since it would not be assumed that the jury would have attributed an improper motive to plaintiff for his remaining in bed, in view of testimony that it was necessary for him to do so.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by S. H. Pearson against the M. M. Potter Company. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Gray, Barker & Bowen, for appellant. Jones & Drake, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained by plaintiff as a result of stepping into a manhole negligently left open by defendant. This manhole was in the sidewalk adjoining the Van Nuys Hotel on Fourth street in the city of Los Angeles. The hotel was under the control and management of defendant, and the manhole, when not used as a means of access to the basement of the hotel, was closed by an iron cap or cover placed upon the opening. It is alleged that on May 29, 1906, defendant removed this cap and negligently permitted the manhole to remain open and unguarded, and that, while thus left open and unprotected, plaintiff, while walking along the sidewalk, stepped or fell into the same, thereby, without any fault on his part, receiving the injuries for which he asks damages. In addition to denying the allegations of the complaint, defendant by its answer avers: That it had no control over the manhole and nothing whatever to do with its use or management, for the reason that it had, prior to the alleged injury to plaintiff, and ever since, by a special contract, given to one Thomas J. Dunnigan entire control, supervision, and charge of the porter service in said hotel; that under such contract said Dunnigan had full power to employ and discharge porters of the hotel and pay them out of his own funds, and to control their conduct and labors in and about the hotel; that as to such porter service he was an independent contractor; that if said manhole was left open, as alleged by plaintiff, it was so left open by one of the porters employed by and under the control of said Dunnigan, and not by any person connected with the management of the hotel, or under the control or direction of defendant. The case was tried before a jury, which rendered a verdict in the sum of \$2,000, the judgment for which, upon the hearing of defendant's motion for a new trial, plaintiff consenting thereto, was reduced to the sum of \$1,844. The appeal is from the judgment thus modified, and an order of the court denying defendant's motion for a new trial.

Appellant's chief contention is that the court erred in refusing to submit to the jury the question whether or not Dunnigan was an independent contractor, but, on the contrary, did instruct the jury that at the time of the injury he was a servant and employé of the defendant, and that any act

of negligence, either by Dunnigan or the men so employed by him, was the act of defendant. The evidence tended to show that one of the men, Harry Carrier, employed and working under the direction and supervision of Dunnigan, and, while engaged in the performance of his labors, left the manhole open. The employment of Dunnigan was by a written instrument, as follows: "Agreement. Los Angeles, Cal., February 1st, 1906. I, Thomas Dunnigan, and five men, hereby agree to the following conditions, if employed by the M. M. Potter Company: First, it is understood that my salary is to be at the rate of \$145 per month. Board? Yes. Second, the M. M. Potter Company does not employ me for any specified length of time, but only for such time as my services may be required. Third, I will at all times conform to and comply with such instructions as may be given me by the manager, or such person or persons as he may designate. [Signed] Thomas J. Dunnigan, Department, porters. Position, head porter." The relation of Dunnigan to defendant is therefore a matter of written contract between him and defendant, and the interpretation of that contract, like any written instrument, is a question of law for the court to determine. Hence there was no error on the part of the court in refusing to submit the matter to the jury. *Am. & Eng. Ency. Law*, vol. 16, p. 192; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 289.

Neither was there any error in the instruction given by the court to the effect that Dunnigan, under this contract, was a servant and employé of defendant. From the very nature of the employment, it is difficult to conceive of a hotel porter being an independent contractor. The employment is one of service, as much so as the employment of a waiter or chambermaid. The character of the service is wholly inconsistent with freedom from constant supervision and direction from the one for whose benefit the service is performed. But, however this may be, the contract under which Dunnigan was employed shows that defendant reserved to itself the right of directing Dunnigan and those under him in the performance of their work. It contains an express provision to the effect that his duties, which includes those under him, should be performed in compliance with the instructions given him by the manager of defendant, or by such person as the manager might designate. In full accord with this provision, defendant's manager testified that when he wanted anything done in the porter service he spoke to his assistant, and the assistant spoke to the head porter. This assistant testified: "I very often gave Dunnigan verbal instructions, or asked him to do certain things." Dunnigan himself testified: "I was under the direction of the manager, and Harry Carrier (the man who left the manhole open)

was under my direction." There can be no question but that Dunnigan, the head porter, and the men under him, in the performance of their duties, were under the supervision and control of defendant—a position wholly inconsistent with the relation of an independent contractor. "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, not only what shall be done, but how it shall be done." *Cyc.* vol. 26, p. 966. "Where a person in the employment of another is, in the discharge of his duties, subject to the immediate direction and control of his employer, he is properly described as a servant." *Gravatt v. State*, 25 Ohio St. 168; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Pioneer Fireproof Construction Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17; *Atlantic Transport Co. v. Coneys*, 82 Fed. 177, 28 C. C. A. 388; *Shearman & Redfield on Negligence*, § 177; *Hale et al. v. Johnson*, 80 Ill. 185. In 16 *American & English Encyclopedia of Law*, p. 187, the author cites a number of cases in support of the rule that "an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished." This rule is in full accord with the doctrine enunciated in the cases cited by appellant, the facts in none of which, in our judgment, are analogous to the case at bar. From what is said upon this subject it is apparent the court did not err in denying defendant's motion for a nonsuit.

On cross-examination plaintiff was questioned with regard to his being a member of certain fraternal organizations, and asked if he had not for a period of 13 weeks received from such organizations sick benefits in the sum of \$12 per week, to which the court sustained an objection. Such fact had not been pleaded in reduction of damages sustained, but appellant contends that it was proper cross-examination for the purpose of showing plaintiff's motive in confining himself to his bed for a period of several weeks, and that the answer, if in the affirmative, was a proper matter for consideration by the jury as affecting the credibility of the witness. Without holding the ruling to be error, we think the court might have properly permitted the question; but, treating it as erroneous, we cannot believe the showing of the fact that plaintiff received sick benefits could have had the slightest influence with the jury in weighing plaintiff's testimony. If it be conceded that the question was a proper one to be put to the plaintiff to test his credibility, the refusal of the court to permit it to be answered did not in any way prejudice the defendant or its case. Had it been answered in the most favorable way

that the defendant could have expected, to wit, that the plaintiff had received such sick benefits for the time which he remained in bed, it could not be assumed that therefore the jury would have attributed an improper motive to him for his remaining in bed, in the face of the independent testimony of his physicians and others that it was necessary for him to do so. In view of its harmless character, the cases cited by appellant have no application.

It is unnecessary to discuss other points made by appellant, other than to say that they are without merit.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 250

MEEKER v. SIMMONS et al. (Civ. 536.)

(Court of Appeal, Third District, California.
March 16, 1909.)

1. BOUNDARIES (§ 3*) — RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS.

The actual line of a survey, when it can be shown, is the highest proof of a boundary line, the next highest proof being monuments, natural or permanent objects, thereon definitely located, and a call for courses and distances must give way to these latter.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 37*) — EVIDENCE — SUFFICIENCY.

In ejectment evidence held insufficient to support a finding that a boundary line was located as claimed by defendant.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 184; Dec. Dig. § 37.*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by M. C. Meeker against Emaline Simmons and another. Judgment for defendants, and plaintiff appeals. Reversed.

J. M. Thompson, for appellant. C. H. Pond, for respondents.

CHIPMAN, P. J. Action in ejectment. The cause was tried by the court without a jury, and defendants had judgment, from which plaintiff appeals on bill of exceptions.

The controversy arises out of conflicting claims to about an acre of land, being a narrow strip of 40 or 50 feet wide, extending along the east side of the land conveyed by plaintiff to defendant Emaline Simmons.

It was stipulated at the trial: "That the first call in defendants' deed, to wit, 'thence running along the center of the county road, north 30° 45' west, 6.80 chains,' is conflicting in this, north 30° 45' west, 6.80 chains, would carry the line 50 feet east of the center of the county road at the end of 6.80 chains, and the remaining portion of the line would be east of the proposed road. That to follow the call in the deed and go down

the center of the county road 6.80 chains the remaining portion of the line would be the west line of the proposed road. To follow the line down the center of the county road the course would be, north 33° 45' west, and the land described in the complaint would belong to the plaintiff; but to follow the course north 30° 45' west, and not go down the center of the county road, the land described in the complaint would belong to the defendants."

The deed was executed and delivered November 4, 1904, and the description of the land, so far as is necessary to be stated, is as follows: "Beginning at a stake which bears south 50½° west of a stake situated under the center of the railroad bridge, said bridge being the crossing of the North Shore Railroad, and the county road leading from Occidental to Camp Meeker, and 1.94 chains distant, running thence along the center of the county road, north 30° 45' west, 6.80 chains, thence leaving said road, along the center of proposed road, north 15° west, 5.33 chains, to a stake," and, as claimed by plaintiff, following the center of the proposed road to the northeast corner of the tract, and thence by courses and distances around an irregular piece of ground and back to the place of beginning, "containing 20 acres of land, exclusive of the proposed new road, all courses corrected on an accepted variation of 18° east." It appeared that plaintiff proposed opening a road from a point on the county road to another point of the county road, thus avoiding a hill and also giving access to his land bordering on the proposed road, and, as testified by plaintiff, the land conveyed "was to be bounded on the east side by the new road that was already staked out at that time." Plaintiff further testified: "The county road there ran a little to the west of her (defendant's) house, and this new road ran on the east side of her house and was to take the place of the county road. The county road was to be abandoned. We proposed to run the line in the center of the new proposed road which was already partially opened up.

* * * The county road was to be abandoned only where this new road took its place. That part of the county road mentioned in the deed for 6.80 chains was not to be abandoned, but just where the new one took its place. That is the reason why we called it a proposed road." And plaintiff testified that Mrs. Simmons agreed to give half of the proposed road. Plaintiff employed Surveyor Symmonds to run out the lines to the tract of land plaintiff was about to sell to defendants. Mrs. Simmons was present when this survey was made. He testified that he started at a point in the center of the county road, and the first call as appears in the deed "was north 30° 45' west, 6.80 chains"; but he testified that "the actual survey was down about the middle of the county road

leading from Occidental north." He further testified: "The next call was north 15° west, 5.33 chains, which was in the center of the proposed road, running along the creek. The next call was north 32° 30' west, 3.62 chains, along the proposed road. The next call was north 9° 30' west, 1.45 chains (the deed reads 1.47 chains), which was still in the proposed road. I would say very near the center. This proposed road, as it was called, had been traveled some. I had traveled it myself. The proposed road showed upon its surface that it had been traveled. It had two bridges, was free and clear of everything so that it was ready for travel. The deed was made shortly after the survey." It appeared that this survey included a considerable excess over 20 acres, and, as defendants desired to purchase only 20 acres, plaintiff reduced the amount to what he supposed was 20 acres by cutting off a strip from the north side of the tract. A second survey was made, but the courses and distances along this proposed road were not changed. The evidence was that the initial error was in the course 30° 45' west, which, if followed, with the other courses and distances as called for in the deed, would give 20 acres and would fix the eastern boundary as claimed by defendants and as found by the court, whereas plaintiff claims that this call should have been 33° 45' west, which would have made the center of the proposed road the true eastern boundary of defendants' land. It is the conceded conflict between this call in the deed and the language which follows it, to wit, "along the center of proposed road," and the further language in the deed, to wit, "containing 20 acres of land, exclusive of the proposed new road," that presents the question now here, and upon which evidence was submitted by the parties to the controversy.

The evidence adduced by plaintiff was: That defendant Mrs. Simmons, grantee in the deed, was present when the line was run along the center of the county road and the new road; that defendants afterwards moved or built their fence along the west side of this new road; that it so remained until in October, 1907, when they moved it over to the line called for in the deed and ousted plaintiff of possession and closed the new road; that this new road had been partly graded and graveled and had been traveled by the public to some extent without objection and with knowledge of defendants. The travel over the road was with light teams, heavy teams avoiding it because, as it appeared, the road as worked was not wide enough for heavy teams meeting to pass each other, nor could a light team pass a heavy one.

Witness Brush, called by defendants, testified: "The new road was being traveled when it was closed up. Both roads were traveled. The new road would be traveled to-day if it was not closed up. At the time it was closed up the new road was traveled

a good deal." Two other of defendants' witnesses testified to the use made of this new road by the public before it was closed by defendants. Both of defendants testified about this new road. Mrs. Simmons testified that this new road was not opened when she bought the land, and that "it wasn't opened for use until after the earthquake. It was then used by buggies and small teams sometimes, small teams mostly, Mr. Meeker and his daughter, and his nephew who drove the stage and the like. All the teaming was on the county road." Mrs. Simmons did not deny being present when the survey of the east line was made along the center of this new road, nor did she deny that she agreed with plaintiff at that time to give half of the land. She did not deny, nor did her husband, that they built a fence along the west side of this road, and that it remained there until in October, 1907, when they moved it to the line called for in the deed. There is no substantial conflict with plaintiff's evidence which showed that Mrs. Simmons understood and that plaintiff intended this new road to mark her eastern boundary. This road was about a quarter of a mile long, commencing at the southeast corner of the tract, and intersecting the county road at the northeast corner, and would give defendants a road along the boundary line, thus avoiding a hill. It seems to us that the evidence without conflict shows conclusively that the parties by their acts and conduct treated the short piece of the county road and this new road as, and intended them to be, the true eastern boundary of the tract sold by plaintiff to defendant.

Mrs. Simmons testified: "When I bought the land, I told Mr. Meeker that I wanted 20 acres and improvements, no more and no less. After the land was surveyed, he told me the piece contained 24 acres and something. I told him I wanted 20 acres and improvements, that is what he agreed to give me, and I didn't want any more. He then said he would survey it so I should have the 20 acres. He told me he had just put stakes on the north side where the line would run, and we fenced it according to the stakes that he put in the ground." This statement is in entire harmony with plaintiff's testimony that he adjusted the acreage by cutting off a strip from the north side of the tract, leaving the eastern boundary unchanged, and Mrs. Simmons testified to nothing to the contrary. The only effect on the eastern boundary by this readjustment would be to shorten the last call in the deed on that eastern line a few feet, but would not otherwise change the courses and distances along the eastern boundary and would not affect the intention of the parties as to the location of this boundary.

Surveyor Winkler surveyed and computed the acreage of the land according to the calls in the deed, and found it to be "20

and a small fraction over." Using the proposed road and the county road as the east line, he found 19 acres and a fraction. Surveyor Green made the acreage, by following the calls of the deed, "a little short of 20 acres." These witnesses did not state the magnetic variation of the compass assumed by them. The deed fixes it at 18° east. Surveyor Symmonds testified: "There is no bearing on this ground that can be depended upon. No two surveyors can give you the same bearing on account of the magnetic troubles. The deed calls for a variation of 18° which is the medium. It is 17° above and 19° below." Assuming that the variation called for in the deed was observed by witnesses Winkler and Green, this testimony only goes to show that plaintiff took a little too wide a strip off the north end of the tract to reduce it to exactly 20 acres. It has no tendency to controvert the facts adduced as to the intention of the parties relative to the actual location of the east line. Defendants' remedy was not to take possession of this disputed strip which, we have seen, was not intended to be included in the deed; but her remedy was against plaintiff for damages or for specific performance. He had agreed, as Mrs. Simmons testified, and as plaintiff admitted, to deed her 20 acres. If he failed to do this, in readjusting the north line, she had her remedy; but it was not to take possession of land which the evidence satisfactorily and without substantial conflict shows was not intended to be conveyed to her.

The foregoing would seem to make it unnecessary to consider the provisions of the deed, but they are not without significance. The county road is a permanent monument along the center of which north is the call in the deed; but to follow the call north 30° 45' west the line leaves the county road before reaching the proposed road, "along the center" of which latter also the line was continued. It would be impossible, if the call "30° 45' west" is to govern, to follow along the center of the proposed road, and defendants would get the whole of the new road, although the deed calls for 20 acres "exclusive of the proposed road." Now the uncontradicted evidence is that this proposed road was staked off and located when the deed was made and has since been traveled and its then location and its location now remains unchanged. It also was a monument as was the county road. This proposed road is again referred to in the deed, where the acreage is fixed at 20 acres "exclusive of the proposed road." We may well believe that the parties fully understood what running along the center of these two roads meant when they saw the line run there, but did not understand that

"north 30° 45' west" meant something else. In the case of *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946, the call for the course was "thence down the said slough north 72° west, 61.50 chains, to a stake in a small slough, while it was alleged and found that, instead of north 72° west, the course should have been north 12° west." The court held that this merely showed that the defendant's claim was based on a harmless error of description, as the wrong course was controlled by the direction to go down the slough to a given point. Not less definite and controlling is the course here—along the center of the county road and the proposed road, "north 30° 45' west," when it should have been "north 33° 45' west."

We think appellant's contention is correct that the actual line of the survey, when it can be shown, is the highest proof of a boundary line, and that the next highest proof is that of monuments, natural or permanent objects, thereon definitely located, and that a call for courses and distances must give way to these latter. *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828. In the present case we think that the evidence brings the case clearly within both of these rules, and establishes the fact that the findings of the court favorable to defendants' contention are without support.

The judgment is reversed.

We concur: BURNETT, J.; HART, J.

10 Cal. App. 257
GONELLA v. SIMMONS et al. (Civ. 537.)
(Court of Appeal, Third District, California.
March 16, 1909.)

1. BOUNDARIES (§ 37*)—EVIDENCE—SUFFICIENCY.

In an action to recover possession of land, evidence held insufficient to support a finding that a certain fence was the dividing line between plaintiff's and defendant's land.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 184; Dec. Dig. § 37.*]

2. EJECTMENT (§ 13*)—TITLE TO MAINTAIN.

One having an equitable title, under which he entered into possession and made valuable improvements, was entitled to maintain an action against another who, without title, wrongfully ousted him.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 56; Dec. Dig. § 13.*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by E. Gonella against Emaline Simmons and another. Judgment for defendants, and plaintiff appeals. Reversed.

J. M. Thompson, for appellant. C. H. Pond, for respondents.

CHIPMAN, P. J. The action is to recover possession of certain land from defendants, who are alleged to have wrongfully entered

thereon and dispossessed plaintiff. Defendants had findings and judgment, after trial by the court without a jury, and plaintiff appeals from the judgment on bill of exceptions.

The question at issue is the true location of the dividing line between plaintiff's and defendants' land and the south boundary of defendants' land. It was agreed at the trial: That on November 4, 1904, M. C. Meeker, then the owner, conveyed by deed a certain tract of land—about 20 acres—to defendant Emaline Simmons; that shortly afterwards Meeker made an oral agreement to convey to plaintiff a tract of about 14 acres adjoining her land on the south; that plaintiff made a partial payment to Meeker and was by the latter put in possession of the land and remained in possession until January 14, 1908, when defendants entered upon the strip of land in controversy and ousted plaintiff therefrom and now hold possession thereof. This strip of land contains about one acre. The question involved relates to the true location of the south boundary of defendants' land as conveyed to defendant Emaline Simmons, and this boundary line depends upon the location of the initial point in the description found in the Meeker deed to Simmons. The deed is the same brought into view in No. 536, entitled *Meeker v. Simmons* (this day decided) 101 Pac. 683. It reads: "Beginning at a stake which bears south $50\frac{1}{2}^\circ$ west of a stake situated under the center of the railroad bridge, said bridge being the crossing of the North Shore Railroad and the county road leading from Occidental to Camp Meeker, and 1.94 chains distant." The description then, as we have held, follows along the center of the county road (which, at the distance mentioned from the center of the railroad bridge, was the initial point of the description) and the center of the proposed road, to the northeast corner of the tract, thence along the north boundary to a section line, thence along the section line for the west boundary to the center of a county road, and thence down said road to the southwest corner of the tract, and for the south boundary, now in question, reading as follows: "Thence leaving said road, south $88\frac{1}{4}^\circ$ east, 19.60 chains, to the place of beginning."

The Simmons tract was originally surveyed, and the lines run around it by Surveyor Symmonds, and the starting point was located 128 feet (1.94 chains) distant from the center of the bridge referred to, which beginning point bears $50\frac{1}{2}^\circ$ west of the center of said bridge. To find this starting point conformably to the Simmons deed, the surveyor must place his instrument at the center of the bridge in order to find the direction south $50\frac{1}{2}^\circ$ west which would bring him to the point of beginning at a distance of 128 feet. The deed leaves no doubt or uncertainty as to this. Symmonds testified that he so located the point of beginning, and that he gave the field notes to Meeker from which the

deed was made. He testified: "In making this survey I ran the line between the premises of plaintiff and the land of defendants. Some of the line was brushy and had to be cut out along the line. I was along the line afterwards and saw a fence standing on the line I surveyed between the parties. A few weeks ago I was there again, and the fence running from the east side had been moved south from where it had originally been built. I made only the one survey of this piece of land. Mrs. Simmons and her son were present with us nearly all the day when I surveyed it. I made the survey at the request of Mr. Meeker. This survey was made from the center of the railroad bridge. * * * The south line of the survey was between the land of the defendants and plaintiff Gonella. The fence I saw there was built on the line that I surveyed and was in a direct line with the point of beginning where I drove a stake in the ground. I drove that stake myself. After the first survey was made, I surveyed a great deal around there, and I fixed the starting point in the middle of the county road under the bridge. That wasn't the center of the bridge by any means, and since that time we use the last-named point in making surveys near that place."

M. C. Meeker, grantor of the parties, testified to like effect. He was present when the survey was made. Speaking of the south line of defendants' land, he testified: "When the line was surveyed, we cut away the brush along the line, and it was plain to be seen. The line fence built by the parties remained for two years or more. This last winter the defendants had part of it taken down and set further south, and on the land that I say is the land of the plaintiff. The defendants also broke down some chicken houses, and split up the lumber and scattered some grain belonging to plaintiff which was in one of the houses. The south line of the defendants' land where the fence was first built was in a direct line with the starting point of the survey. The stake at the starting point was in the center of the road, and the fence was built to the west side of the road."

Witness Proctor for plaintiff testified that he built the railroad bridge referred to in the Simmons deed, that the county road runs under the bridge at about 16 feet from its south end, and that the bridge is 80 feet long.

Plaintiff testified: "I saw a stake driven in the ground in the center of the county road, a little post, where they surveyed the line between my land and the defendants'. The line fence we built was directly in line with this stake. The fence was built to the west side of the road, and within 20 feet of the stake. The fence comes to the west side of the county road. If the fence had been extended, it would have hit the stake. I saw the surveyor drive this stake. The line fence built by the defendants and me remained for about two years, and then the defendants tore it down and removed it 200 feet or more.

* * * The surveyor was Mr. Symmonds. I don't know whether it was the first time or not. [As Symmonds drove but one stake at this point, the witness could have referred to no other.] The line fence which was agreed upon between the defendants and me was at the same place pointed out by Mr. Meeker. It was pointed out by Mr. Meeker and agreed to by Mrs. Simmons. Mrs. Simmons agreed to pay one-half for building the fence. * * * She told me to build the fence, and she would pay for half of it, * * * and we agreed that I would build the fence and she would pay half of it."

Surveyor Winkler testified for defendants: That he surveyed the defendants' tract of land "a few months" prior to the trial, which was in April, 1908; that he got the description from the deed; that the first time he surveyed it "more or less according to what" Mr. Meeker told him. He testified: "I afterwards made a survey of the south and east sides, using the deed for my notes. * * * I began my survey at a point under the bridge, where the wagon road crosses under the railroad bridge." Surveyor Green made a survey of defendants' land and testified for defendants: "I surveyed it on the line according to the deed. * * * I made the survey last Saturday and made a map of it. I started my survey at a stake in the center of the county road under the bridge. It is the center of the railroad bridge to the best of my judgment. It is in the center of the railroad track underneath the center of the bridge, on the county road. Q. You mean you started in the center of the county road? A. Yes, and in the center of the railroad bridge. Q. So far as its width is concerned and not its length, that is what you mean? A. Yes, sir. Q. Well, that would not be in the center of the railroad bridge? A. I think that is the way the deed reads, if I am not mistaken. Q. If the railroad bridge is 80 feet in length, and you started within 16 feet of the south end, that would not be in the center, would it? A. No, sir; if you call the railroad bridge that way it would not be. Q. If you had commenced, we will say, 20 feet further north under the bridge, it would have brought your starting point about 20 feet further to the north, wouldn't it? A. I could not do that, because the county road doesn't go up there, and I have to start in the center of the county road. Q. Now, I will ask you again, if you did start 20 feet further north than where you did, then your peg, your starting point, would have been about 20 feet further north from the peg where you really started, wouldn't it? A. Yes, I guess it would, if I had started there, certainly, but I could not get 50½' from the center of that road if I started further north."

Defendant H. O. Simmons testified: "The east end of the line fence was built from the

county road west to the orchard some 200 feet. The remainder of the fence Gonella built, and we paid him for half of it. * * *

The line of survey where we built the fence was plain to be seen. They had cut away the brush so as to make the survey. But a different survey was made afterwards.

* * * The fence was built along the line where the brush had been cut away. There was no dispute between Mr. Gonella and myself about the division line, everything was pleasant. The Court: You both thought that it was the correct line? A. Yes, sir; we did honestly." Defendant Emaline Simmons testified that she "never made any agreement with Mr. Gonella as to the line between his land and mine. He put the fence where Mr. Meeker laid the line out. There was no agreement whatever. * * * The first part of the fence, next to the road, had been built for a year before there was any work done. I asked him if that fence was on the line, and, when he said it was, we went ahead with the fence together."

This is substantially all the evidence in the case. Except that defendants testified that there was no agreement between plaintiff and defendants that the dividing line should be where the fence was first built, there is no conflict in the testimony. The boundaries of defendants' land were established by Surveyor Symmonds, and the fence was put on the south boundary surveyed by him. Upon this point there is no disagreement, nor is there any dispute that all parties assumed the south boundary to be correct. The uncontradicted testimony of Symmonds and Meeker shows that the line was located agreeably to that survey. The whole controversy arose from surveys made by Winkler and Green after the parties had acted upon what defendants now claim was a mutual mistake, and after Meeker had sold the land to plaintiff. Turning to Winkler's and Green's testimony: Winkler's testimony is very brief, but it appears that he began his survey "at a point under the bridge, where the wagon road crosses under the railroad bridge." He does not say at what point "under the bridge" he started, except that it was "where the wagon road crosses." He does not pretend that he started at a point "under the center of the railroad bridge," which the deed calls for. Winkler's testimony may be dismissed as too uncertain and indefinite and fragmentary to throw any light upon the question. Green is more specific. He started in the center of the county road under the center of the railroad bridge as he considered the center of the bridge, but he admitted that this center was "so far as its width is concerned and not its length." The testimony of Proctor is that the county road "runs under the bridge at about 16 feet from its south end." The bridge (which is located nearly north and south) is 80 feet in length,

and its center called for in the deed is at a point 40 feet from each end. This was the point from which Symmonds established his initial stake in the center of the county road 1.94 chains distant which bore $50\frac{1}{2}^\circ$ west, and this was the survey which furnished the description for the deed from Meeker to Mrs. Simmons, and it was by this survey the south boundary of the land of defendants was established, and on this line the fence between plaintiff's and defendants' land was first built. It appeared that later, in making other surveys in that region, Symmonds started from the center of the county road under the bridge, as did Winkler and Green in their later survey of defendants' land; but it is admitted that the Simmons deed must control, and that deed unmistakably refers to a point "under the center of the railroad bridge," and is absolutely controlling. In starting, as Winkler and Green did, at a point south of this center, which they had no right to do, it necessarily cut off a strip of plaintiff's land as wide as that distance and tapering, as it does, to a point at the southwest corner of Mrs. Simmons' land to which point the parties had built their fence.

It was stipulated that plaintiff had a contract for the purchase of the land adjoining defendants' land on the south. Their south boundary, as established by the Symmonds survey as described in their deed, is plaintiff's north boundary. The finding of the court that this disputed strip of land belongs to defendants is without support in the evidence as is also the finding that the fence erected by defendants "and as now standing marks the dividing line between the lands of the plaintiff and the defendants herein."

Respondent makes the point that, as plaintiff had no complete title and only an agreement to purchase, he cannot maintain the action as against one holding title; but we have seen that defendants have no title to the land in dispute, while plaintiff has an equitable title under which he entered into possession and made valuable improvements. It is this possession from which defendants wrongfully ousted him that he now seeks. We see no reason why he should not do so. The judgment is reversed.

We concur: BURNETT, J.; HART, J.

10 Cal. App. 241

McCORMICK-ORMAND CO. v. NOFZIGER BROS. LUMBER CO. (Civ. 565.)

(Court of Appeal, Second District, California. March 16, 1909.)

1. MONEY RECEIVED (§ 4*)—NATURE OF RIGHT TO MONEY.

An action for money had and received is not supported by a finding that L. sold notes and mortgages to defendant, who agreed to pay

\$400 of the purchase price to plaintiff's assignor, plaintiff's right not being by virtue of defendant having received something as money, which ex æquo et bono it ought to pay over to plaintiff's assignor by reason of its agreement to pay.

[Ed. Note.—For other cases, see Money Received, Dec. Dig. § 4.*]

2. JUDGMENT (§ 255*)—SUPPORT—FINDINGS OUTSIDE ISSUES.

Findings of fact outside the issues afford no support for a judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 445; Dec. Dig. § 255.*]

3. LIMITATION OF ACTIONS (§ 151*)—ACKNOWLEDGMENT.

A written acknowledgment of obligation in a certain sum given plaintiff by defendant after the statute was set in motion extends the period of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 616; Dec. Dig. § 151.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by the McCormick-Ormand Company against the Nofziger Bros. Lumber Company. Judgment for plaintiff. Defendant appeals. Reversed.

W. W. Middlecoff and Horace S. Wilson, for appellant. F. G. Hall, for respondent.

SHAW, J. Action in form for money had and received. Judgment passed for plaintiff, from which, and an order denying its motion for a new trial, defendant prosecutes this appeal.

It is alleged in the complaint that on or about July 1, 1904, the defendant received the sum of \$400 from the Lynn-Lewis Company, a corporation, to and for the use of plaintiff. This allegation is put in issue by specific denial contained in the answer.

Appellant, among other assignments of error, contends that the court not only failed to find upon this issue, but also insists that certain of the findings, without which the judgment has no support, are outside the issues. We are inclined to recognize both contentions as being correct. The finding of the court necessary to a consideration of the question is, in effect, that Lynn-Lewis Company, plaintiff's assignor, and the defendant, entered into a tripartite agreement whereby the former should sell and transfer to the defendant certain notes and mortgages then owned by the Lynn-Lewis Company; that, as a part of the consideration for such transfer and assignment, defendant promised and agreed with the Lynn-Lewis Company and plaintiff's assignor that it would pay to such assignor the sum of \$400, to be applied on certain indebtedness due to it from said Lynn-Lewis Company; that pursuant to said contract and agreement Lynn-Lewis Company did transfer and assign said notes and mortgages to a certain bank in accordance with a request made by defendant, who indorsed and guaranteed payment of the same; that plaintiff

demand payment, but defendant has failed to pay said sum or any part thereof.

The action is predicated upon the theory that defendant had received money or property as, and presumably converted into, money which in fact belonged to plaintiff (2 Ency. of Plead. & Prac. 1016; Kreutz v. Livingston, 15 Cal. 344; Ehrman v. Rosenthal, 117 Cal. 491, 49 Pac. 460; Tutt v. Ide, 3 Blatch. 249, Fed. Cas. No. 14,275b), and as to the ownership of which defendant never at any time had any interest therein. There is absolutely nothing in this finding which in the slightest way indicates that plaintiff had any interest in the notes, or in the proceeds thereof; and hence it does not support the allegation of the complaint as to which issue is joined. The finding, in effect, shows that Lynn-Lewis Company sold, transferred, and assigned the entire interest in the notes and mortgages to defendant, who, with reference to the consideration, agreed that it would pay a part of the purchase money therefor, to wit, the sum of \$400, to plaintiff's assignor. It thus clearly appears that whatever rights plaintiff had were not by virtue of defendant having received something as money, which, *ex æquo et bono*, it ought to refund and pay over to plaintiff, but by reason of an executory promise and agreement on the part of defendant, independently and regardless of the collection of the notes, to pay a part of the consideration for the purchase of these notes and mortgages to plaintiff's assignor. But the action is not founded upon such agreement, and hence there is no basis in the pleadings for such finding. The rule that findings of fact when material must be within the issues is too well settled to require citation of authorities. Being outside the issues, such finding must be disregarded so far as affording any aid in sustaining a judgment rendered thereon. *Gamache v. School District*, 133 Cal. 145, 65 Pac. 301.

Appellant also contends the action is barred by the statute of limitations. The court found to the contrary. The record does not disclose the date of the transfer of the notes other than that the transaction occurred in the month of June, 1904. It does, however, show that defendant converted them to its own use in July, 1904, and that on June 6, 1906, defendant in writing acknowledged its obligation in the sum of \$400 to plaintiff. Conceding the statute was set in motion by such act of conversion, rather than at the date of the payment of the notes, we are nevertheless of opinion upon this record that the written acknowledgment of the obligation received in evidence fully supports the finding of the court in this respect. *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40.

We deem it unnecessary to discuss other points made by appellant.

The judgment and order are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 227

ROOKER v. SAMUELS et al. (Civ. 583.)

(Court of Appeal, First District, California. March 15, 1909. Rehearing Denied May 10, 1909; Denied by Supreme Court May 13, 1909.)

1. BILLS AND NOTES (§ 517*)—SIGNATURE—SUFFICIENCY OF EVIDENCE.

In an action on a note, evidence held to show that it was executed by the party whose signature was attached thereto.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1807; Dec. Dig. § 517.*]

2. WITNESSES (§ 149*)—COMPETENCY—TRANSACTIONS WITH DECEDENT.

In an action against an executor on a note executed by his decedent, an instruction that plaintiff could not testify as to any fact occurring before the death of decedent was proper, being substantially in the language of Code Civ. Proc. § 1880.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 652; Dec. Dig. § 149.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by A. F. Rooker against Leon Samuels, as executor, and another. From an order denying a motion for new trial, defendant Samuels appeals. Affirmed.

R. F. Mogan, for appellant. Roger Johnson, for respondent Rooker. G. S. Switzer and Wm. H. Chapman, for respondent Switzer.

KERRIGAN, J. This is an appeal from an order denying defendant Samuels' motion for a new trial. The action was brought on a joint and several promissory note of William Hellier and G. S. Switzer for \$5,000, made July 10, 1899, payable 18 months after date, with interest at 7 per cent. per annum. A credit of \$300 is indorsed on the back of the note as of June 23, 1904. Hellier died about October 1, 1904, and the defendant Samuels is the executor of his estate. The jury returned a verdict for the full amount alleged to be due.

Appellant (defendant Samuels) contends that the evidence is insufficient to support the verdict of the jury that the note in question was executed by William Hellier. George E. Eaton testified: "I had known Hellier about 10 years before his death. I have had business transactions with him. I have seen him write. I have received checks and receipts signed by him, and I am familiar with his handwriting." The witness further testified that the name "Wm. Hellier" signed to the note in question was in Hellier's handwriting; that the name "G. S. Switzer" was not in the handwriting of G. S. Switzer, but in the handwriting of Hellier. The witness

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

also testified to having heard a conversation between plaintiff and Hellier in Stockton in May or June of 1904, when plaintiff asked Hellier to pay the note, and Hellier replied that he was "hard up" and had met some losses, that he did not know that he could pay it then, but would do so as soon as he could. J. M. Mauser testified that he was assistant paying teller in the Crocker-Woolworth Bank (with which bank Hellier had dealt); that the signature on the note was in Hellier's handwriting. From this brief narration of the record it is clear that the verdict of the jury is abundantly supported by the evidence.

Appellant next contends that the court erred in instructing the jury that the plaintiff could not testify as to any fact that occurred before the death of the deceased. The argument in support of this contention is that it excused the failure of the plaintiff to offer himself as a witness, and that it was thus made to appear to the jury that, if the law permitted it, the plaintiff would have taken the stand and testified. A sufficient answer to appellant's position is that the instruction is substantially in the language of section 1880 of the Code of Civil Procedure, which reads: "The following persons cannot be witnesses: * * * (3) Parties * * * to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

We have examined other points raised by appellant, but deem them without substantial merit.

The order appealed from is affirmed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 267

VIERA v. ATCHISON, T. & S. F. RY. CO.
(Civ. 553.)

(Court of Appeal, First District, California.
March 17, 1909. Rehearing Denied by
Supreme Court May 13, 1909.)

1. RAILROADS (§ 482*)—FIRES—EVIDENCE.

Evidence in an action against a railroad company for a fire held to authorize a finding that the fire was set by sparks from the engine falling on combustibles allowed to collect on the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.*]

2. RAILROADS (§ 480*)—FIRES—NEGLIGENCE.

Negligence may be inferred from sparks being allowed to escape from a locomotive in full blast, and dry grass being allowed on the right of way on which the sparks could fall and kindle a fire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1709-1714; Dec. Dig. § 480.*]

3. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS FOR MORE SPECIFICNESS.

An instruction being correct as far as it goes, a party in order to complain of it for not being more specific and particular as to some particular theory must have requested the further instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

Appeal from Superior Court, Contra Costa County; Wm. S. Wells, Judge.

Action by Manuel Viera against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

E. W. Camp, U. T. Clotfelter, and A. H. Van Colt, for appellant. W. S. Tinning, for respondent.

COOPER, P. J. Plaintiff brought this action to recover the value of 74 cords of stove wood alleged to have been destroyed by fire on the 10th day of June, 1904; it being claimed that said fire originated from sparks escaping from defendant's engine, and, falling upon the dry grass on its right of way, causing the grass to ignite; that the flames extended to and burned the grass upon plaintiff's adjoining land, thus setting fire to and burning the stove wood. It is alleged that the fire was caused by defendant's negligence in allowing dry grass and combustible materials to accumulate upon its right of way, and in allowing burning particles or sparks to escape and fall from its engine upon the said dry grass and set fire to it. The jury, after hearing the evidence, returned a verdict for plaintiff in the sum of \$481, which judgment was duly entered. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and the order denying such motion.

There is no dispute as to the facts that a fire occurred, that the plaintiff's stove wood was burned and destroyed, and that its value was \$481. The main contention of the defendant is that the evidence is insufficient to sustain the verdict. We conclude, after a careful examination, that there is sufficient evidence to support the verdict. The jury had the right, not only to believe all the evidence tending to support the verdict, but to draw all reasonable inferences therefrom. There was evidence tending to show that the fire was first seen burning on defendant's right of way, or on plaintiff's land just south of the right of way, almost immediately or only a few moments after defendant's engine and train had passed; that the fire appeared to have burned the grass on the south side of the right of way, and was being driven by a strong northwesterly wind making its way rapidly southward; that no one had been at or near the immediate spot where the fire appeared to have started on the morning it occurred; that sparks had often been

seen escaping from the smokestacks of defendant's engines as trains were passing. No one saw the fire from the engine fall to the earth and kindle the grass into a blaze. We apprehend that there are few cases of damage caused by a defendant's negligence in setting fire, or allowing it to escape, in which any one actually saw the fire at the moment it escaped, or the place when it first started. It was the duty of the jurors to ascertain the truth as to every fact in issue, and from experience and common knowledge to make reasonable inferences from such fact or facts. The burden was upon plaintiff to prove that the fire was caused by defendant, that it was also due to defendant's negligence, but such proof need only be by a preponderance of evidence, and such as to satisfy and produce conviction in an unprejudiced mind. The law does not require demonstration or absolute certainty because such proof is rarely possible. Moral certainty only is required. We must call in aid of the verdict all deductions which the jury could make from the facts proved. Nearly all cases are determined on the reasonable probability of the fact being as found. Human laws and institutions are not perfect, and with the most careful vigilance of the judge, and the most conscientious discharge of their duty by 12 men duly sworn, the final result in most cases is but an approximation. In the present case it has not been demonstrated beyond doubt that the fire was caused by sparks escaping from defendant's engine, but a fire did occur, and originated on or near defendant's right of way, on which was a large quantity of dry grass. It was seen almost immediately after defendant's engine had passed. Plaintiff's property was destroyed. The reasonable probability that the fire was caused by sparks from defendant's passing engine has been determined by the agreement of 12 men. This is one of the methods the law has provided for the settlement of questions of fact, and we cannot set aside the verdict of the jury when supported by such evidence as herein indicated. It is true that the evidence of the defendant showed that the engine was an oil burner in first-class condition. Two engineers of defendant testified that they had never known of sparks escaping from an oil-burning engine and setting fire to grass on the road. But, as we have said, the evidence is sufficient to justify the jury in finding that the fire was caused by defendant's passing engine. To allow sparks to escape from an engine in full blast, and to allow dry grass on its right of way on which the sparks could fall and kindle the fire, are sufficient facts from which to infer negligence, and to overcome evidence as to the engine being a first-class, properly equipped engine, with proper apparatus to prevent the escape of sparks.

It is claimed that the court erred in modifying instruction No. 13 by inserting the

words "one or" after the word "in" and before the word "both." We have examined the instruction at the folio cited, and there is nothing to show that it was modified, or that it was ever offered in words different from those in which it was given. In fact, it does not appear at whose request the instruction was given.

Objection is further made to instructions numbered 8 and 9, and such objection goes to the point that, after the court had called the attention of the jury to the law, if the jury found certain stated facts, they should find for the plaintiff unless they should find "that plaintiff's own negligence" contributed to the spreading of the fire to plaintiff's land. It is claimed that the instruction as to contributory negligence on the part of the plaintiff should have included his "agents or employes." It is sufficient to say that the instruction was correct as far as it went; and, if the facts were such as to justify a further specific mention of the agents or employes of the plaintiff, the defendant should have requested such instruction. Objection cannot be made here for the first time that a certain instruction, which was correct in general, should have been more explicit and specific as to some particular theory claimed by one of the parties.

We find no error in the case, and the judgment and order are affirmed.

We concur: HALL, J.; KERRIGAN, J.

10 Cal. App. 229

OTIS ELEVATOR CO. v. BRAINERD.
(Civ. 605.)

(Court of Appeal, Second District, California.
March 16, 1909.)

1. MECHANICS' LIENS (§ 132*)—RIGHT TO LIEN—NOTICE TO PREVENT LIEN—PREMATURE FILING.

Where the installation and construction of an elevator in a building which was a prerequisite to the completion of the building was not substantially completed, nor by either the builder or the owner deemed completed at the time the owner filed notice of completion, the filing of the notice was premature, and afforded the owner no protection as to limiting the time for filing claims of mechanics' liens for work done on the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 195-199; Dec. Dig. § 132.*]

2. MECHANICS' LIENS (§ 134*)—STATEMENT OF CLAIM—SUFFICIENCY.

Claim of mechanic's lien by contractor installing elevator in a building held to contain a true statement of the terms, time given, and conditions of the contract.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 134.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Otis Elevator Company against E. R. Brainerd to foreclose a me-

chanic's lien. From a judgment for plaintiff, defendant appeals. Affirmed.

Scarborough & Bowen, for appellant. Jones & Weller, for respondent.

ALLEN, P. J. Appeal by defendant from a judgment and an order denying a new trial. The trial court finds: That the defendant entered into a valid contract with Graham & Eaton for the construction of a building according to certain plans and specifications. Plaintiff as subcontractor entered into a contract with the original contractor for the installation of an elevator and engine according to such plans and specifications, and was to be paid for as follows: One-half on delivery of engine, one-fourth on the completion and acceptance of said elevator, one-fourth 35 days after completion and acceptance thereof. That plaintiff furnished all materials and labor and completed the installation of said elevator and engine on or about December 15, 1905. Defendants Graham & Eaton paid all the contract price except the 35-day payment, which remained unpaid. That within 90 days after completion of the building plaintiff regularly filed its notice of lien as required by the statute. That no notice of completion after actual completion was ever filed and recorded by the owner. That, when said notice of lien was filed, the defendant had in his hands a sum applicable to the payment of liens more than sufficient to liquidate plaintiff's claim. A decree of foreclosure was accordingly entered by the court.

There can be no question but that the findings in the record support the judgment. The only matter to be considered is as to the correctness of the findings. It is in evidence that a notice of completion was filed and recorded by the owner on October 28, 1905. It is also in evidence: That the installation of the elevator in accordance with the specifications was a prerequisite to the completion of the building. That, when said notice was filed, the open front of the elevator hatchway with the doors, styled "the grille," as well as the annunciator, had not been put in the basement floor, and without which grille it was unlawful under the ordinances of the city to operate the elevator. That the delay in completing the elevator in this regard was occasioned by the action of the architect of defendant, who requested plaintiff to omit such grille work in the basement until an opportunity was afforded to confer with the city officials as to the character of grille work necessary to satisfy an ordinance of the city. By reason of this request, the grille work for the basement was not ordered by the agent of plaintiff at the time that he ordered the other materials. Nothing further was said between the parties about this grille work, "except that plaintiff was to finish the elevator as originally intended." The work connected with the grille in the basement

would require the work of two men two days, and would cost \$75 to \$80. The cost or time required to put in place the annunciator, which could not be placed or the wiring done until after the grille work was completed, is not made to appear. The architect testifies that, when the elevator was completed he inspected it and notified plaintiff that it was all right. This was done the latter part of December, 1905. The contract provided for completion payment upon acceptance, and this completion payment is shown to have been made after December 11, 1905. That, before the elevator was completed, the owner desired to occupy the building and use the elevator, and the agent of plaintiff said it would be all right with him to use it before completion, if the city authorities would consent. That the elevator inspector, while it was illegal, gave a special permit to use the elevator pending its completion. The occupation of the building by the owner is shown to have been by permission, rather than under a claim of completion. The agreement between the plaintiff's agent and the architect-agent of defendant clearly demonstrated that the incomplete character of the structure was conceded by all parties when the owner assumed control. To say that the occupation by the owner was notice of completion in the face of the contract between plaintiff and the contractor which provided that the completion payment should not be made until acceptance which acceptance is clearly shown to have been refused until December, and that such occupancy was by express consent of plaintiff subject to its right to proceed with the completion, would be to say that there was no time within which plaintiff could assert a lien. It is thus to be seen that there was evidence tending to show that the work of construction under the contract was not substantially completed, nor by either party deemed completed, at the time of filing and recording of the notice of completion. Hence the same was premature, and afforded defendant no protection as to limiting the time for filing claims of lien, and sustains the finding of the court to the effect that after completion no notice was filed.

Appellant contends that the claim of lien filed by plaintiff was void because, under the evidence, it was shown that it did not contain a true statement of the terms, time given, and conditions of the contract. The claim that the contract for installation of an elevator of necessity included the work of excavation preliminary thereto, which was performed by the original contractor, is without merit. Neither will the lien be held void because in the contract between plaintiff and the contractor no specific mention is made of grille work in the basement, while the same was provided for in the original contract. The contract of plaintiff provided that it was to furnish all enclosures. It affirmatively appears that this grille work in the basement was included therein and form-

ed a material and necessary part of the enclosure and installation, and the contract was so construed by all parties. The fact appearing that the delay in completion was the fault of the owner by reason of his agent's acts and representations is a factor to be considered when defendant urges that the delay may have occasioned a loss to the owner by reason of which the work remaining to be done after October should be deemed trivial imperfections. If any loss occurred by reason of the delay, it was clearly shown to be occasioned by the owner's authorized agent and not by the plaintiff. We find no material difference between the terms of payment as stated in the contract and the claim of lien, and the statute was complied with as to the statements required in such notice.

The other findings having support from the evidence, it is unnecessary to determine whether or not the finding of the court with reference to the amount remaining unpaid in the hands of the owner was an accurate statement. The lien claimant was entitled to have the 35-day payment, which was far in excess of its claim, retained; nor could the same be paid by the owner to the prejudice of a valid lien claimant, and such finding is not necessary in support of the judgment.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 234

PEOPLE v. CASSELMAN. (Cr. 113.)

(Court of Appeal, Second District, California. March 16, 1909. Rehearing Denied by Supreme Court May 13, 1909.)

1. CRIMINAL LAW (§ 1144*)—APPEAL—CHANGE OF JUDGES—PRESUMPTION.

In the absence of a showing to the contrary, changes of trial judges during the trial of a criminal prosecution not affecting the court, but only its personnel, will be presumed to have been made for good and sufficient reasons, and to have been assented to by defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3020; Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 1163*)—APPEAL AND ERROR—PRESUMPTIONS AS TO PREJUDICE—EXAMINATION OF WITNESSES.

After a witness for defendant in a criminal prosecution had been cross-examined and counsel for defendant on redirect-examination said, "I shall ask you, Mrs. D.," the court interrupted, "No; Mr. B., please don't. That is all, Mrs. D.," whereupon the witness left the stand. *Held*, that in the absence of a showing that no offer was made to prove some fact in issue by further examination of the witness, or that substantial rights of defendant were prejudiced by the interruption, it would be presumed on appeal that defendant was not prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3092, 3095; Dec. Dig. § 1163.*]

3. CRIMINAL LAW (§ 1134*)—APPEAL AND ERROR—REVIEW—CONDUCT OF TRIAL.

The degree of courtesy to be exercised between court and counsel is not a subject for

judicial review, unless it appears that defendant's case is prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2986, 2989; Dec. Dig. § 1134.*]

4. CRIMINAL LAW (§ 1166½*)—HARMLESS ERROR—EXAMINATION OF WITNESSES.

In ruling on an objection by defendant in a criminal prosecution to a question asked on cross-examination of her foster father inquiring how defendant made her money, the court said: "I think, this being the foster father, he would be apt to know as much as anybody." *Held* that, where the answer of the witness was favorable to defendant, her rights could not have been prejudiced by the ruling, though the effect of the court's statement might be calculated to influence the jury as to the weight to be accorded the answer of the witness, so that, if the answer had been adverse to defendant, the remark might have been prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.*]

5. CRIMINAL LAW (§ 674*) — RECEPTION OF EVIDENCE—EXCLUSION OF IMPROPER EVIDENCE OF OTHER OFFENSES.

In a prosecution for forgery, defendant introduced a letter written by the district attorney to a handwriting expert, which tended to prove that, on a former occasion, defendant had pleaded guilty to forgery. The district attorney made no reference to the former conviction, and disclaimed any intention of doing so. Under these circumstances, and in the absence of evidence that defendant was then on probation or any evidence of her former conviction other than that contained in the district attorney's letter, she was asked how she came to be on probation, to which she answered, "Because I pleaded guilty to a charge," whereupon the court interrupted, saying: "That is foreign to this proposition entirely." *Held*, that the ruling of the court was correct in view of the position taken by the district attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1603; Dec. Dig. § 674.*]

6. CRIMINAL LAW (§ 675*)—CUMULATIVE EVIDENCE.

After contradiction by a witness for the state of a fact testified to by a witness for the defense, refusal to permit the defendant's witness to repeat her testimony was not prejudicial, as such repetition would not have strengthened such testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 850; Dec. Dig. § 675.*]

7. CRIMINAL LAW (§ 1137*)—ESTOPPEL TO ALLEGE ERROR—REQUESTED INSTRUCTIONS GIVEN.

Defendant in a criminal prosecution cannot complain of an erroneous instruction given at her request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3009; Dec. Dig. § 1137.*]

8. CRIMINAL LAW (§ 1141*)—APPEAL—PRESUMPTIONS AS TO CAUSE OF ERROR—REQUESTED INSTRUCTIONS.

Where defendant in a criminal prosecution complained of the giving of an erroneous instruction, it devolves upon her to show affirmatively that the instruction was not given at her request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3015; Dec. Dig. § 1141.*]

9. CRIMINAL LAW (§ 836*)—REQUEST FOR INSTRUCTIONS—INDORSEMENTS—SUFFICIENCY.

Where all the instructions requested by defendant were embodied in one statement, and

the trial judge under each of the instructions given wrote "Given," and immediately following the instructions refused wrote "Stricken out by the court," the court clearly distinguished what part of the requested charge was given and what part was refused, as required by Pen. Code, § 1127.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2019; Dec. Dig. § 836.*]

10. CRIMINAL LAW (§ 836*)—REQUESTS FOR INSTRUCTIONS—INDORSEMENTS BY COURT.

Where the charge requested consists of a number of instructions embodied in one statement, and the judge indorses a part as "Given," together with his signature thereto, and indorses another part as, "Stricken out by the court," without his signature, the indorsement is a sufficient compliance with Pen. Code, § 1127, requiring the court to indorse and sign its decision upon each charge presented and given or refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2019; Dec. Dig. § 836.*]

11. CRIMINAL LAW (§ 676*)—TRIAL—NUMBER OF WITNESSES—DISCRETION OF COURT.

The number of witnesses who may be called upon a single question rests within the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.*]

12. CRIMINAL LAW (§ 676*)—TRIAL—NUMBER OF WITNESSES.

Fixing the number of witnesses upon the question of the character of a witness for the state in a criminal prosecution at seven on each side was not an unreasonable limitation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.*]

13. CRIMINAL LAW (§ 1036*)—APPEAL—PRESENTATION OF MATTERS BELOW — LIMITING NUMBER OF WITNESSES.

Where defendant did not show in the trial court that she was prejudiced by a ruling limiting the number of witnesses on a certain question to seven on each side made after defendant had introduced three witnesses, her objections will be deemed to have been waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2639; Dec. Dig. § 1036.*]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Ruby Casselman was convicted of forgery, and appeals. Affirmed.

Earl Rogers, P. W. Schenck, and W. H. Dehm, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Upon trial in the superior court of Los Angeles county the defendant was convicted of the crime of forgery. She prosecutes this appeal from the judgment rendered upon such conviction, and also from an order of court denying her motion for a new trial.

The forged document was a check purporting to be drawn upon, and by the defendant presented for payment to, the First National Bank of Los Angeles. The trial commenced on April 16, 1908, before the late Hon. B. N. Smith presiding as judge. On April 18, 1908, Hon. Walter Bordwell, presiding as judge, the trial of the case was by consent of all

parties continued to April 22, 1908, on which last-mentioned date the trial proceeded before Judge Smith as judge presiding until April 25, 1908, when Judge Bordwell sat as presiding judge, on which occasion the closing arguments were made and the case submitted to the jury, which brought in a verdict of guilty as charged. On April 29, 1908, before Hon. W. P. James presiding as judge, H. H. Appel was associated with counsel for defendant, and the passing of sentence was continued to May 9, 1908, and on said last-mentioned date again continued, at defendant's request, to May 23, 1908, at which time Hon. Curtis D. Wilbur, judge presiding, another firm of attorneys were, on defendant's motion, associated with her counsel, and a stipulation made that the reporter's transcript of the testimony should be used on motion for a new trial as a correct statement thereof, as well as of the rulings of the court and exceptions taken thereto. On May 29, 1908, Judge Wilbur presiding, defendant's motion for a new trial came on for hearing, at which time some of defendant's counsel proceeded to present said motion, when other of defendant's counsel stated to the court that they did not desire to participate in said motion for a new trial, whereupon the judge presiding asked defendant whom she desired to represent her in the proceeding. Defendant in open court stated that she did not wish the attorney who was presenting the motion to represent her and had requested that he not appear again in her behalf, but that she did desire Messrs. Variel & Barber, who had theretofore been associated as her counsel and who were then in court, to represent her interest. The court then stated to her former counsel that he was discharged, whereupon her attorney, Mr. Variel, stated that defendant did not desire to present her motion for a new trial, and thereupon the court denied said motion. On June 19, 1908, the defendant's application for probation theretofore made was denied; the judgment of the court being that defendant be punished by imprisonment for a term of seven years. On June 29, 1908, the Honorable W. H. Jamison presiding as judge, a substitution of attorneys was had, whereby Mr. Earl Rogers was substituted as attorney for defendant, at which time notice of appeal was filed and 30 days' time granted to defendant within which to present her proposed bill of exceptions. Thereafter a bill of exceptions was by the Honorable W. H. Jamison as judge duly settled and allowed. While appellant does not attempt to point out or designate any particular steps in the proceedings, the history of which we have set forth, as constituting error, her counsel nevertheless claim the result of these several judges presiding at different stages of the trial was in itself prejudicial to defendant. Such change in the bench did not change the court which undoubtedly had ju-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

risdiction of the case. In the absence of any showing to the contrary, we must presume that this change in its personnel was for good and sufficient reasons. Upon like grounds we must presume that defendant assented to such change. Hence, not having objected, even if there was error, and upon the record we are unable to perceive any, she is presumed to have waived the same. The cases of *People v. Hobson*, 17 Cal. 429, and *People v. Henderson*, 28 Cal. 465, furnish authority for holding that the proceedings, though unusual, were free from prejudicial error.

Referring now to the specific assignment of errors upon which appellant contends for reversal: After a witness for defendant had been cross-examined, counsel for defendant proceeded in redirect examination as follows: "Q. I will ask you, Mrs. Davis—The Court: No, Mr. Brown; please don't. That is all, Mrs. Davis." Whereupon the witness left the stand. Inasmuch, however, as no offer was made to prove any fact in issue, we cannot say that defendant's rights were prejudiced by the action of the court. The manner in which the ruling is made is indicative of impatience on the part of the court, but such fact does not excuse counsel, if he regarded the matter of sufficient importance, from submitting a formal statement or offer of what he desired to prove. Such procedure, if taken and disclosed by the record, would comply with the rule that errors must be made to affirmatively appear, and also enable this court to determine whether or not the substantial rights of defendant were prejudiced thereby. *People v. Brotherton*, 47 Cal. 388, 404; *In re Eschrich*, 85 Cal. 98, 24 Pac. 634.

There is nothing in the point that the rights of appellant were prejudiced by a remark of the court, made in the presence of the jury, and calculated to subject defendant's counsel to ridicule. The remark of the court was in response to proffered testimony by defendant which the court with perhaps unnecessary emphasis held to be wholly irrelevant. The degree of courtesy to be exercised between court and counsel is not a subject for judicial review, unless it clearly appears that defendant's case is prejudiced thereby. In *People v. Oliveria*, 127 Cal. 382, 59 Pac. 772, the record discloses a much greater violation of the rule of conduct which ordinarily prevails between the court and an attorney engaged in the trial of a cause, yet the court there held it was not reversible error. To the same point, see *People v. Modina*, 146 Cal. 142, 79 Pac. 842. On cross-examination the foster father of defendant was asked the question as to how defendant made her money, and in ruling upon defendant's objection to the question the court said: "I think, this being the foster father, he would be apt to know as much about it as anybody." The effect of such statement might well be calculated to influence the jury as to the weight otherwise accorded to the answer of the witness; and, if adverse to defendant, might be regarded as

prejudicial. In view of the fact, however, that the answer, in so far as it concerned defendant, was favorable rather than otherwise, her rights could not have been prejudiced by the question.

It appears that defendant had on a former occasion pleaded guilty to the crime of forgery; the only evidence tending to prove such fact being that contained in a letter written by the district attorney to an expert in handwriting. Defendant introduced this letter in evidence. The district attorney made no reference to this former conviction, and disclaimed any intention of doing so. Under these circumstances, and in the absence of any evidence that defendant was then on probation or any evidence of her former conviction other than that contained in the district attorney's letter introduced by herself, she was asked how she came to be on probation, to which she answered: "Because I pleaded guilty to a charge." Whereupon the court interrupted, saying: "That is foreign to this proposition entirely." We think this ruling, in view of the position taken by the district attorney as to her former conviction, clearly correct. A different case might have been presented if the district attorney had sought to impeach her testimony, or make any point against her by reason of such former conviction.

It is urged that the court erred in refusing to permit the witness Davis to testify in rebuttal with reference to a certain letter which the witness McNamara on the part of the state had testified he found in defendant's purse. Davis had already testified in minute detail as to the articles which were in the purse when she saw it. While her attention was not directed to this particular letter, the list of articles named as having been found by her did not include this letter. The question in issue was whether the letter was in the purse, as to which fact the testimony of Davis and McNamara was conflicting. To permit Davis to repeat her testimony that it was not in the purse, or say, as suggested by defendant's counsel, where she had last seen it, could not strengthen her testimony touching this fact.

Appellant contends that instruction No. 16 is erroneous. This instruction is the last of a number of instructions which appear from the indorsements and filing marks to have been embodied in one document. There is no indorsement indicating at whose request this instruction was given. It does appear, however, from the bill of exceptions, that certain instructions proposed by defendant were stricken out in pencil from the face of the document containing all of defendant's proposed instructions. The instructions thus shown by the bill of exceptions to have been stricken out are identical with those numbered 6, 8, 9, and 10 of the document above referred to, of which instruction No. 16 constitutes the last. While we think it devolves upon defendant to affirmatively

show that this instruction was not given at her request, it thus clearly appears that it was one among others requested by her, and therefore, if error, she is in no position to complain. *People v. Rangod*, 112 Cal. 669, 44 Pac. 1071.

The court failed to give certain instructions contained in the charge requested by defendant, and she contends that the court failed to indorse and sign the instructions so refused, as required by section 1127 of the Penal Code. As hereinbefore stated, the instructions requested by defendant were embodied in one instrument and numbered from 1 to 16, both inclusive. This instrument constituted the charge requested by defendant. Underneath each of said instructions, other than those numbered 6, 8, 9, and 10, was written the words, "Given, B. N. Smith, Judge," and immediately following the instructions refused—that is, Nos. 6, 8, 9, and 10—is written the words with appropriate number in each case, "Stricken out by the court." Where changes are made, they are indicated by writing underneath such numbered paragraph, "Words in italics supplied by the court." It thus clearly appears that the charge, which consists of the several instructions embodied therein, was in part given and in part refused, and that the court did by indorsement clearly distinguish what part was given and what part was refused, as required by section 1127.

Where the charge requested consists of a number of instructions embodied in one instrument and the judge indorses a part as "given," together with his signature thereto, and indorses another part as "stricken out by the court," without his signature, it is a sufficient compliance with the law in this regard.

It appears from the bill of exceptions that certain instructions identical with those numbered 6, 8, 9, and 10 "were stricken out in pencil from the face of the document containing all of the proposed instructions handed in by defendant, and those which were actually given by the court were indorsed, 'Given, B. N. Smith, Judge.'" As the contrary is not shown, we must assume the words, "Stricken out by the court," indorsed under instructions Nos. 6, 8, 9, and 10, to have been written by the court, though in our judgment, had the court's action been indicated by erasure only as shown by the bill of exceptions, it would have sufficiently distinguished the part of the charge refused and fully enabled defendant to reap any benefit inuring to her by reason of such act. In either view of the case, the action of the court in refusing these instructions is sufficiently indicated.

Upon the question of the character of a witness called upon behalf of the prosecution, and after defendant had examined

three witnesses touching the subject, the court stated that upon such point each side would be limited to the testimony of seven witnesses. The rule is well settled that the number of witnesses who may be called upon a single question rests in the discretion of the court. *Butler v. State*, 97 Ind. 378; 8 Am. & Eng. Ency. of Law, 469. Fixing the number in this case at seven on each side was not an unreasonable limitation. If the substantial rights of defendant were prejudiced by reason of the court announcing the number permitted to testify after she had placed three witnesses upon the stand, such fact showing how she was prejudiced by the ruling should at the time have been presented to the court; otherwise, even if error, it is deemed to be waived.

A careful consideration of the case satisfies us there is no prejudicial error which upon the record justifies a reversal.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 219

KINARD v. JORDAN et al. (Civ. 556.)

(Court of Appeal, First District, California. March 11, 1909. Rehearing Denied April 8, 1909; Denied by Supreme Court May 10, 1909.)

1. PARTIES (§ 32*)—JOINDER OF DEFENDANTS.

The action, based on the agreement of defendant H. to pay plaintiff one-eighth of what he should receive for sale of a mine, which he is alleged to have sold to defendant mining company for 1,000,000 shares of its stock, part only of which have been issued, and all of those to the other defendants, being as to defendant H. one to enforce specific performance of his agreement, and as to the other defendants to have it adjudged that their ownership of the shares issued to them is subject to a constructive trust in favor of plaintiff, the complaint alleging that each of the other defendants holds a specific number of shares as a trustee for H., with notice of plaintiff's claim and rights under the contract, and subject to such claim and rights, such other defendants are necessary and proper parties defendant.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 32.*]

2. CONTRACTS (§ 189*) — CONSTRUCTION — "PRICE."

Under defendant's contract to pay plaintiff, on sale of a mine, a certain proportion of the net price received, plaintiff is entitled to such proportion of the stock of a company for which it is sold, as "price" does not necessarily mean value in money, but may mean some other equivalent. [Citing Words and Phrases, vol. 6, p. 5547.]

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 189.*]

3. TRUSTS (§ 371*)—ACTION FOR DELIVERY OF PROPERTY—COMPLAINT—ALLEGING VALUE.

The action being to compel defendants, alleged to be trustees under a constructive trust, to deliver to plaintiff, the equitable owner, a certain number of shares of stock, the complaint need not allege the value thereof.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 371.*]

4. PLEADING (§ 416*)—WAIVER OF OBJECTION TO RULING ON DEMURRER.

Where demurrer to the complaint was sustained as to all the defendants except H., without leave to amend, and as to H. it was overruled, but with direction to file a new complaint against H. alone, plaintiff, had he complied with the order, would have waived any objection he had to the ruling on the demurrer and his right of appeal therefrom.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 416.*]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by C. E. Kinard against William H. Jordan and others. Judgment for defendants. Plaintiff appeals. Reversed.

C. E. Kinard, in pro. per. Crittenden Thornton, for respondents.

KERRIGAN, J. A demurrer to the complaint was sustained as to all the defendants except Huntington, without leave to amend, and as to him it was overruled, with the direction to the plaintiff to file a new engrossed and amended complaint against him alone. Plaintiff did not comply with this order within the time specified and extensions thereof. Whereupon the "complaint" (action) was dismissed as to all the defendants. There are two notices of appeal in the transcript—one from the order disposing of the demurrer, and the other from the judgment of dismissal. As the former seems unauthorized (section 963, Code Civ. Proc.) we will consider only the latter.

The complaint is full of redundant matter, and in many respects is unintelligible. An outline of the case, as we understand it, is as follows: Defendant Huntington made a contract with Charles Bell and William S. Bell, by the terms of which he agreed to pay over to them one-quarter of the selling price of a certain mine or mining claim known as the "Socrates quicksilver mine." He subsequently conveyed said mine to a corporation, in consideration of which the corporation issued 1,000,000 shares of its capital stock of the par value of \$1 per share. About 450,000 of these shares were issued to certain of the defendants, it is alleged, in trust for Huntington, but with notice of the rights of plaintiff, as the assignee of Charles Bell, to receive one-eighth of the price of the mining claim. The object of this action is to recover this one-eighth in the form of 125,000 shares out of the aggregate of about 450,000 shares issued to the defendants.

It is alleged in the complaint, to state the allegations briefly (after setting out various formal matters in paragraphs 1 to 5, inclusive): That on August 13, 1874, the United States issued its patent for a certain mining claim called the "Socrates quicksilver mine" "to Charles and William S. Bell and others." That one Alexander Warner claimed to own

an interest in said mine, and that he agreed to sell it to Frank A. Huntington, one of the defendants herein, for the sum of \$8,000; said Huntington also to pay to Charles Bell and William S. Bell a further sum of \$8,000, and to expend \$5,000 in developing said mine. That thereafter Warner conveyed to Huntington according to said contract all his interest in said mine, and received therefor the said sum of \$8,000. That thereafter the following agreement was entered into by Huntington and the two Bells: "This agreement, made and entered into this 12th day of April, 1900, by and between Frank A. Huntington, of San Francisco, California, party of the first part, and William S. Bell and Charles Bell of the same place and state, parties of the second part, witnesseth: That for and in consideration of the sum of five thousand dollars (\$5,000) to be expended by the party of the first part, said amount to be expended on developing and improving the Socrates quicksilver mine, the parties of the second part hereby agree that in lieu of payment of the commission of eight thousand (\$8,000) dollars provided to be paid in agreement of April 3, 1900, between Alexander Warner and F. A. Huntington direct to said parties, the said first parties agree to pay to said second parties one-quarter ($\frac{1}{4}$) of the net profits of working the ores of said mine, and upon the sale of said mine one quarter of the net price received therefor." That the two Bells accepted this agreement. Then, after setting up an assignment by Charles Bell of his interest in said agreement to plaintiff, the allegations of the complaint proceeded: That on September 17, 1903, certain of the defendants sold and transferred by a grant deed the said mining property to the defendant Socrates Consolidated Mining Company, a corporation, for a consideration "of 1,000,000 shares of the capital stock of said mining corporation of the par value of \$1 per share, or, in round figures, a total of \$1,000,000, as the purchase price of said mine." That, at the time of this transfer the mining company, through its officers, had actual knowledge of the contract last referred to of April 12, 1900, between Huntington, and of the right of plaintiff's assignor to receive one-eighth of the net price paid for said mine. That said mining corporation has not issued, or offered to issue, any part of 125,000 shares (being one-eighth of the 1,000,000 shares) of its capital stock to said Charles Bell or his assignee, nor paid anything of value, or any consideration equivalent to the value of the said 125,000 shares to said Charles Bell or to his assignee. That the defendant mining corporation accepted the deed from said grantors, and recorded it 22 months thereafter. That the failure and neglect to record said deed was for the purpose of hiding from Charles Bell and plaintiff the

sale and conveyance of the said mine, and that the said grantees had knowledge of the agreement between the Bells and Huntington above set forth. That at the time of the issuance of said stock the defendant Huntington was entitled to a proportion thereof exceeding 450,000 shares. That certificates of said capital stock for 450,000 shares were issued some to each of the defendants (setting forth the number of shares to each). That all this stock was held in trust for Huntington. That they so hold as such trustees with knowledge of and subject to the claim of Charles Bell and his assigns to one-eighth of said purchase price. Then follows an allegation of breach of the contract, and the prayer, which is as follows: "Wherefore this plaintiff prays judgment against the defendants, and each of them: (1) That it be adjudged and decreed that this plaintiff is entitled to be paid from defendants the amount of 125,000 shares of the capital stock of the Socrates Consolidated Mining Company, a corporation, of the par value of \$125,000. (2) That it be adjudged and decreed that each and all of the above-named defendants are the trustees of this plaintiff to the amount of 125,000 shares of the capital stock of the said Socrates Consolidated Mining Company, and that a proper order be made that each and all of the defendants herein mentioned transfer and deliver to this plaintiff the said amount of 125,000 shares of said capital stock of said Socrates Consolidated Mining Company, of the par value of \$125,000. (3) That it be ordered, adjudged, and decreed that the defendants M. E. Clowe and W. W. Brownell and the Bank of Yolo, a corporation, are co-owners in common in said agreement and contract set out in paragraph 8 of plaintiff's complaint herein, and that each and all of the defendants herein took said capital stock of the said Socrates Consolidated Mining Company with notice of the claim of the one-eighth of the capital stock of the assignor of this plaintiff, and that 125,000 shares of said capital stock is held in trust for this plaintiff."

To the complaint there was interposed this demurrer: "That there is a misjoinder of parties defendant to the said amended complaint in this: (a) That the said William H. Jordan, Thomas W. Nowlin, J. F. Fassett, John H. Miller, Elizabeth A. May, Socrates Consolidated Mining Company, Bank of Yolo, W. W. Brownell, M. E. Clowe, and F. A. Huntington are each and every one of them misjoined with each other, and each and every other party defendant to said action. That the said complaint does not state facts sufficient to constitute a cause of action against either or any or all of said defendants." Apparently the action, as regards the defendant Huntington, is one to enforce the specific performance of his agreement to transfer to plaintiff, as assignee of Charles Bell, 125,000 shares of the capital stock of

the Socrates Consolidated Mining Company, being one-eighth the price received for the Socrates quicksilver mine; and, as regards the other defendants, to have it adjudged that their ownership of the shares of stock issued to them is subject to a constructive trust in favor of plaintiff. The complaint is indefinite and uncertain in many particulars; but the only questions raised by the demurrer are: First, that there is a misjoinder of parties defendant; and, second, the failure to state sufficient facts to constitute a cause of action.

1. As the complaint alleges that each of the defendants, other than Huntington, holds a specified number of shares as a trustee for Huntington, with notice of plaintiff's claim and rights under the contract, and, subject to such claim and rights, it appears to us that, under the cause of action attempted to be alleged making them constructive trustees of plaintiff, they are proper and necessary parties defendant.

2. Does the complaint state a cause of action?

(a) It may not be amiss to say in passing that under the contract of April 12th, by the terms of which Huntington is required to pay one-quarter of the net price received for the mine, the Bells, or their assignees, are entitled to their proportion of the capital stock for which the mine was sold, because "price" does not necessarily mean value in money. It may mean money or some other equivalent. *Hudson Iron Co. v. Alger*, 54 N. Y. 173, 177; *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085; 6 Words and Phrases, p. 5547. Furthermore, we do not desire to be understood as expressing any opinion as to whether the plaintiff is entitled under the terms of the contract of April 12th to one-eighth of 450,000 shares or one-eighth of 1,000,000 shares of the capital stock of the said mining corporation.

(b) Defendants contend: That the contract in controversy is a mere personal covenant, and that it does not bind the assignees of Huntington, the covenantor, because they are not named therein; that therefore the defendants named in the complaint as purchasers from Huntington, although with notice of the contract, are not liable thereon to any one. If the plaintiff here were pursuing those defendants personally, it may be that this point would be held sound, but we do not understand that such is the case. The theory of the complaint, as already pointed out, seems to be that these defendants hold certain shares of stock, not as absolute owners, but as trustees for Huntington, and constructively for plaintiff.

(c) Defendants also assert that the complaint, while attempting to do so, does not effectively allege an assignment of the contract from Charles Bell to plaintiff. The allegation of the complaint covering this matter is certainly bad as to form, but it is apparent

that it can be easily remedied, and as against a general demurrer we think the complaint is sufficient in this respect.

(d) Defendants further insist that the complaint should allege the actual or market value of the shares of the capital stock of the mining company. It is true that in alleging, as the complaint does, that the stock of the corporation was divided into 1,000,000 shares of the par value of \$1 each, it does not allege the value of the stock. *Mining Co. v. Huff*, 62 Kan. 405, 63 Pac. 442; *Hart L. Co. v. Everett L. Co.*, 20 Wash. 71, 54 Pac. 767; *Plumb v. Griffin*, 74 Conn. 132, 50 Atl. 1. And if this were an action to recover the value of the shares, the contention of defendants would be correct. *Mining Co. v. Huff*, supra. But this is an action to compel defendants, alleged to be trustees under a constructive trust, to deliver to the plaintiff, the equitable owner thereof, 125,000 shares of the said corporate stock, and we know of no rule of pleading in such a case that requires the complaint to allege value. It may be that a general demurrer would lie to a complaint that showed affirmatively upon its face that the property involved is of trivial value, or too small in value to justify a court of equity in taking cognizance of it. *Story, Eq. Plead.* § 500 et seq. The complaint discloses no such infirmity.

(e) Part of the allegation of the complaint as to the breach of the contract is bad both in substance and in form; but, disregarding that part, the breach of the obligation of defendants to the plaintiff is sufficiently set forth therein elsewhere.

Finally, on the hearing of the demurrer to the amended complaint, the trial court, as already observed, sustained the demurrer without leave to amend as to all the defendants except Huntington, and as to him the demurrer was overruled, but with a direction to the plaintiff to file a new complaint against Huntington; and, no new complaint having been filed as directed, the cause was dismissed. Doubtless the object of this order was, as stated at the oral argument, to have the complaint stripped of the allegation attempting to allege a cause of action against the defendants other than Huntington; but, if the plaintiff had complied with this order, he would have waived any objection he had to the ruling on the demurrer, and his right of appeal therefrom. No motion to strike out was made, and the order of the court in this regard cannot be upheld.

The complaint contains, as before stated, allegations of unnecessary matters, and in many respects is vague and indefinite; but we apprehend that it states facts sufficient as against all the defendants.

The judgment is therefore reversed.

We concur: COOPER, P. J.; HALL, J.

155 Cal. 509

BARTON et al. v. RIVERSIDE WATER CO.
et al. (L. A. 2,141.)

(Supreme Court of California. April 21, 1909.)

1. WATERS AND WATER COURSES (§ 107*)—
SUBTERRANEAN WATERS—WELLS—DEPRE-
CIATION OF SUPPLY—INJUNCTION—ESTOP-
PEL.

Defendant R. company in 1899 and 1900, owing to excessive droughts and additional diversions of water from a subterranean basin by others, bored additional wells, which were necessary to furnish sufficient water for public use. That the wells were being bored, and the water taken to a city to supply the previous use, was notorious, as was also knowledge that such diversions would decrease the common supply. A complaint was filed to restrain the use of such additional wells on June 4, 1904, though most of the plaintiffs testified that the wells so bored immediately affected their own. *Held*, that complainants were estopped to enjoin the continued use of such wells under the rule that, where a complainant has stood by while a development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it will affect his own water supply, an injunction will be refused.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

2. WATERS AND WATER COURSES (§ 107*)—
PERCOLATING WATERS — CORRELATIVE
RIGHTS.

The doctrine of correlative rights in percolating waters was a change in the law, so that a clear case must be made thereunder to justify an injunction to prevent a continuance of the use of such waters, taken in good faith before such doctrine was enunciated, and which use was in full operation at that time.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 117; Dec. Dig. § 107.*]

3. WATERS AND WATER COURSES (§ 102*)—
PERCOLATING WATERS—ARTESIAN WELLS.

Where new artesian wells objected to drew their water from the same supply from which the owners had previously taken water under a valid diversion, and the new wells did not increase the amount diverted, they constituted a mere change of the place of diversion, without injury to others who were therefore not entitled to complain.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 102.*]

4. WATERS AND WATER COURSES (§ 105*)—
PERCOLATING WATERS—DIVERSION—CHANGE
OF PLACE.

One having a right to take a definite quantity of water from a basin of permeable material saturated therewith, and not composing part of any stream, may change his place of diversion,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

so long as the total amount of water taken is not thereby increased.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 113; Dec. Dig. § 105.*]

5. **WATERS AND WATER COURSES (§ 101*)—DIVERSION—CHANGE OF MODE.**

Where a water company had been diverting a certain amount of water from the wash of an artesian basin continuously for 15 years, by means of cuts and trenches, it was entitled, when its supply began to fail, to drive wells in the wash by means of which the requisite quantity previously diverted was obtained from the same source of supply, as the wells only constituted a different means of collecting water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 110; Dec. Dig. § 101.*]

In Bank. Appeal from Superior Court, San Bernardino County; Paul W. Bennett, Judge.

Action by John H. Barton and others against the Riverside Water Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Byron Waters and C. C. Haskell, for appellants. Houghton & Houghton, John S. Chapman, Henry Goodsell, Charles R. Gray, and Collier & Carnahan, for respondents.

SHAW, J. This is an appeal by the plaintiffs from a judgment of nonsuit in favor of said defendants.

The action is to enjoin alleged diversions of water from an artesian basin alleged to exist in the San Bernardino valley. Each plaintiff is the owner of a tract of farming land situated over the said basin, on which he has been accustomed to use the waters of the basin. Some of them obtain the water by means of pumps, or artesian wells, and others by diversions from natural streams forced to the surface from subterranean strata within the basin by the pressure of the water from the higher lands surrounding it. The respective tracts of land owned by the several plaintiffs are not contiguous, but are situated in different parts of the basin and several miles apart. The basin is extensive, embracing something over 30 square miles. It is of irregular outline, and somewhat circular in shape. The city of San Bernardino is situated near the center of it. It is alleged that the defendants, without right or authority, by means of artesian wells naturally flowing, and other wells operated by pumps, are diverting from the basin, and carrying to lands not situated therein, or in the watershed contributing thereto, large quantities of water from the said basin to be used for irrigation and other purposes on said outside lands; that by reason of these diversions the waters of said basin are depleted, the level thereof lowered, and the common supply of plaintiffs diminished and exhausted to such an extent that the plaintiffs' lands are deprived of the use of the

waters of the basin, to the great damage of the respective plaintiffs. By the term "basin" we do not mean to imply that its floor is level. The central part of it slopes slightly toward the outlet at the southwest corner. During some extraordinary floods the Santa Ana river flows on the surface through the basin and over its outlet. The lands of several of the plaintiffs do not lie within the limits of the basin as the same is claimed to exist by the plaintiffs themselves. These lands are situated below the outlet of the basin in a sandy formation, which it is claimed is saturated with water overflowing from the basin. As to these lands, the claim of the plaintiffs is that the depletion of the waters in the basin, by the alleged unlawful diversions of the defendants, diminishes the overflow to such an extent that the plaintiffs owning these lands are unable to obtain from such overflow sufficient water to irrigate their lands as they have heretofore done.

The plaintiffs allege that the water is confined in the basin by a dike of impervious material, which by some convulsion of nature has been thrown across the southwest and lower corner of the basin, extending from bed rock upward to about 40 feet below the surface of the ground. This vertical space of 40 feet it is claimed is occupied by a deposit of sandy material, similar to that within the basin, through which the water passes underground over the dike into the lands below, except in unusual floods, during which there is a surface stream there flowing. This so-called outlet is one mile or more in width. The diversions of water complained of are, for the most part, made above this alleged dike and within the artesian basin proper, but some of them are made from the sandy formation below the alleged dike. The complaint alleges, in effect, that the artesian basin and the land immediately surrounding it is composed of a mass of sand, gravel, and other porous material, and that the water therein forms a common supply for the plaintiffs, so connected, because of the character of the material in which it lies and its free movement therein, that a diversion of water from one part of the basin is practically a diversion from the whole, and decreases the common supply of all of them, though not affecting them all to the same extent. It is upon this theory that they all unite in one action, claiming that the injury to be enjoined is a common injury to all. These allegations are denied, and the answers pleaded misjoinder of causes of action and of plaintiffs and defendants, respectively. It is earnestly insisted, particularly by the attorney for the Riverside Highlands Water Company, in a very able and elaborate brief, that there is no common supply, and that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

there is consequently a misjoinder. We think that there is some evidence in support of the allegations of the complaint on this point, and, at all events, we will assume for the purposes of this decision that these allegations are sufficiently established and will not discuss the question of misjoinder. We think that the motion for a nonsuit was properly granted upon other grounds.

1. The Riverside Water Company is engaged in the business of taking water from this basin and carrying it to Riverside for sale and distribution in that community, for irrigation and other purposes. It is a public service corporation, and the water it obtains from this basin is devoted by it to the use of the community at Riverside. It has been in charge of this public use for many years. The exact time does not appear, but the evidence shows that it began some time prior to 1887, and that it has continued ever since. Originally the water was all taken from Warm creek, a stream rising within the basin by reason of hydraulic pressure in the underlying strata. Under natural conditions this stream carried from 3,500 to 4,000 miners' inches of water, all of which was taken by said company and appropriated to said public use. From 1893 to 1900 there was a series of very dry years, the average annual rainfall being only 11.19 inches. The average for the decade from 1883 to 1893 was 20.10 inches, and the general average since records have been kept is 15.62. The three seasons of 1897-98, 1898-99 and 1899-1900 were excessively dry, giving an average of only 8.12 inches. This prolonged drought, combined with the effect of large additional diversions of the waters of the basin by other persons for whom none of the defendants were in any wise responsible, caused the natural flow of Warm creek to decrease gradually to about one-half its former quantity. This decrease made it necessary for the Riverside Water Company, in order to supply those dependent upon it, to find means of obtaining more water. For that purpose, and soon after the decrease became apparent, it began putting down artesian wells in the basin, and it has ever since continued to do so as its needs required, not with the intent to increase its diversion from the basin, but to keep it up to the original quantity. The evidence shows that this new method of securing the water was in use at least as far back as the year 1895. In 1899 and 1900, owing to the excessive drought aforesaid, and additional diversions by others, additional wells were bored by this company, and it is these wells against which the chief complaint is made, as against this defendant. The wells are deep, and the expense of boring them must have been considerable. There was an absolute necessity for more water to serve the public use. The fact that the wells were being bored, and that the water obtained thereby was taken to Riverside to supply the

previous use, was notorious. The fact that these diversions would decrease the common supply of all the plaintiffs was obvious, and must have been known to each of them. The complaint alleges that the diversions of all the defendants by means of wells had been going on continuously for at least two years before the action was begun. The complaint was filed on June 4, 1904. It is not seriously claimed that any of the plaintiffs were ignorant of these facts. Most of them, as witnesses, testified to knowledge thereof; many of them declaring that the wells of this company, bored in the years 1899 and 1900, immediately affected their own wells. No objection or protest against the boring of these wells by the Riverside Water Company was ever made by any of the plaintiffs. The first hint of any claim that these diversions were made without right on the part of the respective defendants was manifested by the beginning of this action.

So far as this company is concerned, the case comes within the rule established in Fresno, etc., Co. v. S. P. Co., 135 Cal. 207, 67 Pac. 773, and followed in Southern C. R. Co. v. Slauson (Cal.) 68 Pac. 107, and Crescent Canal Co. v. Montgomery, 143 Cal. 252, 76 Pac. 1032, 65 L. R. A. 940. This rule, briefly stated, is that where one whose property is taken for a public use has stood by without objection, knowing that it was so taken and applied, and has allowed the public use to be instituted and carried on at great expense, and has permitted the people benefited thereby to adapt themselves to the new conditions, and avail themselves of the conveniences and advantages thereby afforded, he cannot thereafter maintain an action to enjoin the continuance of such public use, or to recover possession of the property so taken, but will be relegated to an action for damages. The rule was mentioned in Katz v. Walkinshaw, 141 Cal. 136, 74 Pac. 772 (64 L. R. A. 236, 99 Am. St. Rep. 35), a case involving the waters of this basin, where the court, evidently referring to cases such as that here presented, and avowedly intending to suggest a rule of decision in such cases, said: "Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused."

We may concede, for the purposes of this case only, that the more recent diversions of the company by means of wells are not a continuance of its ancient right to divert the waters naturally flowing in Warm creek, and that the wells do not constitute a mere change of the means and place of diversion of the water to which the said company's right had been established. We may assume that the company is in the same position,

with respect to these wells, as it would be if the boring thereof had been the inception of its operations. So assuming, it still remains true that the plaintiffs knew of these diversions of water from the basin, and either knew, or had good cause to believe, that the water was being taken from their own source of supply, and that such taking tended to exhaust the supply; that it was carried away for use outside the basin in a community depending thereon, and which, we may presume, had settled and established itself there in reliance upon the continuance of that supply (*Crescent C. Co. v. Montgomery*, supra); that great expense in the meantime had been incurred in maintaining the supply and the works necessary for its distribution; and that, so knowing, they stood by for at least 9 years after the well boring had begun, and, by their own admission, 2 years after it was completed, and uttered no word of complaint or protest. The injunction against this defendant was properly refused on this ground.

The decision in *Katz v. Walkinshaw* was rendered, and the previous cases on the subject of percolating waters thereby overruled, because of our conviction that the doctrine that the owner of the soil was the absolute owner of the waters percolating therein, and could extract the same at will, regardless of the effect on other lands, is unsuited to our conditions, and would constantly tend to produce injustice and render insecure the title to water supplies devoted to beneficial use. The doctrine of correlative rights in such waters, declared in that case, was adopted because it was deemed necessary for the protection of present and future uses of such waters against the unreasonable and remediless invasions that would be allowable under the doctrine of absolute and irresponsible ownership. It was perceived that the decision would be regarded as an innovation, and that it might cause suits to be begun to prevent the continuance of uses of such waters previously made. While adhering to, and fully approving, the doctrine announced in *Katz v. Walkinshaw*, especially in respect to uses of percolating water having their beginning after that decision was made, we desire to say that a clear case must be made to justify an injunction to prevent a continuance of the beneficial use of such waters, begun in good faith before that decision, and which was in full operation at that time, which is the condition presented by the case at bar. This action was begun only a few months after that decision became final.

2. The wells of the Riverside Highland Water Company are of more recent construction, and perhaps, as to some of them, there may be no laches or estoppel against the plaintiffs. But the injunction against this company was properly refused on still another ground. It is established by the evidence that the said defendant had originally obtained the water solely by means of artesian

wells, that for 10 years or more before the action was begun it had been maintaining such wells in the northwestern part of the basin several miles distant from the new wells here complained of, and that from said wells defendant had obtained a flow of about 400 inches of water, which it had been continuously transporting to places of use outside the basin, distributing the same to its customers, and that by this means large and valuable improvements had been made in the territory to which this water had been conducted. It had gained the undisputed right to take the water by this means and to this place. From the causes heretofore mentioned its wells began to fail, and the new wells complained of were thereupon sunk in the same basin, solely for the purpose of obtaining enough water, in connection with its old wells, to keep up its former supply to its former customers. The new wells take from the same supply as the old ones, and the total amount taken has not been and is not to be increased. They constitute a mere change of the place of diversion without injury to others. In the case of running streams the right to make such a change is well settled, and it is clearly just. *Ramelli v. Irish*, 96 Cal. 217, 31 Pac. 41; *Davis v. Gale*, 32 Cal. 34, 91 Am. Dec. 554; *Jacobs v. Lorenz*, 98 Cal. 340, 33 Pac. 119; *Smith v. Corbit*, 116 Cal. 592, 48 Pac. 725. The rule is the same with regard to underground streams. *Vine-land Irr. D. v. Azusa Irr. Co.*, 126 Cal. 495, 58 Pac. 1057, 46 L. R. A. 820. We think the reasons of the rule apply with equal, if not greater, force to one having a right to take a definite quantity of water from a basin of permeable material saturated with water, and not composing part of any stream, conceding this basin to be of that character as plaintiffs claim, and that said defendant is accordingly acting within its established rights in maintaining these new wells.

3. The same observations apply to the West Riverside 350-Inch Water Company. This company is not, strictly speaking, a public service corporation delivering water to a public use. It is engaged in procuring 350 inches of water for its stockholders, and delivering it only to stockholders in proportion to their respective amounts of stock, for use on their respective tracts of land. See *McFadden v. Board*, 74 Cal. 571, 16 Pac. 397, and *Hildreth v. Montecito W. Co.*, 139 Cal. 29, 72 Pac. 395. It obtains the 350 inches of water from the region immediately below the dike above mentioned, where, as plaintiffs claim, the overflow from the basin saturates the sandy soil composing what is really the bed or wash of the Santa Ana river. Originally this company obtained the water by means of open cuts in the wash, beginning at the surface and running up stream on a less grade than the surface of the ground, reaching a depth of some 10 or 12 feet at the upper ends; the waters in the

soil being thereby collected and conducted into its canal. Because of the prolonged drought and diversions from the water supply, above mentioned, the water level lowered so that the cuts no longer collected the amount of 350 inches required by its stockholders. Thereupon the company sunk wells in the wash, and inserted therein pumps, by means whereof it obtained the requisite quantity of water, obviously from the same source of supply. There is no pressure upon the water in these wells. During the dry season the pumping lowers the water level at the pumps about 25 feet below the natural level. How far the cones of depression extend in the sandy soil at such times does not appear, but during the rainy season the former level is restored. The land of the nearest plaintiff is over a mile away, and not directly in the course of the wash. It is at least doubtful if the wells of this defendant affect the water in his land, but conceding that they do diminish his supply, and that of some other of the plaintiffs, they cannot complain of the action of this defendant in simply adopting different means of collecting the water to which it had by means of long use acquired an undoubted right. The evidence shows that it had been diverting the water from this wash continuously for a period of at least 15 years before the beginning of the action, and that its right to do so by means of its cuts and trenches was not disputed. Its right to the water being thus established, it had a clear right, upon the principles heretofore stated, to continue to divert the water by changing its method of obtaining it.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; HENSHAW, J.; MELVIN, J.; LORIGAN, J.

(155 Cal. 500)

QUINN v. ELECTRIC LAUNDRY CO.
(S. F. 4,903.)

(Supreme Court of California. April 17, 1909.
Rehearing Denied May 17, 1909.)

1. MASTER AND SERVANT (§ 121*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—NEGLIGENCE.

Where it was the duty of a laundry company to keep a mangle guard in proper position that the danger to the operator should be materially lessened, though not entirely obviated, the company's failure to perform such duty constituted negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 229; Dec. Dig. § 121.*]

2. MASTER AND SERVANT (§ 235*)—INJURIES TO SERVANT—MACHINERY—ADJUSTMENT.

Where the sole duty of plaintiff working a mangle in a laundry was the proper introduction of clothes into the machine, and when the guard needed adjustment, the head operator would inform the foreman or report to the engineer by whom the adjustment would be made,

the duty of keeping the guard in proper position devolved on the employer, and not on plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 711; Dec. Dig. § 235.*]

3. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—INSTRUCTIONS—NEGLIGENCE.

Where plaintiff, an inexperienced girl, 19 years of age, and wholly unfamiliar with machinery, was directed to feed sheets into a laundry mangle, which was dangerous to operate unless care was exercised by one familiar with its structure, and plaintiff's hand was caught and drawn into the machine and injured because of the improper adjustment of a guard, defendant was negligent in failing to warn plaintiff of the danger, and in omitting to give her proper instructions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 315; Dec. Dig. § 153.*]

4. MASTER AND SERVANT (§ 218*)—INJURIES TO SERVANT—ASSUMED RISK.

Where plaintiff, a girl 19 years of age, and wholly unfamiliar with the operation of machinery, was directed to operate a laundry mangle on which the guard was not properly adjusted, and there was nothing to show that she understood or appreciated how fast the machine was moving, which greatly affected the likelihood of getting her hand caught and injured therein as she did, and she had received no instructions or warning as to the danger of removing pieces from the rollers when the machine was in operation, she did not assume the risk of such injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 608; Dec. Dig. § 218.*]

5. MASTER AND SERVANT (§ 295*)—INJURIES TO SERVANT—ASSUMED RISK—INSTRUCTIONS.

The court charged that a servant's implied assumption of risk is confined to that work for which he is employed; and, if the master orders him to do work of such a different character that it is without the scope of the employment, and with a different class of employes, he will not assume the risk unless the evidence is clear, explicit, and uncontradicted "to that point." *Held*, that the words quoted referred to the assumption of the risk, and that the instruction was not objectionable as misleading; the court having also charged on the responsibility of the servant who undertakes any hazardous employment with knowledge of its dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1178; Dec. Dig. § 295.*]

6. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—ACTION—COMPLAINT.

In an action for injuries to a servant, an allegation that defendant operated the machine on which plaintiff was injured while it was insufficiently provided with guards, sufficiently alleged defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 827; Dec. Dig. § 258.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank H. Kerrigan, Judge.

Action by Margaret Quinn against the Electric Laundry Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

C. H. Wilson, for appellant. H. W. Hutton, for respondent.

MELVIN, J. This is an action for damages by a young woman, employed by defendant corporation, who was severely injured while operating a mangle in defendant's laundry. Judgment for \$2,500 was given in favor of plaintiff. From the judgment, and from the order denying a new trial, this appeal is prosecuted.

It is alleged in the complaint that plaintiff, who was about 19 years of age, was wholly unfamiliar with the operation of machinery; that she had been engaged by defendant as a "shaker out," and that as such she was required to shake garments and prepare them for the mangling machine; that after working for some time in the capacity in which she was hired, plaintiff was ordered by defendant to work at the mangle; that she knew nothing of the perils attending such work; that defendant did not warn her of the dangerous character of the machine, but advised her that it was safe; and that plaintiff went to work upon said mangling machine about the 20th day of August, 1902, and continued thereat until the 17th day of September, 1902, upon which day, being engaged in operating the said machine, without fault on her part, and by reason of the defective and dangerous character of said steam mangling machine, her left hand became caught in the mechanism thereof. It is also alleged in the complaint that the mangling machine in question was "defective and out of repair and unsafe in this, that it had not sufficient guards thereon to prevent the person who was operating the same from becoming entangled therein, and in further having a defective guard thereon, which was insufficient when in repair, the said guard consisting of a sheet of tin, which was there placed for the purpose of preventing its operator from becoming caught in said machine and the working parts thereof, but which was not of sufficient strength, and was further defective in this, that it was loose, and was not attached to the said machine, it having been formerly screwed on the said machine, but the said screws had been removed, so that the said tin guard was loose and ineffective, and of no use whatever; the said mangling machine with a proper guard thereon being dangerous to any person, who might operate the same, in this, that any person engaged in operating such machine, either with or without such guards as might be placed thereon, was liable to become caught therein and injured."

The front of the machine where the young woman was working at the time of the accident was provided with a long piece of curved brass, over which the clothes were passed in "feeding" them into the mangle. There was some evidence that some screws were out of one end of this appliance, and in one part of her testimony plaintiff said this attachment "kept coming up and down all the time, and it must have got caught in the machine, and with that it drew my hand right in the

mangle." On cross-examination she testified that she could not tell whether this brass contrivance moved very much or not, but that it had moved considerably when she was at work a short time before. In addition to the brass attachment mentioned there was an adjustable guard regulating the size of the opening through which the pieces of clothing were introduced into the space between the rollers of the mangle. It was shown that when this guard needed attention, report would be made by the head girl at the mangle to the foreman of the department, who would report to the manager and get the latter's consent to the guard being raised or lowered. Upon such report the engineer would regulate the space between the edge of this guard and the place where the clothing entered the mangle. Some of the witnesses testified that on occasions report was made directly to the engineer, who would thereupon fix the guard. There is a conflict in this regard, but all of the witnesses agree that the girls themselves never raised or lowered the guard. Some of the witnesses testified that one-fourth of an inch was sufficient space for the passage of sheets—the kind of pieces being ironed at the time of the accident—and it was shown that the guard was so adjusted when plaintiff was injured as to leave a space of one inch.

Appellant contends that the evidence wholly fails to prove negligence on the part of defendant, because the condition of the curved brass attachment was not shown to have contributed to the accident, because the adjustment of the height of the guard is not the duty of the defendant, but the operator at the machine, and because, according to the allegations and proof, no guard will insure absolute safety. We think the evidence is insufficient to show that the condition of the curved brass appliance contributed to the injury, but we cannot agree with the conclusion that, the machine being dangerous with or without guards, the manner of the adjustment of the guard could not, in any event, be material to the determination of the question whether or not defendant was negligent. If it was the duty of defendant to keep this guard in proper position in order that the danger might not be obviated entirely, but materially lessened, then the failure to perform such duty would be as reprehensible as the neglect with reference to some safety appliance which might be attached to a piece of mechanism, in such manner as to exclude all danger of accident. It is certain that one's fingers would pass more easily through a space one inch wide than through an aperture but one-fourth of an inch in width. But appellant maintains that the adjustment of this guard was not a duty devolving upon the owner of the mangle, but upon the operator, citing *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710; *Towne v. Electric Co.*, 146 Cal. 766, 81 Pac. 124, 70 L. R. A. 214; *Leishman v. Union Iron Works*, 148 Cal. 274, 83 Pac. 30, 3 L. R. A. (N. S.) 521, 113 Am. St. Rep.

332. The first of these cases was one in which the plaintiff had been injured while using a planing machine fitted with dull knives. He was a skilled workman, and knew better than his employer when the knives required filing. The second was a case in which an experienced lineman was injured by the breaking of a pike pole set up by a fellow workman; and the last was one in which a moulder was hurt by an explosion caused, either by the careless work done in preparing a mould, or by the use of a rusty plate which it was his duty, or that of a fellow workman, to clean with the materials furnished in abundance by the employer.

It appears from the testimony that the sole duty of the girls working at the mangle was the proper introduction of the clothes into the machine. They had nothing to do with the adjustment, except to report when there was necessity for raising or lowering the guard. This case comes within the rule stated in *Skelton v. Pacific Lumber Co.*, 140 Cal 511, 74 Pac. 14, where this language was used: "The duties which a master owes to his servants, and which duties he must perform, are to furnish suitable machinery and appliances with which the service is to be performed, to keep them in order and repair, to exercise ordinary care in the selection and retention of sufficient and competent servants, and generally to make such provision for the safety of employes as will reasonably protect them against the dangers incident to their employment; and, if the act be one which it was the duty of the employer to perform, and one of the servants negligently performs it to the injury of another servant in the same common employment, then the offending servant in the performance of this duty acts as the representative or agent of his employer, and the employer is responsible."

It is to be remembered that the plaintiff was a girl about 18 years of age, who knew nothing of machinery. She had been employed in the laundry less than three months. For seven or eight weeks of that time she had been engaged in shaking out clothes, and for about two weeks in catching ironed clothing after it had passed through the mangle. Occasionally, when one of the other girls was absent temporarily, she would work for a time at the front of the mangling machine, putting in small garments. She had been given very little experience in guiding sheets into the mangle. According to the testimony of witness Keeney: "It is more difficult to feed sheets into that machine than it is towels, pillow cases, and things of that kind, and it required more experience. The machine runs faster when you are feeding sheets than when you are feeding other things." This same witness said: "It takes experience to run that machine, and if no one told me how to run it, I would expect to get into trouble." Witness Johnson also declared: "It

takes experience to run the machine, and knowledge of the machine." That some skill is required in the operation of such a mangle appears from the testimony of Torre, who said: "There is a certain way of keeping your fingers out of the machine. The guard is there to protect your getting your hand in this way. I cannot very well explain it—when you feed a sheet through, you run your hand up against the guard this way, so that you won't stick your hand into the machine, or against the roller. That is what the guard is for." Torre also testified that when sheets were being put through the mangle, plaintiff's place was at the receiving end of the machine. He denied that he had ordered her to take a place at the front of the mangle the morning of the accident. There is no claim made by him that he ever gave Margaret Quinn any instruction with reference to the class of work she was performing when she got hurt. She testified, however: "No one ever told me anything about the mangle or explained it to me, or told me that I was liable to get caught in it. I never had any experience around that machine, or any other, and had not fed sheets prior to that time. I was caught in feeding the second sheet." On cross-examination she modified this last statement somewhat, but the substance of her testimony was that she had enjoyed but very slight experience in putting sheets through the mangle. It is the avowed belief of plaintiff's counsel that the evidence indicates that Miss Quinn could not have known whether the guard was fixed at a proper height or not. The theory of appellant, however, is that the dangers were so apparent to even the least experienced person that any one working at the mangle must have observed and understood them, and must have assumed all of the risks incident to the employment. That the brass attachment, the guard, and the large rollers were in plain sight appears from the uncontradicted testimony, but the small roller against which the sheets were first drawn was not visible from the position occupied by plaintiff at the time she was injured, and plaintiff says she knew nothing of its existence. It would seem that the position and function of this roller at least should have been fully explained by defendant to any person who was directed to guide clothes into this ponderous machine.

I think that this case, from the youth and inexperience of plaintiff, the dangerous character of the mechanism whereby she was injured, and the manner in which Miss Quinn was put to work comes clearly within the rule announced in *Verdell v. Gray's Harbor, etc., Co.*, 115 Cal. 523, 47 Pac. 365, 778, where, quoting from *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138, this court says: "But on the other hand, when one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, the em-

ployer is bound to give him such instructions as will cause him to fully understand and appreciate the danger attending the employment, and the necessity for care." See, also, *Mullin v. California Horse Shoe Co.*, 105 Cal. 77, 38 Pac. 535; *Ryan v. Los Angeles, etc., Co.*, 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87; *Jenson v. Will & Fink*, 150 Cal. 398, 89 Pac. 113. In the case last cited the following language, thoroughly applicable here, is used: "In the case at bar the questions whether the plaintiff had knowledge and appreciation of the dangers were matters to be determined by the jury from all the facts in the case, taking into consideration the youth of plaintiff, his inexperience, and the work to which he was assigned, the particular character of the dangers attending it, and the failure of defendant to give him any warnings or instructions concerning them. If, therefore, it be conceded that plaintiff had knowledge of the dangers, as appellant claims he had, it cannot be said that under the evidence the jury were not warranted in finding, as they must necessarily have found under the instructions of the court, that plaintiff, by reason of his tender years and inexperience, and unadvised of the dangers, was not possessed of sufficient judgment to appreciate them." We think that in the case at bar there was ample evidence to justify the submission of the question of negligence to the jury. Such question is peculiarly theirs to answer. *Buchel v. Gray Bros.*, 115 Cal. 421, 47 Pac. 112.

There is some conflict of authority in the various states with reference to cases of the kind here considered. It would not be profitable to review all of them here, but we do think it perhaps important to comment upon *Burke v. Davis*, 191 Mass. 20, 76 N. E. 1039, 4 L. R. A. (N. S.) 971, 114 Am. St. Rep. 591, for that is a case upon which appellant lays considerable emphasis. That case is easily distinguishable from this, because the plaintiff, as the court found, "upon her own statement was fully aware of the risk she ran in working upon this machine, and for that reason was reluctant to work upon it." It is by no means the law in Massachusetts that an operator at a mangle is presumed knowingly to take all risks incident to that employment, for in *Manning v. Excelsior Laundry Co.*, 189 Mass. 231, 75 N. E. 254 (a case cited and distinguished in *Burke v. Davis*, supra), the rule with reference to an ignorant and uninstructed operative is thus given: "There is nothing to show that the machine was defective, and the questions are whether the risk was an obvious one which the plaintiff in the first case assumed, and, if not, whether the defendant negligently failed to warn and instruct her regarding the danger, and that depends on whether it was a part of her duty, or whether she was warranted in understanding that it was a part of her duty, to

remove pieces which caught on the rollers. She must, of course, be held to have understood and appreciated those facts of common experience which a girl of her age would be naturally expected to have become familiar with. She must be held to have known, for instance, that if her hand came in contact with the cylinder, which she knew was hot, it would be likely to be burned. *Gaudet v. Stansfield*, 182 Mass. 451, 65 N. E. 850. But it is a different question whether she should be held to have understood and appreciated the risk which there was that her hand might be drawn in between the roller and the cylinder if she attempted to remove a piece from one of the rollers. The rate at which the machine was revolving, and which one of the witnesses testified was very rapid, naturally would have a great deal to do with the likelihood of getting her hand drawn in, and there is nothing to show that she understood or appreciated how fast the machine was revolving. She had seen others remove pieces from the rollers when the machine was in operation, and had received no instructions or warning as to the danger, and might naturally have supposed that the act was attended with no particular risk or it would not have been allowed. Taking her youth and inexperience into account, we do not see how it could have been ruled as matter of law that the risk was an obvious one which she must be held to have assumed." The case nearest to this in its facts of any called to our attention is *Stager v. Troy Laundry*, first reported in 38 Or. 480, 63 Pac. 645, 53 L. R. A. 459, and after reversal on account of an erroneous instruction and retrial, appearing again in 41 Or. 141, 68 Pac. 405. In the former report, after a review of the facts which are very similar to those presented by the record before us here, the Supreme Court of Oregon uses this language: "Under these conditions we cannot say, as a matter of law, that she assumed the risk by accepting or continuing in the service, and the question was properly left to the jury for their determination."

Appellant complains of this instruction: "A servant's implied assumption of risks, which accompanies and is a part of a contract of hiring, is confined to that particular work and class of work for which he is employed, and, if the master orders him to work temporarily in another department of the general business where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employes, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work; and, in a case involving the principle here declared, it will not be held, as a matter of law, that the injured party assumed the risk, unless the evidence is clear, explicit, and uncontradicted to that point." It is admitted that the above language was approved by this court

as a part of the charge in *Daubert v. Western Meat Co.*, 135 Cal. 147, 67 Pac. 133, but the contention is that the final paragraph is so ambiguous as to require amplification. We think the words "to that point" refer to the assumption of the risk; and, while the instruction might have perhaps been improved by adding the language of appellant's brief, "The instruction relates to the assumption of risks on the knowledge or want of knowledge of the injured employé," we do not believe that the jury could have been misled by the omission of such qualification, because the court in another part of the charge gave a correct instruction upon the responsibility of a servant who undertakes any hazardous employment with full knowledge of its dangers.

Another contention is that the complaint does not state facts sufficient to constitute a cause of action because it lacks an allegation that defendant knew of the defect of which plaintiff complained. It is averred, however, that defendant operated the machine while it was insufficiently provided with guards. This is equivalent to an allegation of negligence. *Silveira v. Iverson*, 125 Cal. 266, 57 Pac. 996.

We find no other matters in the record requiring special attention, and, for the reasons above set forth, the judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(155 Cal. 488)

In re THOMAS' ESTATE. (S. F. 5,070.)
(Supreme Court of California. April 17, 1909.
Rehearing Denied May 17, 1909.)

1. NEW TRIAL (§ 131*)—PROCEEDINGS—STATEMENT—AMENDMENT.

If the settled statement on a motion for new trial does not truly represent the case, the remedy is by application to the trial court within the six months allowed by Code Civ. Proc. § 473, to vacate the settlement of the statement with leave to amend it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 269; Dec. Dig. § 131.*]

2. WILLS (§ 297*) — ESTABLISHMENT — EVIDENCE—DECLARATIONS OF TESTATOR.

Declarations of one whose will is attacked as a forgery are admissible to show the actual knowledge of the deceased at the time of the making of the alleged will, and that this knowledge was at variance with the statements made as facts in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 692-693; Dec. Dig. § 297.*]

3. WILLS (§ 297*) — ESTABLISHMENT — EVIDENCE—DECLARATIONS OF TESTATOR.

Declarations of one whose will is attacked as a forgery are inadmissible to show that he entertained a different testamentary intent from that expressed in the alleged will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 692-693; Dec. Dig. § 297.*]

4. EVIDENCE (§ 573*) — EFFECT OF OPINION EVIDENCE—COMPARISON OF HANDWRITING.

An instruction that, where the question is one of similarity of writings, an ordinary in-

dividual can arrive at a conclusion quite as correct as that of the opinion of the most skilled expert in handwriting, is erroneous, and is properly refused.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2399; Dec. Dig. § 573.*]

5. EVIDENCE (§ 573*) — EFFECT OF OPINION EVIDENCE—COMPARISON OF HANDWRITING.

The jury are at liberty to use their own judgment in the matter of handwriting, and are not obliged to follow the opinion of experts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2399; Dec. Dig. § 573.*]

6. TRIAL (§ 306*)—CONDUCT OF JURY.

The jury may take exhibits in evidence to the jury room and inspect and compare the writings therein, as provided by Code Civ. Proc. § 1944, and may use a magnifying glass in aid of their investigation, whether it was used in the courtroom or not.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 306.*]

Department 2. Appeal from Superior Court, Santa Clara County; M. H. Hyland, Judge.

Application by John R. Young for the probate of the will of John W. Thomas, deceased. From a judgment against the proponent, he appeals. Affirmed.

B. A. Herrington and William A. Bowden, for appellant. Sullivan & Sullivan, Theo. J. Roche, and William B. Hardy, for respondents.

HENSHAW, J. A purported will of the deceased was offered for probate. A contest was instituted before probate; it being alleged that the purported will was a forgery. Issue was joined. Trial was had before a jury upon the special issue propounded in the following interrogatory: "Did the deceased, J. W. Thomas, subscribe his name to the instrument purporting to be his last will and testament filed in this court on the 8th day of December, 1905?" The jury answered "No." The court adopted this special verdict, and made findings against the validity of the will, and by its decree denied it probate. John R. Young, the proponent of the will and named therein as sole executor, moved for a new trial. A statement for use on the motion was settled and filed October 14, 1907. Thereafter, on October 30, 1907, and before the decision upon the motion for a new trial, the contestants served notice on proponent and his attorneys of a motion to set aside the certificate to the statement and to amend the statement upon the ground "that the statement now on file does not truly represent the case." A hearing was had upon this motion, evidence was by the court taken, and the court, "being satisfied that said statement is inaccurate and does not truly represent the case, orders that the certificate of the judge appended to said engrossed statement be and the same is canceled and set aside. The court thereupon further orders that said statement be amended as follows." The statement as filed contained declarations to the effect that the court

had refused to give certain instructions, and that to its refusal the proponent had duly excepted; whereas, in fact, the record established that the proposed instructions had been given. Objection is made that the court was without power so to amend the statement, or, if it had the power, that it was error to amend it under the procedure taken. The application of the contestants was to set aside the certificate and to amend the bill. The application was made within six months after the settlement of the bill, and thus within the time contemplated by section 473 of the Code of Civil Procedure. The form which contestants adopted was not only in itself proper, but is the form expressly sanctioned by this court in *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439, where it is said: "The proper course, perhaps, would have been as taken in *Warner v. Thomas, etc.*, 105 Cal. 409, 38 Pac. 960, namely, to move the court to vacate the settlement and allowance of the statement, with leave either to re-engross the same, and place the proposed amendments therein, or to have them deemed to be so re-engrossed, settled, and allowed." The application not only does not do violence to the decision of this court in *Merced Bank v. Price*, 152 Cal. 697, 93 Pac. 866, but conforms in all respects to the requirements and rules of practice there indicated. One of the principal purposes of such a statement is that it shall speak the truth upon matters which an appellate tribunal may be called upon to review. It was therefore not only proper for, but the duty of, the trial court to see that the statement which it settled comported with verity.

Upon November 7, 1905, John W. Thomas, an aged man of 82 years, died in the city of San Jose. On the 13th of November the public administrator filed a petition for letters, as in case of intestacy. On the 24th of November B. F. Thomas, a nephew of deceased, petitioned for letters of administration. Thereafter, on December 8, 1905, the will here declared a forgery was presented for probate by John H. Young. The will was a typewritten instrument. Proponent offered evidence tending to show that it was prepared in the office of William A. Bowden, an attorney at law, and was there signed by the deceased and published and declared to be his last will and testament in the presence of the subscribing witnesses, Bowden and Mrs. Young, proponent's wife. There were certain circumstances which at once caused suspicion to arise concerning the validity of this instrument. Young was not related to Thomas, had known him only since June, 1904, when he made his acquaintance for the purpose of effecting a loan of \$600 from him, which loan he never repaid. He subsequently borrowed \$300, which he asserts that he repaid, though Thomas' papers give no evidence of this. He knew that he was named as executor of the will. He was the custodian of the will. The will declared that the only relation of the deceased was a nephew residing

in Portland. The newspaper to which Young was a subscriber contained an account of the sickness and death of Thomas, but at no time before or after the funeral did Young appear at the Thomas house, and the will was not presented by Young for probate until the full statutory period of thirty days had elapsed. The will gave to Young \$2,000, and named him as executor without bonds. It declared Thomas to be of about the age of 84, when in fact he was at its date not 82. The will made the testator declare that "the only relation that I know anything of at the present time is a nephew, Benjamin Thomas, who resides at Portland in the state of Oregon, or resided there when I last heard from him." In fact, it was shown and appeared from various letters and papers of the deceased that he had numerous relatives, that he kept in constant communication with them, and followed with great interest and particularity the progress of their lives. Moreover, when Thomas was found ill unto death by Mrs. Hellen, a witness upon the contest, she also discovered a document lying face downward on the stand by the side of the sick man's bed. This paper was in form an olographic will, wholly written and signed by the deceased, lacking only the date to give it validity under the statute. That instrument, after making provision for the payment of his debts and funeral expenses, provided as follows:

"Second: After such payment, I give to Amelia Nolting two hundred dollars.

"Third: I give, devise and bequeath all the property real and personal and effects of every name and nature which I now have may disposed of or entitled to; one-third to my brother T. F. Thomas, Hermitage, Wyoming county, New York. One-third to my sister Anna T. Perry, South Richland, Oswego county, New York. One-third to my nephews and a niece herein named to be equally divided between them and their heirs and assigns forever, B. F. Thomas, Modesto, California, R. B. Thomas, Lacon, Illinois. I make, constitute and appoint B. F. Thomas of Modesto, Stanislaus county, California, to be my executor of my will and to act without bonds of this my last will and testament, hereby revoking all former wills by me made.

"In witness whereof I have hereunto subscribed my name and affixed my seal.

"J. W. Thomas."

There was thus a statement in the testator's own handwriting showing a very intimate knowledge of his relatives and their whereabouts—a statement in flat contradiction to his purported declaration in the will of July 11, 1905. This olographic instrument, it was shown, had been in existence for three years, which the more conclusively established that this knowledge of his relatives could not have been acquired after July 11, 1905, the date when, by the purported will, he declared that he knew nothing of them or their whereabouts. Letters of the deceased were forthcoming, showing

that he maintained an intimate correspondence with and knowledge of his relatives, and, finally, the testimony of many witnesses, experts, and those familiar with the handwriting of the deceased, went to establish that his signature to the purported will of July 11th was forged and fraudulent. All these matters were shown in evidence against the validity of the alleged will, with many more facts and circumstances to the same end, not necessary here to consider; for it will not be contended, and indeed is not contended, that the evidence was not sufficient to justify the verdict of the jury and the judgment of the court. It is contended, however, that for certain erroneous rulings upon the admission of this evidence the court should have granted a new trial, and to the consideration of these matters we now come.

Questions calling for the declarations of the testator were admitted over objection, the following serving to illustrate their character: "Q. What statements, if any, did he (the testator) make to you about his relations? A. He said he had a number of relations, and that he intended to treat them all alike. Q. What did he state to you with reference to the date of his birth? A. He told me he was born August 21, 1823. Q. State to the jury what he said to you concerning his relations; that is, who his relations were and where they resided? A. He told me that he had relatives in the East, and spoke of his brother and his sister Annie. He spoke of her about two weeks before he died. He told me that he wanted his relations to inherit his property." In addition, written declarations of the testator expressed in letters proved to be in his handwriting, and in the holographic will above quoted, were received in evidence. All of this evidence was admitted over objection, and it is here contended that it was improperly admitted. It is the general rule, recognized by the great weight of authority and accepted in this state, that the declarations of a deceased, when forming no part of the *res gestæ* of the testamentary act, are not admissible for or against the genuineness or validity of the instrument, saving in the two cases where the question for determination is that of the testator's sanity or that of undue influence. In both these instances the underlying principle is the same. The declarations are then admitted, not in proof or disproof of any statement of fact contained in them, but as tending to show the condition or state of mind of the declarant; this condition or state of mind having a direct and important bearing upon the disputed question of his mental capacity or of the execution of the will under undue influence. They are not admitted in proof or disproof of the matter embraced in the declaration. "These declarations are to be admitted, not in any manner as proof of the

truth of the statements declared, but only for the purpose of showing thereby what in fact was the mental condition, or in other words the mental capacity of the testator at the time when the instrument in question was executed." *Throckmorton v. Holt*, 180 U. S. 552, 572, 21 Sup. Ct. 474, 45 L. Ed. 663. That such is the accepted rule in this state will be seen by a glance at the *Estate of Gregory*, 133 Cal. 131, 65 Pac. 315, and *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252. But, however, it must be conceded that there is a strong counter current of authority by which it is held that where the issue is forgery declarations of the testator, even as to his testamentary intent, though forming no part of the *res gestæ*, will be received as tending to prove the issue. The whole subject is learnedly considered and the cases upon either side collated by the Supreme Court of the United States in *Throckmorton v. Holt*, supra, and the occasion here requires nothing more than a citation to the complete and exhaustive discussion which is there had, after which that court adopts the rule as in this state it exists. But in the generality of cases the courts have had to deal with declarations such as those in *Throckmorton v. Holt*, where the improbability that the deceased would have made the testamentary disposition in the will attacked is sought to be shown by declarations establishing his affection for an omitted friend or relative, or his dislike of a person or relative who has been the recipient of his bounty, and, generally, where the state of his affections and his testamentary intent are sought to be established by such evidence, consisting of either oral testimony or of the testator's writings. Such evidence, as we have said, is not admissible. But the evidence here offered is of different character, and stands upon an entirely different plane. It is not attempted here to show by the declarations of the testator the probability that he entertained a different testamentary intent from that expressed in his purported will. What is sought to be shown is the actual knowledge of the testator at the time of the making of the purported will; that this knowledge was at variance with statements made as facts in the will, leaving the jury to draw the inference as to the probability or improbability of a testator, with this knowledge, so falsifying in so solemn an instrument as his last testament. The declarations go to establish knowledge and not testamentary intent, and they do not at all come within the reason of the rule which excludes such declarations in other cases. Thus, if a testator should declare in his purported will that "I make no provision for my sister Anne, knowing that she has predeceased me," and the fact was and could be shown by the testator's own letters and the replies thereto that he was in correspondence with this sister be-

fore and after the date of the purported will, it would certainly be evidence (and after the death of the testator the strongest possible evidence) that he knew that his sister Anne was alive at the date when his purported will caused him to declare his belief in her death. So here two statements of alleged fact are found in the purported will, the one that the testator was at its date 84 years old, the other that "the only relation that I know anything about at the present time is a nephew named Benjamin Thomas, who resides at Portland in the state of Oregon, or resided there when I last heard from him." As to the first of these declarations, contestant undertakes to show by the deceased's oral declarations that the latter's knowledge and belief at the date of the will was that he was not 84 years old, but 81, leaving it as a matter of legitimate inference for the jury to say whether he spoke falsely in declaring to his friends his age, or whether it was more likely that the false statement was that contained in the purported will; in other words, leaving this evidence as a legitimate aid to the jury in determining whether or not the will was forged, whether or not it was probable or improbable that the testator would make in that instrument statements so at variance with his knowledge of the facts.

The second point in controversy is the statement of fact to the effect that the testator had knowledge of only one relative, whereas he had a very intimate knowledge of the names and residences of other relatives; that the only relative of whom he knew was Benjamin Thomas, who resided in Portland "when I last heard from him," whereas, in fact, this nephew, to the testator's knowledge, did not reside in Portland when he last heard from him, but did reside in San Francisco, Cal. Upon these matters it would not be sufficient for the contestant merely to establish the fact that Thomas had other relatives, or the fact that the nephew resided in San Francisco. It was essential that the proof should go further, and, if possible, establish the knowledge of the testator of these facts, always for the purpose of allowing the jury to draw the inference as to the probability or improbability of a testator, with such knowledge, having made the false or erroneous statement contained in the will. The testator being dead, no higher evidence of such knowledge could be had than that evidenced by his own writings, and all of this evidence directed to these ends was therefore unquestionably admissible, pertinent, and proper. It was indirect and secondary evidence, but under the circumstances of the case it was the highest character of evidence possible to be adduced. Since the state of mind of a testator may always be shown by his declarations in a proper case, as a part of that condition or state of mind there may

also be shown his knowledge. This determination does not include the improper admission of declarations touching testamentary intent which do not fall within the recognized rule. The evidence here was plainly addressed to the question of the testator's knowledge. Thus the latter portion of the answer to the first question above quoted was open to objection—that portion of the answer where the testator is said to have declared that he intended to treat his relatives all alike—but the question itself was pertinent, and such portion of the answer as was objectionable would doubtless have been stricken out on motion.

Complaint is made of the refusal of the court to give certain proposed instructions, but the amended statement discloses that these instructions were actually given. The court refused, however, to direct the jury as follows: "(7) In a case involving the comparison of different writings where the question is one of resemblance or similarity, an ordinary individual can arrive at a conclusion quite as correct as that of the opinion of the most skilled expert in handwriting. Jurors have a right to use their eyes as well as their ears in such a case, and may differ in their conclusion from the opinion of the expert witness." Appellant declares that the proposed instruction has received the sanction of this court in *People v. Storke*, 128 Cal. 486, 60 Pac. 1090, and that the refusal to give it was therefore error. In *People v. Storke* the charge was libel and consisted of the sending of scurrilous anonymous letters. An attempt was made to fasten the authorship of these letters on one Gutierrez, and exemplars of Gutierrez's handwriting had been admitted in evidence for the purpose of comparison with the libelous letters. Subsequently the district attorney moved to strike out all of these exemplars on the ground that there had been no independent evidence connecting Gutierrez with the writing of the disputed and libelous matter. The court granted the motion. In discussing the ruling this court said arguendo: "In a case involving a comparison of different writings, the ordinary individual can frequently arrive at a conclusion quite as correct as that of the opinion of the most skilled expert in handwriting, particularly where as in this case, this expert testified that there was no resemblance or similarity." The court in this language was not laying down a rule of law, but was engaged in argumentative consideration. In saying that the ordinary individual can frequently arrive at as correct a conclusion as can an expert it may perhaps be said that there was something of an overstatement of the fact. Certainly, in the majority of instances, the mind of the expert and trained observer, disciplined to discern, not only obvious dissimilarities, but to detect as well actual dissimilarities disguised under the appearance of similitude, will arrive at a re-

sult more correct than will that of the untrained observer. But, aside from this, the proposed instruction contains no qualification at all, and goes far beyond the language of this court in declaring that an ordinary individual can arrive at a conclusion quite as correct—a declaration which this court has never made and which is supported neither by reason nor authority. Moreover, upon the question of the weight to be accorded to the expert testimony and the jury's right and power in judging such evidence, the instructions were full. Thus, to quote but one of several instructions, the court declared as follows: "Generally the testimony of experts will not be allowed to overthrow the positive and direct evidence of credible witnesses who testify from their personal knowledge. While the law permits in certain cases expert testimony in reference to handwriting to be given, yet such testimony should be received with great caution, and the jury are at liberty to reject it if they should find it not well founded in fact. The jury is at liberty to use their own judgment in the matter of handwriting, and are not obliged to follow the opinion of experts."

Upon motion for new trial affidavits were introduced to the effect that a memorandum book or diary purporting to have been kept and written by William A. Bowden, attorney for proponent, had been taken to the jury room, submitted to inspection under a magnifying glass by the foreman of the jury, who then argued to his fellow jurors that the name "Thomas" had been interpolated in the book after the trial of the cause. These statements were met by counter affidavits on the part of the foreman and certain of his fellow jurors denying these allegations. It appears that the memorandum book was an exhibit in the case, and, as such, the jury was entitled to take it and inspect it, and make investigation and comparison of the writing therein contained. Code Civ. Proc. § 1944. It is not shown that the magnifying glass, if one was used, had not also been employed in the courtroom in the examination of exhibits, but, even if it were, we would not hold that the employment of this mechanical device by the jurors in aid of their investigation of handwritings was illegitimate or improper.

For the foregoing reasons, the order appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

10 Cal. App. 284

WETHERBEE v. JOHNSTON. (Civ. 610.)
(Court of Appeal, Second District, California.
March 17, 1909.)

1. APPEAL AND ERROR (§ 909*) — REVIEW — PRESUMPTIONS.

Where it appears from the statement of the case that no evidence was offered on the trial

of the giving, or service, of any notice to redeem from a tax sale, the appellate court will not presume, in support of a finding, silent on the subject, that such notice was regularly given.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 909.*]

2. TAXATION (§ 750*) — SALE — NOTICE — PURCHASE BY STATE.

Pol. Code, § 3785, requiring 30 days' notice to be given of the expiration of the time for redemption from a tax sale or intention to apply for a deed, applies to a sale to the state as well as to a sale to an individual.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 750.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by W. B. Wetherbee against George W. Johnston. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Reversed.

Charles Lantz, for appellant. John N. Anderson and Victor Montgomery, for respondent.

TAGGART, J. Action to quiet title. Judgment for plaintiff, and defendant appeals from judgment and order denying his motion for a new trial.

The court finds plaintiff's title to rest upon a deed from the state made by the tax collector of Orange county, on July 24, 1905; that the lot in question was sold to the state on March 13, 1888, for delinquent taxes for the year 1887, upon an assessment made in the name of Fred Ruchman, and a deed to the state was made March 20, 1887. (This is evidently intended to be 1896, the date appearing in the deed introduced in evidence.) That defendant is the grantee by regular mesne conveyances of the title of Fritz Ruhman to the property.

Appellant presents three reasons for the reversal of the judgment: (1) That there was no showing that the notice of 30 days of the expiration of the time for redemption or intention to apply for a deed was given by the state, or any one on its behalf, before the making of the deed to the state, as required by section 3785 of the Political Code at the time the sale was made; (2) that the description of the property in the tax proceedings was insufficient; and (3) that, although the lot in question, by virtue of the creation of Orange county in 1889, is now located in that county, the taxes for 1887 were levied, and the sale of the lot made, and the deed therefor executed to the state, by the tax collector of the county of Los Angeles, and that the right of redemption was to be exercised in Los Angeles, and not Orange, county, and defendant attempted to redeem the same from the sale to the state through the county auditor of Los Angeles county on February 26, 1907. It will not be

necessary to consider the last two points, as it is apparent that the first is determinative of the case. It appears, from the statement of the case in the transcript, that "no evidence was offered upon the trial of the giving, or service, of any notice to redeem any property from the said or any purported tax sale." With such a record there is no room for an appellate court to presume, in support of a finding, silent on the subject, that such notice was regularly given. It has frequently been held that, where an individual purchased property at a tax sale, while section 3785 of the Political Code required the 30 days' notice to be given, a deed taken without doing so was void. The provision of section 3787, making the deed conclusive evidence of the regularity of certain proceedings, was held not to apply to the giving of this notice, in *Miller v. Miller*, 96 Cal. 379, 31 Pac. 247, 31 Am. St. Rep. 229. *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Walsh v. Burke*, 134 Cal. 594, 66 Pac. 866.

The argument of respondent, based upon reasons why the state should not be considered as a purchaser in the same sense as an individual, finds complete answer in the opinion in the case of *Johnson v. Taylor*, 150 Cal. 201, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181, where it is said, citing the foregoing and other cases: "As the law then stood, a deed could not be issued to the purchaser without the giving of the notice required by section 3785, and one relying on a tax deed was bound to establish the giving of such notice as a part of his proof of title. Furthermore, this court has held in San Francisco, etc., v. Banbury, 106 Cal. 130, 39 Pac. 439, that the requirement of giving notice applied as well to the state as to a private purchaser." In that case it was also held that the amendment of section 3785 was not retroactive, that the right of redemption from a tax sale must be governed by the law in force at the time of the sale, and cannot be affected by subsequent legislation, and that the owner of property sold for taxes may invoke this rule against the state the same as any other purchaser. The curative act of 1903, which was considered in *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81, and applied in *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352, has no application to the omission or defect here under consideration, and we find nothing in the other cases cited by respondent in conflict with the foregoing views.

It is apparent, therefore, that the title of plaintiff failed for lack of proof of notice under section 3785 of the Political Code, and the decree of the superior court quieting his title should be reversed and cause remanded.

Judgment and order reversed.

We concur: ALLEN, P. J.; SHAW, J.

10 Cal. App. 319

RUPPEL v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. No. 561.)

(Court of Appeal, First District, California. March 24, 1909. Rehearing Denied April 22, 1909; Denied by Supreme Court May 18, 1909.)

1. STREET RAILROADS (§ 117*) — COLLISION WITH VEHICLE—QUESTION FOR JURY.

In an action for death of the driver of a vehicle by collision with a street car, evidence held to present questions for the jury as to whether the motorman was negligent in failing to give proper warning of the approach of the car, and in operating the car at an excessive rate of speed.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 253; Dec. Dig. § 117.*]

2. STREET RAILROADS (§ 117*) — COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE —QUESTION FOR JURY.

In an action for death of the driver of a vehicle in a collision with a street car, evidence held to present a question for the jury as to whether decedent was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 255-257; Dec. Dig. § 117.*]

3. TRIAL (§ 352*) — SUBMITTING SPECIAL ISSUES TO JURY.

Where the evidence showed that decedent was driving his vehicle parallel to the track of a street railroad, and as a car approached from the rear allowed the vehicle to swerve toward the track, so that it came into collision with a car approaching from the rear, a special issue requested by defendant, "Did the deceased change the direction in which he was driving so as to swerve in towards the track, and thereby bringing his wagon into a position of danger?" was not subject to the objection that it did not refer to any particular time or place, and was improperly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 840-845; Dec. Dig. § 352.*]

4. APPEAL AND ERROR (§ 1062*) — HARMLESS ERROR—REFUSAL OF SPECIAL ISSUES.

In an action against a street railroad company for death of the driver of a vehicle by collision with a street car which approached the vehicle from the rear as it was being driven at the side of the track, error of the court in refusing a special issue as to whether decedent allowed his vehicle to swerve toward the track so as to come into collision with the car was immaterial, where the evidence warranted a finding that the motorman might have avoided the collision by sounding the bell and checking the speed of his car, and that an affirmative answer to the desired special issue would not have been inconsistent with the general verdict for plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4213; Dec. Dig. § 1062.*]

5. STREET RAILROADS (§ 99*) — COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE —INJURY AVOIDABLE BY DEFENDANT.

Where the driver of a vehicle was killed by collision with a street car which approached the vehicle from the rear, decedent's negligence in permitting his vehicle to swerve toward the track would not defeat recovery where the car could have been stopped in time to avoid the collision after decedent changed his course.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 210; Dec. Dig. § 99.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, JUDGE.

Action by Eliza Ruppel, administratrix of Conrad Ruppel, deceased, against the United Railroads of San Francisco. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Morrison, Cope & Brobeck, for appellant. Stafford & Stafford (W. P. Caubu, of counsel), for respondent.

KERRIGAN, J. This is an action by the plaintiff, as administratrix of the estate of Conrad Ruppel, deceased, to recover damages alleged to have been sustained by the heirs of the deceased by reason of his death resulting from the negligence of the defendant. This is the second appeal. At the first trial defendant obtained a verdict. On motion of plaintiff the court granted a new trial on the ground that the evidence did not support the verdict, and that it showed negligence on the part of the defendant. The order was sustained by this court. 1 Cal. App. 666, 82 Pac. 1073. The jury on the next trial returned a verdict for the plaintiff, upon which verdict judgment was entered against the defendant. This is an appeal by the defendant from that judgment, and from an order denying its motion for a new trial.

The defendant operates a line of street cars by electric power along Mission street in the city of San Francisco. It appears from the testimony that the deceased, Conrad Ruppel, was driving a light one-horse wagon along the easterly side of Mission street toward Silver avenue; that a car of the defendant's line, traveling in the same direction, struck with its right-hand step the left rear wheel of the wagon; and that the deceased was thrown to the ground by the force of the impact, and received injuries from which he died. The defendant contends that there was no evidence of negligence on its part, or, if there was, that the evidence shows that the deceased himself contributed to the accident to such an extent as to preclude a recovery. The evidence introduced on defendant's behalf is to the effect that, as the wagon was proceeding along Mission street and parallel with the track, there was sufficient space between the wagon and the track for the car to pass the wagon up to the time when the car was within a short distance (26) feet of the wagon, when the horse and wagon swerved in so as to bring the left hind wheel of the wagon so near the track that it was struck by the right-hand step of the car. There is also testimony tending to establish that the motorman, immediately upon discovering the danger of a collision, sounded an alarm, and endeavored to bring his car to a stop; that there is a slight grade where the accident happened; and that the motorman was unable to stop the car in time to prevent a collision.

Plaintiff introduced testimony tending to show that no timely warning was given the decedent of the approach of the car; that the motorman thought that the wagon was at a safe distance from the track, and omitted to give any warning signal until he was within 10 or 13 feet of the wagon, and permitted the car to run by the force of its required momentum so fast that, when he discovered that the wagon could not be cleared, it was impossible to avoid the accident.

There was testimony to the effect that the car was operated at an unlawful rate of speed; one witness testifying that it ran as fast as 10 miles an hour. There was also testimony that the defendant failed to give the decedent a sufficient warning of the approach of the car by ringing the bell, or in any other way. On this phase of the case the motorman testified that he gave the bell an ordinary ring at Colton street, which was about 600 feet from the place of the accident; that he rang it again and furiously when about 26 feet from Ruppel's wagon. The other witnesses in the case for the plaintiff testified that they heard no bell rung at Colton street, or after leaving there except the one which was immediately followed by the collision. The record shows that it was not until the last ringing of the bell that Ruppel gave any indication that he heard the warning. At that time he turned his head toward the left and promptly pulled his horse to the right, and away from the track. It was variously estimated by the witnesses that the car and wagon were separated 10, 13, or 26 feet at the time the last bell was rung. It further appears from the testimony of the motorman himself that he saw the decedent at a point about 600 feet away, and kept him under observation; that during all the time of the approach of the car deceased was proceeding parallel with the railroad track and about 3 feet from it; that when the car was about 26 feet from the wagon it swerved towards the track a few inches; and that that divergence was sufficient to render it impossible for the motorman to avoid striking it. The witness Stafford testified in this connection that from the time the wagon came into view of those on the car it was so close to the track that the car could not have passed it without striking it and that it did not, as testified to by the motorman, veer toward the track, that the motorman thought there was sufficient space between the wagon and the track to let the car pass, but that upon approaching the wagon the motorman perceived his error, whereupon he sounded the warning signal and applied the brakes, at which time, however, the wagon being only about 10 feet ahead, the collision was inevitable. The jury might well say that it was the duty of the motorman to anticipate that the horse

and wagon might swerve towards the track, and to give the decedent a sufficient warning of the approach of his car by ringing the bell. It was also for the jury to say whether or not, in permitting the car to run "fast," "very fast," or "seven or eight miles an hour," or at an unlawful rate of speed, and not to have rung the bell after leaving Colton street until within "10," "13," or "26" feet of the wagon, the motorman was guilty of negligence, which proximately caused the injury.

As to whether the decedent was guilty of contributory negligence was a question—like that of the negligence of the defendant—for the determination of the jury. And considering all the circumstances of the case—among others, that Stafford testified that the deceased did not swerve in toward the track, and that he had a right to rely upon receiving reasonable warning, by the ringing of the bell, of the approach of the car—we certainly cannot say that it abused its power in holding that the deceased was not guilty of contributory negligence. *Scott v. S. B. V., etc., Co.*, 152 Cal. 613, 93 Pac. 677; *Driscoll v. Cable R. R. Co.*, 97 Cal. 567, 32 Pac. 591, 31 Am. St. Rep. 203.

Defendant, under section 625, Code Civ. Proc., requested the court to submit to the jury 13 special issues, 5 only of which were submitted; and, while the defendant contends that each one offered should have been given as requested, it insists more particularly, that the refusal of the court to give the eleventh was error. We have examined all of the issues refused, and we think that the eleventh is the only one calling for discussion. It reads as follows: "Did the deceased change the direction in which he was driving so as to swerve in towards the railroad track, and thereby bring his wagon into a position of danger?" Respondent contends that this question is too general, as it does not refer to any particular time or place, and that, therefore, the court was right in refusing to submit it. We think, however, that this issue was not open to such objection. The motorman testified that, when he was within 26 feet of the wagon, it suddenly swerved toward and near the track, and that the accident was thereupon inevitable. This was the only testimony to that effect in the record, and it was clearly with reference to this testimony, which fixed the time and place, that the question was proposed, and upon which the defendant desired an answer from the jury.

But even if this interrogatory had been submitted to the jury, and answered in the

affirmative, still we do not apprehend that it would have been a determination by them that the decedent was guilty of contributory negligence, and hence inconsistent with the general verdict in favor of plaintiff. The jury may have concluded that the motorman, in running his car at the rate of speed that he did, and in giving no alarm prior to the alleged swerving other than the one 600 feet away, failed to exercise the usual precautions to avoid the collision, and that his failure to do so was some evidence that decedent did not fail to exercise ordinary care for his own safety; and in considering this point we are bound to assume that the jury took this view. *Scott v. S. B. V., etc., Co.*, supra; *Meek v. Penn Co.*, 38 Ohio St. 632; *Sherman & Redfield* on the Law of Negligence, § 92, and cases cited; *Robinson v. W. P. Ry. Co.*, 48 Cal. 409. Furthermore, even if the question had been submitted to the jury, and they had answered, "Yes," still we would be unable to say that such a conclusion is inconsistent with the general verdict; for, according to the testimony of the motorman himself, a good stop could be made in 13 feet, and here he had 26 feet in which to stop, and yet he did not do so on this occasion until he had run eight feet after hitting the wagon. According to this testimony, by the exercise of proper care the motorman could have avoided the accident after discovering the peril of the decedent, and therefore the company is liable, although the wagon of deceased may have veered toward the track as claimed. The rule applicable to this phase of the case is stated thus in *Fox v. Oakland Consol. Ry. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216, that one having an opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding that the latter has placed himself in a position of danger by his own negligence. See, also, *Esry v. S. P. Co.*, 103 Cal. 541, 37 Pac. 500; *Lee v. Market St. Ry. Co.*, 135 Cal. 295, 67 Pac. 765. It should be further said in this connection that the answer of the jury to one of the interrogatories submitted to them indicates quite clearly that they thought that the motorman had the last chance to avoid the accident, but failed to avail himself of it.

We have carefully examined the other points discussed in the briefs concerning the instructions of the court and the admission of testimony, but find no error in respect to them.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 312

KILLIAN v. KILLIAN et al. (Civ. 642.)

(Court of Appeal, Second District, California.
March 23, 1909. Rehearing Denied
by Supreme Court May 18, 1909.)

1. HUSBAND AND WIFE (§ 273*)—COMMUNITY PROPERTY — PRESUMPTIONS — BURDEN OF PROOF.

The allegation in the complaint, in an action by the surviving husband for community real estate standing in the name of the deceased wife, that the deceased wife received the title for the use of the community of herself and the husband, and for their mutual convenience, negatives any presumption of a gift of the property to the wife, rendering evidence controverting the prima facie fact that the husband gave the property to the wife admissible.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1024; Dec. Dig. § 273.*]

2. HUSBAND AND WIFE (§ 262*)—SEPARATE PROPERTY — PRESUMPTIONS — BURDEN OF PROOF.

Civ. Code, § 164, as amended in 1889 (St. 1889, p. 328, c. 219), providing that when property is conveyed to a married woman the presumption is that the title is vested in her as her separate property, declares a mere rule of evidence fixing the burden of proof, where the question of ownership is litigated, and does not conflict with the preceding sections, providing that all property acquired by the wife during coverture is community property, unless acquired by gift, etc.; and hence, when property is deeded to the wife during coverture, the law, in the absence of evidence to the contrary, regards it as her separate estate, though the consideration was paid out of community funds, and the wife need not prove that it was a gift, but the husband must show that it was not.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

3. HUSBAND AND WIFE (§ 266*) — GIFTS OF WIFE—PROPERTY SUBJECT TO.

Community property may be the subject of a gift from husband to wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 928; Dec. Dig. § 266.*]

4. HUSBAND AND WIFE (§ 273*)—COMMUNITY PROPERTY—RECOVERY.

Where the complaint, in an action by the surviving husband for community real estate standing in the name of the deceased wife, alleged that he was the owner thereof, and negatived a gift to the wife, the court must find on the issue of gift.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1024; Dec. Dig. § 273.*]

5. HUSBAND AND WIFE (§ 263*)—COMMUNITY PROPERTY—EVIDENCE.

Community estate may be vested in either spouse, and the character of the property as community or separate property must be determined from the nature of the transaction, and, on the issue whether property standing in the name of the wife is community property, any evidence as to the manner of acquisition of the property is admissible to overcome the presumption created by Civ. Code, § 164, as amended in 1889 (St. 1889, p. 328, c. 219); and, unless the rights of an innocent purchaser have attached, the character of the property, when questioned, must be determined by the evidence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 915; Dec. Dig. § 263.*]

6. HUSBAND AND WIFE (§ 262*)—COMMUNITY PROPERTY—RECOVERY.

Where property acquired during coverture by purchase was conveyed to the wife by the vendor at the request of the husband, who

claims it as community property, the husband must overcome the presumption created by Civ. Code, § 164, as amended by St. 1889, p. 328, c. 219, and prove that he did not give it to the wife, which is not done by proof of his undisclosed intention, but his acts and declarations at the time must disprove a gift.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 914; Dec. Dig. § 262.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Jonas S. Killian against Jonas E. Killian and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Reversed.

Gray, Barker & Bowen, for appellant.
Walter G. Van Pelt and Norman A. Bailie, for respondents.

SHAW, J. Plaintiff is the surviving husband of Lucy W. Killian, and defendants are the children of the marriage, the eldest son being the administrator of the estate of his deceased mother. Two of said defendants, Howard S. and Oliver C. Killian, are minors, and appear by their duly appointed guardian ad litem. In form the action is one to quiet title to real estate, the purpose thereof being to have three certain tracts of land, the title to which, at the time of her death, stood of record in the name of Lucy W. Killian, adjudged and declared community property of plaintiff and his deceased wife, and that as such it passed to him as surviving husband of deceased. The case as tried was upon the issue joined by the allegations of the complaint and answer thereto of the minor children; the two adult sons by their answer, in effect, admitting the allegations of the complaint. Judgment went for defendants, from which, and an order denying his motion for a new trial, plaintiff prosecutes this appeal.

The complaint contains a description of the property, and alleges: "That said several tracts of property hereinbefore described were, for the convenience and accommodation of said plaintiff and said deceased, during their said married life, conveyed to said Lucy W. Killian as grantee, and all of said property has ever since said conveyance, stood of record in the name of said Lucy W. Killian; that said Lucy W. Killian took and received said deeds to said property, and took and received the title to said property as community property of her self and her said husband, and said property, and the title thereto, has at all time since the making of each and all of said deeds been, and still is, the community property of this plaintiff and said deceased, and that by reason of the death of his said wife the entire title of all of said property, so being in her and standing in her name at the time of the death of his said wife, passed upon her death to said surviving husband, this plaintiff." In answering this paragraph of the complaint said minor defendants, by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

their guardian ad litem, deny, "that the title to said real estate hereinbefore referred to was, for the convenience and accommodation of said plaintiff and said Lucy W. Killian, deceased, during their said married life, taken in the name of said Lucy W. Killian as grantee; deny that said Lucy W. Killian took and received the title to said property as community property of herself and her husband; deny that said property, and the title thereto, has been, at all times since the making of each and all of said deeds, or still is, the community property of said plaintiff and said Lucy W. Killian, deceased, or that by reason of the death of the said Lucy W. Killian all of the said property standing in her name at the time of her death passed to her surviving husband, this plaintiff."

The court found that plaintiff and deceased intermarried November 29, 1881, and from that date to the death of deceased, which occurred in February, 1908, continued to be husband and wife; that all of the property was acquired subsequent to 1897, and that the consideration for the purchase thereof was paid out of the community funds and property belonging to plaintiff and his said wife; that at the time of the purchase plaintiff and said deceased entered into the possession of each of the tracts so acquired, and up to the time of the latter's death continued in possession thereof, during all of which time plaintiff farmed the lands, and out of the proceeds of such farming operations supported his family, gave to his children (defendants herein) extended educational advantages, sold the crops, and collected, deposited, and checked out all of the money derived from said sales, and in all respects made improvements, developed the lands, and managed the same precisely as though the title thereto stood in his name. By finding 5 the court found: "That at the death of said Lucy W. Killian, and for several years prior thereto, all of said above-described property stood of record in her name, the said several three tracts having been theretofore deeded to her as grantee at the time of purchase, that said deeds were made to her, not by the plaintiff herein, but by the several owners of said property, at the oral request, and by the oral direction, of said plaintiff, and that the title to said property was taken in her name, not at her instance and request, but at the suggestion and request of plaintiff herein." As a conclusion of law the court found that at the time of her death said Lucy W. Killian was the owner of said lands as her sole and separate estate.

Issue was joined upon the allegation that Lucy W. Killian took and received title to the property for the benefit and use of the marital community of herself and plaintiff, and for their mutual convenience and accommodation. This allegation, conceding that such be necessary, is sufficient to negative any presumption of a gift of the property to deceased. The court not only failed to make

any finding responsive to such issue, but on motion of defendants struck out all testimony of plaintiff touching any oral agreement or understanding had at the time between him and his wife which controverted the presumption that the property was a gift, or tended to prove that Lucy W. Killian agreed to receive and hold the property as the community estate of herself and husband. It is unnecessary to quote the evidence so stricken out; suffice it to say that it tended to controvert the prima facie fact that the plaintiff either intended to, or did, give the property to his wife. In so ruling the learned trial judge assigned as grounds therefor his "conclusion that the only instances in which a husband may claim that property which stands in the wife's name, and which was conveyed to her by a third party, belongs to the community are cases where it is made to appear that the property has been conveyed to her without his knowledge or consent, or where his consent is the result of fraud, undue influence, or mistake." In thus ruling we think the court in error. Section 164, Civ. Code, as amended in 1889 (St. 1889, p. 328, c. 219), provides that, "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." "But this is a mere rule of evidence fixing the onus probandi in cases where the question of ownership is in litigation." *Jackson v. Torrence*, 83 Cal. 521, 22 Pac. 695. There is no conflict between this and the preceding sections of the Code, which provide, excluding property owned before marriage, that all property acquired by the wife during coverture is community property, unless it be acquired by gift, bequest, descent, or devise. The rule, however, is well established that community property may be the subject of a gift from husband to wife; and, since it is presumed to be her separate estate, it devolves upon the husband to negative any theory upon which such presumption could be founded. The property having been deeded to the wife, the law, in the absence of any evidence touching the question of the gift thereof, regards it as her separate estate, notwithstanding the consideration therefor was paid out of community funds. *Alferitz v. Arrivillaga*, 143 Cal. 646, 77 Pac. 657. Under such circumstances the wife is not required to prove that it was a gift, but it devolves upon the husband to overcome the presumption by showing that it was not a gift.

There is nothing in the cases of *Bekins v. Dieterle*, 5 Cal. App. 693, 91 Pac. 173, and *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108, cited by appellant, which is in conflict with this view. The question involved in the former case was an alleged fraudulent transfer of property by the husband to the wife for the purpose of defeating the claim of a judgment creditor. Hence it bears no analogy to the case at bar. In the *Bollinger Case*

property had, prior to the amendment of section 164, been purchased with community funds, and deeded to the wife, and as to the character of which there was no question. Subsequent to the amendment of section 164 it was sold, and a part of the proceeds used in the purchase of another piece of property upon which Bollinger and his wife gave a mortgage to secure a loan with which to pay the balance of the purchase price. The deed to the property so purchased was taken in the name of Bollinger and his wife jointly. Upon the death of the wife the husband brought suit against the administrator to quiet his title, claiming the whole of said property. Discussing the effect of the Code upon the conveyance to the wife, the court said: "This at most only created a presumption that the deceased took the part conveyed to her as tenant in common with her husband. The presumption is not conclusive, and was not intended to control or overthrow direct evidence. Here the evidence overthrows the presumption. * * *" While not stated in the opinion, reference to the record discloses facts showing that Bollinger did not give the property to his wife. It was the fact that the property was bought with community funds, together with the facts showing that it was not the subject of a gift, which overthrew the presumption.

Since by reason of the conveyance of the property to Lucy W. Killian it is presumed, under section 164, to be her separate estate, the law, in the absence of any evidence to the contrary, likewise presumes the existence of any fact showing the property to have been acquired by her in such manner as to constitute it separate property. The court finds that it was purchased with community funds, but, notwithstanding this fact, it may have been a gift from the husband to the wife. There is an absence of anything which could be construed as a finding upon the subject of the property being a gift. It is alleged in the complaint that plaintiff is the owner of the property, and since his ownership depended, not upon whether it had been purchased with community funds, but upon the question as to whether or not he had given it to his wife, the court should have made a finding responsive to the allegation, which, in our judgment, as stated above, sufficiently negatives the idea of a gift thereof. If the property was not the subject of a gift from plaintiff to deceased, then, as the consideration therefor was community funds, it follows as a conclusion of law that plaintiff, upon the death of his wife, became entitled thereto as owner. The position of respondents, as sustained by the trial court, is that the transaction whereby the property was conveyed is, in the absence of an attack for fraud, duress, etc., conclusively presumed or deemed to be a gift. We cannot agree with this contention. *Parker v. Chance*, 11 Tex. 513. The effect of the amendment, where litigation ensues over the ownership of prop-

erty the title to which is vested in the wife by deed, is to shift the burden of proof. As said in the case of *Nilson v. Sarment*, 153 Cal. 524, 96 Pac. 315, the "presumption is just the opposite" of what it was prior to the amendment of section 164. As the community estate may be vested in either spouse (*Vassault v. Austin*, 36 Cal. 691), and as its true character is to be determined from the nature of the transaction without reference to who retains the title (*In re Est. of Young*, 123 Cal. 337, 55 Pac. 1011; *Bollinger v. Wright*, 143 Cal. 292, 76 Pac. 1108; *Santa Cruz Rock Pav. Co. v. Lyons* [Cal.] 43 Pac. 599), it follows that evidence tending to establish any facts controverting the presumption and showing the true character of the holding is admissible. The manner of its acquisition, not in whom the legal title is vested, other than in so far as it may under section 164 constitute prima facie evidence of the fact, determines the character of the estate. Hence any competent evidence touching the manner whereby the property was acquired is admissible. Nor is such evidence admissible upon the ground of fraud, constructive or otherwise, but upon the principle that, so far as the rights of either spouse therein is concerned, it is immaterial which of them holds the common property. Unless rights of an innocent purchaser for value have attached, its character when questioned must be determined by any competent evidence, oral or otherwise, which tends to disclose the manner of its acquisition. Sections 162-164, Civ. Code. If acquired during coverture by purchase and conveyed to the wife by a third party at the request of the husband, who claims it as community property, he must, in order to justify his claim, prove that he did not give it to his wife. An undisclosed intention on the part of the husband will not constitute such proof. It is for the court to decide upon his intention from his acts, declarations, and conduct at the time. *Woods v. Whitney*, 42 Cal. 358; *Allen v. Southern, etc., Co.* (C. C.) 70 Fed. 375. In our judgment the Legislature never intended by the amendment of section 164 to abridge the right of either spouse to hold the community property. To hold that, because the property paid for with community funds was, at the request of plaintiff, deeded to the wife, it must, in the absence of attack for fraud, etc., be deemed the separate estate of the wife is to construe the section as raising a conclusive presumption against the husband. It will not bear such interpretation. We are therefore of the opinion that, aside from shifting the burden of proof, the amendment to section 164 effects no change, either as to what constitutes common property, or in the manner of ascertaining its character.

The judgment and order are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App 295

PITCAIRN v. HARKNESS. (Civ. 608.)

(Court of Appeal, Second District, California. March 20, 1909. Rehearing Denied by Supreme Court May 20, 1909.)

1. DEEDS (§ 138*)—"RESERVATION" AND "EXCEPTION" DISTINGUISHED.

An "exception" in a deed is always of some part of the estate not granted at all, while a "reservation" is something taken out of that which is clearly granted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 456; Dec. Dig. § 138.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2538-2544; vol. 7, pp. 6140-6144; vol. 8, pp. 7656, 7787.]

2. DEEDS (§ 143*)—RESERVATION—EFFECT.

An owner of land conveyed a part of it "reserving therefrom a strip of land 25 feet wide off the east side for street purposes." A subsequent conveyance of the balance of the land included the reserved strip, with the recital, "Said purchase includes 25 feet joining the west side of the above to be used for streets." *Held*, that the reservation in the former deed did not except the strip from its operation, but merely secured to the grantor an easement or right of way over the strip, and such easement right, whether considered as appurtenant or in gross, was conveyed to the grantee in the subsequent conveyance, and this interpretation must follow notwithstanding Civ. Code, § 1069, providing that reservations in a grant shall be construed in favor of the grantor other provisions of the Code providing that all interpretations shall be directed toward the ascertainment of the intent of the parties.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 143.*]

3. EASEMENTS (§ 30*)—ABANDONMENT—NON-USER.

An easement of right of way is not lost by mere nonuser for the purpose intended, and hence is not abandoned by use of the land for agricultural purposes.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

4. QUIETING TITLE (§ 39*)—PLEADING—CROSS-COMPLAINT.

In an action to determine conflicting claims to land in which plaintiff claimed exclusive ownership and defendant claimed the same by cross-complaint, the court could determine the respective rights of the parties as developed by evidence of an easement in defendant under the complaint and answer without the filing of cross-complaint.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 80; Dec. Dig. § 39.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Elizabeth E. Pitcairn against L. V. Harkness. From a judgment for plaintiff and an order overruling a motion for a new trial, defendant appeals. Reversed and remanded.

Wright, Bell & Ward, for appellant. C. J. Willett and M. B. Butler, for respondent.

ALLEN, P. J. The action was one to determine conflicting claims to a certain 25-foot strip of ground lying between tracts of land owned by the respective parties. Plaintiff in her complaint alleged exclusive ownership and right of possession thereto, which was denied by the answer, and defendant, in ad-

dition, filed a cross-complaint, in which he claimed the exclusive ownership and right of possession as against plaintiff.

The court found that plaintiff was the owner and entitled to such possession, and that defendant had no right or interest therein. This appeal rests upon the specification of error in relation to the inaccuracy of this finding. It appears from the evidence set out in the statement on motion for a new trial that in 1883 one Wharton acquired a tract of land in the city of Pasadena containing 41 acres, the northerly line of which tract extended from the intersection of the center line of Hill avenue with the center line of Colorado street easterly along the line of Colorado street a distance of 18.65 chains. No conveyance of said tract by Wharton appears to have been made until May 7, 1887, at which date he conveyed to his wife a portion of said tract, the northerly line of which commenced at the intersection of the streets above named, and thence extended easterly 10.49 chains to a point; thence south, west, and to the place of beginning, the area of which included 12 acres of land, "reserving therefrom a strip of land 25 feet wide off the east side for street purposes." Two days thereafter Wharton entered into a contract with one Dennison, through which he agreed to sell and Dennison agreed to buy 18.18 acres lying east of the land conveyed to the wife, and in the description of the land so agreed to be sold the northwest corner thereof was identical with the northeast corner of the 25-foot strip. Wharton having deceased, thereafter by virtue of an appropriate decree of the probate court in the matter of the estate of Wharton, his administrator conveyed to Dennison's assignee the land so agreed to be sold, and in the deed the premises were described as commencing at a point which is the northeast corner of the 25-foot strip in controversy; thence east to the northeast corner of the 41-acre tract; thence south, west, and north so as to include all of the lands owned by Wharton east of the said 25-foot strip mentioned in the deed to the wife. In the deed and contract of Dennison, however, is found this statement: "Said purchase includes 25 feet joining the west side of the above 18.18 acres, to be used for streets." No controversy as to conflicting line or surveys is presented, nor is there anything in the record warranting a claim by either of a title by prescription. In fact, appellant concedes this point.

The only question for determination is as to the effect which should be given the reservation in the deed to the wife and the effect of the reference to the strip in question in the subsequent contract and deed to Dennison. We are of opinion that the reservation in the deed to the wife was not intended to except from the operation of the deed

the strip mentioned. "An 'exception' is always of some part of the estate not granted at all. A 'reservation' is always of something taken back out of that which is clearly granted." *Sears v. Ackerman*, 138 Cal. 586, 72 Pac. 172. That the strip was included within the general description of the tract granted to the wife is clearly expressed. What was taken back out of the grant was the reserved right to use the strip for street purposes. This interpretation we think proper, notwithstanding section 1069, Civ. Code, which provides that reservations in a grant shall be interpreted in favor of the grantor. Such rule must be considered in connection with other provisions of the Code in reference to interpretations, the most prominent of which is that all interpretations should be directed toward the ascertainment of the true intent of the parties. Keeping in mind these rules, we endeavor to ascertain what was the true intent and meaning of Wharton when he executed the conveyance to his wife and inserted therein the reserving clause. Had Wharton intended that the 25-foot strip should not be included in the conveyance to the wife, there was no necessity for continuing the northerly line so as to include this strip, for he owned the land to the east thereof. That he did continue such line so as to include the strip is significant and indicates to our mind an intention that the same should be included within the conveyance. The reasoning employed in *Abraham v. Abbott*, 8 Or. 54, wherein the facts presented were similar to those under consideration, is most convincing, and from which we are led to say that, Wharton being the owner of the land to the east of the tract conveyed to the wife, if he did not intend to grant any interest in this 25-foot strip, he will not be presumed to have included it in the deed for the mere purpose of reserving it, if any other reasonable construction can be given to the language of the instrument. Otherwise we can see no reason why the grantor should have included this strip in the description of the land. This reservation in the deed to the wife, we think, was for the purpose of securing to Wharton and to the land owned by him lying to the east an easement and right of way, and the language employed was not with the intent to exclude the strip from the conveyance. This being true, it must follow that after the execution of the deed to the wife no interest in the 25-foot strip remained in Wharton other than the easement rights reserved. This construction of the deed seems to have been acquiesced in by all parties, for the grant to Dennison by metes and bounds was only of the land lying east of the strip. The statement in the contract of Wharton with Dennison that the purchase includes the strip to be used for street purposes is but

another way of expressing an intent that Dennison, as successor in interest of the grantor, should be entitled to all rights of way reserved by Wharton in the strip, and this easement reserved by Wharton, Dennison acquired by his deed, whether the easement reserved be one appurtenant to the remaining land of Wharton or deemed one in gross. *Fudickar v. East Riverside Irr. Dist.*, 109 Cal. 37, 41 Pac. 1024. Appellant being the successor of the easement rights of Wharton, the court erred in holding that he possessed no interest, claim, or right in or to said strip. It matters not that the strip was never used for a street or road. Easements granted are not lost by mere nonuser, nor would the cultivation of the strip by appellant amount to an abandonment of his right of way. The issue presented by the complaint and answer was as to plaintiff's exclusive right to said strip of ground. In actions of this character, cross-complaints are unnecessary and perform no effective office, and under the complaint and answer it was competent for the court to have determined the respective rights of the parties as developed by the evidence.

The finding that defendant had no claim or interest—which must be taken as a finding that he had no right of way over said strip—is unsupported by the evidence.

The judgment and order are therefore reversed, and cause remanded for further proceedings.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 232

Ex parte KING. (Cr. 92.)

(Court of Appeal, Third District, California.
March 19, 1909.)

1. CRIMINAL LAW (§ 879*)—PLEAS—VERDICT.

Where defendant pleads not guilty and also former jeopardy, there should be a verdict on both pleas.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2103; Dec. Dig. § 879.*]

2. HABEAS CORPUS (§ 4*)—ERROR IN FINDING.

Where defendant's plea of former jeopardy is disregarded, it is error to be corrected by appeal, and is not assailable on application for writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

Application by E. J. King for a writ of habeas corpus. Denied.

Selvage & Cutten and W. Stingley, for petitioner.

BURNETT, J. Petitioner, charged with a misdemeanor, was tried and convicted in the justice court of Union township, Humboldt county, and was sentenced to serve a term of 30 days in the county jail. At the time of his arraignment he interposed the plea of not guilty, and also, in appropriate phraseology,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

of "once in jeopardy." The jury failed to find upon this latter plea, and it was contended here by petitioner that the judgment of the court was void, therefore entitling him to his discharge on habeas corpus. It is no doubt true that there should have been a verdict on each plea. *People v. Kinsey*, 51 Cal. 278; *People v. Helbing*, 59 Cal. 567; *People v. Fuqua*, 61 Cal. 377. Hence, judgment was improperly passed upon defendant, and upon appeal it would be the duty of the appellate court to reverse it and order a new trial. *People v. Tucker*, 115 Cal. 337, 47 Pac. 111. But we have found no case, and we have been cited to none, holding that such a judgment is void upon its face, and therefore assailable upon application for a writ of habeas corpus. Indeed, it seems to be settled by authority, as stated in *Church on Habeas Corpus*, § 253: "Neither will once in jeopardy be reviewed or inquired into on habeas corpus. If pleaded and disregarded, it is an error to be corrected by appeal."

For the reason that the question is one of error, and not of jurisdiction, the application of petitioner could not be entertained, but as he was remanded at the hearing, no further order is necessary.

We concur: CHIPMAN, P. J.; HART, J.

10 Cal. App. 284

JONES v. LEONARDT. (Civ. 604.)

(Court of Appeal, Second District, California.
March 19, 1909. Rehearing Denied
April 17, 1909.)

1. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Evidence, in an action for death of a servant, held to show that the accident was caused by defendant's negligence, though there was no eyewitness to the killing.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 954; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 281*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence, in an action for death of a servant, held insufficient to show contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 987; Dec. Dig. § 281.*]

3. DEATH (§ 85*)—ACTION—DAMAGES.

In an action by an administratrix to recover for death of her decedent, under Code Civ. Proc. § 377, authorizing heirs or personal representatives to sue and providing that such damages may be given as may be just, an instruction that the jury may consider the loss of the comfort, society, support, and protection suffered by the widow and children of deceased by his death was proper, as the recovery is for the benefit of the heirs.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 111; Dec. Dig. § 85.*]

4. EXECUTORS AND ADMINISTRATORS (§ 51*)—ASSETS OF ESTATE—RECOVERY FOR DEATH.

The recovery by an administratrix for the death of her decedent, under Code Civ. Proc. §

377, is for the benefit of decedent's heirs, and does not constitute assets of decedent's estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 51; * *Death*, Cent. Dig. §§ 134, 137.]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Samantha E. Jones as administratrix of the estate of James M. Jones, deceased, against Carl Leonardt. From a judgment for plaintiff, and an order denying motion for new trial, defendant appeals. Affirmed.

M. E. C. Munday, for appellant. Will D. Gould, Charles J. Noyes, and James H. Blanchard, for respondent.

TAGGART, J. James M. Jones was an employé of the Baker Iron Works, which was a subcontractor for steel work under the defendant, who was engaged, as contractor, in the construction of a large building in the city of Los Angeles. While Jones was engaged in his regular employment on the seventh floor of the building, one of the employés of the defendant, in passing over and across the temporary floor above, broke through, causing one of the joists supporting the floor to break into two pieces, one of which fell and struck Jones, precipitating him down the light shaft some 60 or 70 feet to the lower floor, and causing his death. The negligence relied upon consisted in the insufficient securing of the joist supporting the floor which was broken through, which does not seem to be, or to have been, contested. Appellant contends in support of his appeal that the evidence does not support a finding of negligence upon the part of defendant in this: That it does not show that the death of Jones was due to the falling of the joist in question. This is upon the theory that there was no eyewitness who testified to seeing Jones struck, and that from the evidence in the case an inference might be drawn that Jones fell for some other reason. One of the employés of defendant testified that his back was toward Jones when he heard the cracking noise; that he turned around; saw the joist coming, one end falling toward Jones and the other toward himself; that he was so scared he could not say that he saw Jones struck, but he looked immediately after, and Jones was missing from the place in which he had been. The foreman for defendant says the joist broke almost over where Jones was working, not more than 2 or 3 feet from directly over him. His body was found, shortly after, at the bottom of the light well, broken, bruised and crushed by the fall. The doctrine of *Puckhaber v. S. P. Co.*, 132 Cal. 363, 64 Pac. 480, is not applicable to such a state of facts. Neither is there any question of the burden of proof or the preponderance of evidence involved under the facts of this case, as in the case of *Valente v. Sierra*

Ry. Co., 151 Cal. 534, 91 Pac. 481, cited by appellant.

Appellant's contention that plaintiff's intestate was guilty of contributory negligence by selecting an unsafe place to work in is equally without support in the record. The foreman for the Baker Iron Works testified that the place where Jones was working was perfectly safe, and there is no testimony in conflict with this, except that of the superintendent for defendant.

The instruction of the jury by the court that they were to take into consideration the loss of the comfort, society, support, and protection suffered by the widow and children of deceased by his death, in estimating the damages which the plaintiff might recover, was proper. The action, under section 377, Code Civ. Proc., is a purely statutory one, and the recovery is for the benefit of the heirs, and the bringing of the action by the personal representative of the deceased does not make the damages recovered a part of the estate of the deceased. *Munro v. Dredging, etc., Co.*, 84 Cal. 515, 528, 24 Pac. 303, 18 Am. St. Rep. 248. The administrator as such has no interest in the matter, and brings the action only because the statute says so. He is made a statutory trustee to recover the damages for the benefit of the heirs. Unless it is shown there are heirs who can take, an administrator has no right of action. *Webster v. Norwegian Mining Co.*, 137 Cal. 400, 70 Pac. 276, 92 Am. St. Rep. 181.

No error appearing in the record, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

155 Cal. 519

DAVIS v. LE MESNAGER et al. (L. A. No. 2,289.)

(Supreme Court of California. April 26, 1909.)

APPEAL AND ERROR (§ 1177*)—DETERMINATION OF CAUSE—MANDATE AND PROCEEDINGS IN LOWER COURT—NEW TRIAL.

Where a judgment for defendant and the order denying a new trial are reversed for error in excluding plaintiff's evidence, a new trial is necessary, and it is error to grant plaintiff's motion for findings and judgment upon the prior judgment roll and the opinion of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by W. J. Davis against Mrs. George Le Mesnager and others. From a judgment for plaintiff, defendants appeal. Reversed.

Denis & Loewenthal, H. H. Appel, and H. J. Fish, for appellants. Charles Lentz, for respondent.

PER CURIAM. This cause was tried in the superior court, and judgment was rendered therein in favor of the defendants. An order was subsequently made denying plaintiff's motion for a new trial. From this judgment and order the plaintiff appealed, and upon the appeal the judgment and order denying a new trial were reversed. See Davis v. Le Mesnager, 152 Cal. 97, 92 Pac. 76. Upon the going down of the remittitur the plaintiff moved the court for findings and judgment in his favor upon the prior judgment roll and the opinion of the Supreme Court. The motion came on for hearing, and thereupon, in support of the motion, there was presented to the court the opinion of the Supreme Court, the remittitur and the judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment roll in the superior court upon the former judgment. The defendants objected to this method of procedure, and objected to the hearing of the motion and to the entry of judgment thereon. The court below, however, overruled their objections, and, over their exception, granted the motion, and rendered judgment in favor of the plaintiff. From this judgment certain of the defendants appeal.

The court below erred in disposing of the case in this summary manner. The judgment and the order denying a new trial were reversed by the Supreme Court upon the former appeal. This made it necessary to try the case again in the superior court. The error which made it necessary to reverse the case was an error of law occurring upon the trial, consisting of a ruling of the court as to the validity of a deed offered in evidence. The plaintiff could not prevail without offering evidence in support of his controverted allegation of ownership, and the court, in this method of procedure, gave him judgment without any evidence whatever.

The judgment is reversed, and the cause remanded for a new trial.

155 Cal. 521

WHITNEY ESTATE CO. v. NORTHERN ASSUR. CO. OF LONDON. (S. F. 4,970.)

(Supreme Court of California. April 30, 1909. Rehearing Denied May 27, 1909.)

1. INSURANCE (§ 124*)—NATURE OF CONTRACT.

Under Civ. Code, §§ 2527, 2551, 2558, defining insurance as a contract whereby one undertakes to indemnify another against loss arising from an unknown event, and providing that the sole object of insurance is the indemnity of insured, and declaring that gaming or wagering policies shall be void, a policy of insurance is a contract of indemnity, and, except in case of a valued policy, insured may only recover such loss as he has actually sustained, not exceeding the sum stipulated.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 172; Dec. Dig. § 124.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3674-3677.]

2. INSURANCE (§ 138*)—CONTRACTS—VALIDITY.

It is competent for the parties to a contract of rent insurance to stipulate for a method of ascertaining and computing the loss of rent, without violating the rule that insurance shall furnish only indemnity against loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 246; Dec. Dig. § 138.*]

3. INSURANCE (§ 173*) — INDEMNITY INSURANCE — CONTRACTS — CONSTRUCTION — "VALUED POLICY."

A rent insurance policy, stipulating that insurer should be liable for the actual loss of rent by a fire rendering the building untenable, based on the rentals in force from the rented portions at the time of the fire, and computed from the date of the fire for the time required to put the premises in tenantable condition, and requiring insured to carry insurance on the rent in an amount equal to the annual rent, un-

der penalty of being a co-insurer to the extent of the deficiency, makes the insurer liable for such amount of the rent, at the rate paid for the portions rented at the time of a fire, as would become payable to insured during the time required to restore the premises to a tenantable condition, without deduction for any expenses connected with the renting; the policy being analogous to a "valued policy" defined by Civ. Code, § 2596, as a policy expressing on its face an agreement that the thing insured shall be valued at a special sum, in so far as it prescribes a method of determining the amount of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 358; Dec. Dig. § 173.*]

For other definitions, see Words and Phrases, vol. 8, p. 7282.]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Whitney Estate Company against the Northern Assurance Company of London. From a judgment granting insufficient relief, plaintiff appeals. Reversed, with directions.

L. A. Redman, for appellant. Goodfellow & Eells and T. C. Coogan, for respondent.

SLOSS, J. This is an action on a policy of fire insurance. The facts are undisputed; such of them as were put in issue by the pleadings having been found by the court upon the agreement of the parties.

The defendant, in June, 1905, issued to plaintiff a policy containing the following provisions bearing upon the question in dispute:

"Northern Assurance Company of London.

"In consideration of the stipulations herein named and of sixty-six 20-100 dollars premium does insure the Whitney Estate Co. for the term of one year from the 1st day of June, 1905, at noon, to the 1st day of June, 1906, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding fifteen thousand four hundred no-100 dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

"15,400. On rents of the brick building known as the Starr King Building, situate No. 117 to 125 on the south side of Geary street, between Grant avenue and Stockton street, San Francisco, California. * * *

"It is understood and agreed that in case the above-named building or any part thereof shall be rendered untenable by fire, this company shall be liable to the assured for the actual loss of rent ensuing therefrom, based upon the rentals in force from the rented portions of the premises at the time of fire, not exceeding the sum insured. Loss to be computed from the date of the fire for the time it would require to put the premises in tenantable condition, excluding from such time such portion thereof as may

be consumed by a strike or by any other delay beyond the control of the assured.

"In the event of disagreement as to the time required to put the premises in tenantable condition, the same shall be ascertained by two competent and disinterested appraisers," etc.

"The assured stipulates and agrees to carry insurance on said rents in an amount equal to the annual rents of said premises, and it is understood and agreed that if at the time of fire, the aggregate amount of insurance shall be less than the annual rentals at the time of the fire, the assured shall be held to be an insurer in the amount of such deficiency, and in that capacity shall bear a proportionate share of the loss."

All of the foregoing, except the first paragraph quoted, is contained in a slip or "rider" attached to a policy in the form usually employed for fire insurance. One of the clauses found in the body of the policy, and relied on by respondent, declares that "wherever in this policy * * * the word 'loss' occurs, it shall be deemed the equivalent of 'loss or damage.'" Many of the other provisions common to such usual or "standard" form are in their nature inapplicable to the subject-matter of this particular contract.

On April 18, 1906, the Starr King building was owned by the plaintiff, and on that day it was totally destroyed by fire. At the time of the fire of April, 1906, the total amount of insurance on rents carried by plaintiff, including and concurrent with that of the defendant, was \$69,175, and the total amount of rents being collected by plaintiff from tenants occupying the rented portions of the building was a sum which if paid for one year, would aggregate \$68,298. For such rents the plaintiff was required to, and did, furnish to its tenants certain services, including the operation of an elevator, the supply of water and light, and the services of a janitor. The cost to the plaintiff of such service, if paid for one year, would aggregate \$10,000. The time required to put the building in tenantable condition was agreed upon by the parties to be 12½ months. The position of the plaintiff was that, on these facts, it was entitled to recover from the insurers the gross amount of the rents for one year, viz., \$68,298. The defendant contended, however, that the loss or damage sustained by plaintiff and recoverable by it was only the sum remaining after deducting from the gross annual rentals the \$10,000 which, if there had been no fire, plaintiff would have been obliged to expend in furnishing the aforesaid services to tenants. The latter view was accepted by the trial court, which, after finding, as a conclusion of law, that plaintiff's loss or damage was \$58,298, awarded judgment for \$12,964.47, the proportion of such loss payable by defendant. From this judgment plaintiff appeals.

The question thus presented is, so far as we are able to learn, a novel one. Rent insurance is a comparatively recent development of underwriting, and cases dealing with its peculiar problems are few. In their briefs the learned counsel for the respective parties present various authorities, but none of the cases cited on either side can be said to be closely in point. They are valuable in so far as they illustrate general principles of insurance law which must be looked to for the determination of the question before us. One of these principles—and the one upon which the respondent bases its position—is that a policy of insurance is a contract of indemnity. It is, as defined in Civ. Code, § 2527, "a contract whereby one undertakes to indemnify another against loss, damage or liability, arising from an unknown or contingent event." Section 2551 provides that "the sole object of insurance is the indemnity of the insured. * * * Policies "executed by way of gaming or wagering" are void. Civ. Code, § 2558. "The measure of an insurable interest in property is the extent to which the insured might be damaged by loss or injury thereof." Accordingly it is universally held that (except in case of a valued policy) "the insured is entitled to recover under the policy only such loss as he has actually sustained, not exceeding the sum stipulated." 16 Am. & Eng. Ency. of Law, 840.

The contention of the respondent is that the application of these rules requires the affirmation of the judgment. The "loss of rent" suffered by plaintiff was not, it is said, the gross amount of rents which it would have received, but only the surplus remaining after deducting the expense to which it would have been put in collecting such rents. This position would have much force if the subject of insurance consisted of such property that the loss occasioned by a fire could be accurately determined. But, in the case of rents of a building it is not, in the nature of things, possible to determine, at any particular period, just what the income from rents for the ensuing year would be. It may be that a greater or a less part of the building may be occupied during the year than at its commencement; so with the matter of expense. The annual outlay for elevator service, wages of janitors, light and water will depend upon a variety of contingencies which cannot be foretold. Furthermore, the fact that a building is rendered untenable may cause a loss of rents to the owner in ways that are even more incapable of measurement. A building vacated by its tenants in consequence of fire may remain vacant, in whole or in part, long after it has been restored and is again ready for occupancy. In view of all these uncertainties, it is perfectly competent for the parties to a contract of rent insurance, without in any degree violating the principle that the insurance shall fur-

nish only indemnity against loss, to stipulate for a method of ascertaining and computing such loss. We think the policy before us, fairly construed, does provide that the loss of rents shall be deemed to be the amount of rentals that would be collected by the insured during the period that may be required to restore the building to a tenantable condition, assuming that the rentals would have continued to be the same in amount as at the time of the fire. So construed, the policy, if not strictly a valued policy (Civ. Code, § 2596), may be regarded as analogous to a valued policy in so far as it prescribes a method for determining, as between the parties, the amount of loss. The suggested meaning is the one indicated by the clauses of the policy quoted by us. The insurance company agrees to be liable for the "actual loss of rent ensuing" from the fire, and makes provision for the manner of determining the loss. It is to be based upon the rentals in force from the rented portions of the premises at the time of fire, and to be "computed from the date of the fire for the time it would require to put the premises in tenantable condition." No elements except those of actual rentals at time of fire, and time required for repair, are mentioned. The first of these elements is easily ascertainable, and special provision is made for arbitration as to the second, in the event of disagreement. If it had been intended that any other item should enter into the computation, it seems reasonable to suppose that something would have been said regarding such other item. The view suggested is fortified by a consideration of the clause requiring the insured to carry insurance on said rents in an amount equal to the annual rents of the premises, under penalty of being held to be a co-insurer to the extent of the deficiency. If respondent's contention be correct, this clause would require, if the management of the building involved any expense whatever, the carrying of insurance to an amount greater than the loss which could possibly be sustained. It would impose upon the insured the obligation of insuring to the extent of his gross rents, although the liability of the insurers would be limited to the net rents. In this view the requirement would be unreasonable and burdensome. It is, however, a perfectly proper and legitimate condition if recovery, in the event of fire, is to go to the extent of the total rentals, without any deduction for expenses.

As we have said, no case directly in point has been called to our attention. Perhaps the one that affords the closest analogy to the one before us is *Stevens v. Columbian Ins. Co.*, 3 Caines (N. Y.) 43, 2 Am. Dec. 247. There the charterer of a vessel had insured the freight under an open policy. There was a total loss en route, and it was held that the insured was entitled to recover the gross amount named in the policy, without any deduction for expenses of wages and provisions for the crew which would have had to be

borne by plaintiff if the vessel had completed her voyage. It is true that there are many distinctions between marine insurance and insurance against loss by fire, and that the rules governing the one cannot always be applied to the other. The doctrine of the *Stevens Case* is, in this state, expressly adopted by statute as the method of estimating the loss of freight under an open marine policy. Civ. Code, § 2741. But notwithstanding the differences arising from the nature of marine and fire insurance, each is a contract of indemnity, and much of the reasoning of the court in the case just mentioned has a direct bearing upon the one before us. "Although indemnity is the leading object of insurance, it is not always the criterion by which to ascertain the amount of the loss," says the court, and goes on to point out that "to adopt the net amount of freight as the rule would lead to much litigation and uncertainty respecting the deductions to be made. But to take the gross amount of freight as the rule of damages would be equal, simple, and easily ascertained." The last observation has particular force when applied to the facts of the case before us.

The respondent relies on *Lite v. Firemen's Ins. Co.*, 119 App. Div. 410, 104 N. Y. Supp. 434. The policy there involved was one on "the profits of the lease" of certain buildings leased by plaintiff, and by him sublet to various tenants. In the course of the opinion it is said that plaintiff's recovery was to be "measured by the difference between the rentals which he is able to realize from the property, less the rent paid by him, plus the expense of running and maintaining the building." The subject of insurance being the profits of the lease, it was obviously necessary, in estimating plaintiff's loss, to deduct from the rents received by him all expenses incurred. The case is not at all analogous to the present one, where the insurance is on rents. *Barry v. Farmers', etc., Ins. Ass'n (Iowa)* 81 N. W. 690, and *McIlrath v. Farmers', etc., Ins. Ass'n (Iowa)* 86 N. W. 310, are also cited by respondent. These were cases of insurance on growing crops, which were destroyed before maturity. In each case it was held that plaintiff could recover only the market value of the grain destroyed, after deducting what it would have cost to prepare it for market. This ruling has no bearing on the question before us. The insured was entitled to no more than the value of the property lost at the time of its destruction. The value of a growing crop is not the equivalent of the value which such crop would have at maturity, and the court was simply declaring a method of ascertaining the value of the property at the time of destruction, and the consequent loss. See *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62; *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 703; *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267.

Upon a consideration of the entire policy,

we think it was intended to make the defendant liable for such amount of rent, at the rate paid for the portions rented at the time of the fire, as would have become payable to plaintiff during the period required to restore the premises to a tenable condition, without deduction for any expenses connected with the renting.

The judgment is reversed, with directions to the trial court to enter judgment in accordance with the views herein expressed.

We concur: ANGELLOTTI, J.; SHAW, J.

10 Cal. App. 271

KRAMM v. STOCKTON ELECTRIC R. CO.
(Civ. 548.)

(Court of Appeal, Third District, California.
March 18, 1909. Rehearing Denied
April 17, 1909.)

1. NEW TRIAL (§ 70*)—GROUNDS—VERDICT CONTRARY TO EVIDENCE—DUTY OF TRIAL COURT.

If the trial judge is satisfied that the verdict is opposed to the evidence, it is his duty to set it aside.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.*]

2. APPEAL AND ERROR (§ 979*)—DISCRETION OF TRIAL COURT—SETTING ASIDE VERDICT.

While the fact that the trial court acts from a conscientious sense of duty will not prevent its rulings setting aside a verdict from being disturbed on appeal, it will not be disturbed unless the appellate court, viewing his action from his superior position in weighing the evidence and determining the credibility of witnesses, can say that he abused his discretion in setting the verdict aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3871; Dec. Dig. § 979.*]

3. STREET RAILROADS (§ 114*)—INJURY ACTION—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for intestate's death by being struck by a street car, motorman's testimony held to show contributory negligence by decedent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 248-250; Dec. Dig. § 114.*]

4. STREET RAILROADS (§ 114*)—INJURY ACTION—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action for intestate's death by being struck by a street car, the motorman's testimony held not to show he was negligent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243-246; Dec. Dig. § 114.*]

5. NEW TRIAL (§ 69*)—VERDICT CONTRARY TO EVIDENCE—POWER OF TRIAL COURT—CREDIBILITY OF WITNESSES.

In passing upon a motion to set aside the verdict as contrary to the evidence, the trial court could give full credence to a witness.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 141; Dec. Dig. § 69.*]

6. NEGLIGENCE (§ 122*)—PRESUMPTIONS—AVOIDANCE OF DANGER.

It is presumed that all men are in possession of their senses, and will use ordinary prudence to avoid danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221, 222; Dec. Dig. § 122.*]

7. STREET RAILROADS (§ 93*)—INJURY TO PERSON ON TRACK—DUTY TO AVOID INJURY.

A motorman, as well as a locomotive engineer, can assume that a person on the track possesses ordinary intelligence and will get off the track as the car approaches, and can rely upon that presumption until it may be too late to avoid injury, provided he gives proper signals.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 197; Dec. Dig. § 93.*]

8. STREET RAILROADS (§ 98*)—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Common prudence requires one on a street car track to carefully use his senses of sight and hearing to avoid danger, and that he is absorbed in his immediate business is no excuse for his failure to do so.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

9. NEGLIGENCE (§ 100*)—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN DOCTRINE.

Negligence by the injured person does not excuse his wanton killing by another.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 100.*]

10. APPEAL AND ERROR (§ 979*)—DISCRETION OF TRIAL COURT—SETTING ASIDE VERDICT—ABUSE OF DISCRETION.

Where, in an action for death, the evidence would justify an inference by reasonable men that defendant was not negligent, the appellate court will affirm the order of the trial court setting aside a verdict for plaintiff as opposed to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3871; Dec. Dig. § 979.*]

11. APPEAL AND ERROR (§ 1097*)—SUBSEQUENT APPEALS—LAW OF CASE.

A decision on a former appeal that the evidence required the questions of negligence and contributory negligence to be submitted to the jury is not the law of the case on a subsequent appeal so as to necessarily require the reversal of an order setting aside a verdict for plaintiff as opposed to the evidence, though the evidence on both trials was practically the same; the questions on the two appeals being entirely different.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

12. TRIAL (§ 165*)—NONSUIT—DETERMINATION.

A motion for nonsuit is equivalent to a demurrer to the evidence, or an objection that all of the material facts, even if true, did not justify a judgment for plaintiff, and the evidence must be construed more strongly against defendant on such motion, waiving any question of variance or credibility of witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by Catherine Kramm, as administratrix, against the Stockton Electric Railroad Company. From an order granting a motion for a new trial, plaintiff appeals. Affirmed.

Jacobs & Flack, for appellant. Arthur L. Levinsky and Budd & Thompson, for respondent.

BURNETT, J. The action was brought to recover damages for the death of plaintiff's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Intestate, alleged to have been caused by the negligence of defendant. There have been three trials of the case, in the first of which a jury found a verdict for plaintiff, which was set aside and a new trial granted by the trial judge. In the second a motion for a nonsuit was granted and the order was reversed by this court. 3 Cal. App. 606, 86 Pac. 738, 903. In the last trial a jury again found a verdict for plaintiff, and the trial judge set aside this verdict and granted the motion for a new trial, and from this order the appeal is taken.

It is admitted that the evidence was virtually the same at all these trials; the defendant calling no witnesses, but relying upon the testimony of the witnesses for plaintiff. This evidence was reviewed at considerable length by this court in said appeal, and it was therein said, through Presiding Justice Chipman: "To our minds it is quite obvious that there was sufficient evidence in support of plaintiff's case to require that it be passed upon by the jury. * * * Without further noticing the evidence or further comment, in our judgment the case should have gone to the jury, because, among other reasons, the jury as presumably 'sensible and impartial' men might have decided that the deceased exercised ordinary care (Herbert v. Southern Pacific Co., 121 Cal. 230, 53 Pac. 651), or that the motorman 'had the last clear opportunity to avoid the injury,' in which case it was his duty to have done so (Esrey v. Southern Pacific Co., 103 Cal. 541, 37 Pac. 500; Lee v. Market St. Ry. Co., 135 Cal. 293, 67 Pac. 765)." In his opinion granting the motion for a new trial, the learned judge of the court below declared: "The court is satisfied: First, of the contributory negligence of the decedent, and that this is shown not only by a preponderance of the evidence but beyond any reasonable doubt. Second, that the speed of the car did not exceed eight miles an hour, and that this is shown by a preponderance of the evidence. Third, the plaintiff has failed to show willful or wanton negligence on the part of the motorman as the same is defined by our Supreme Court. Fourth, that plaintiff failed to show and that the evidence was insufficient to justify the conclusion that the motorman had the last clear opportunity to avoid the accident, when he realized the danger in which decedent had placed himself. The court is therefore constrained to hold that the verdict is not supported by the evidence. The court has been very reluctant to reach this conclusion: First, because it is always very loath to set aside the verdict of a jury under any circumstances; and, secondly, on account of the decision of the appellate court on motion for a nonsuit. But bearing in mind that the appellate court in deciding that motion had 'nothing to do with the question of the credibility of the witnesses, nor with testimony tending to create a conflict, nor with any apparent disagreement as to the facts among

plaintiff's witnesses,' and that the evidence on such motion not only had to 'be viewed most strongly against defendant but most favorably to plaintiff,' and being constrained after several critical examinations of the evidence to believe that the verdict is not supported by the evidence, the court will grant a new trial."

The foregoing naturally suggests the inquiry: To what extent a trial judge is bound by the verdict of a jury, and by what rule or standard must he determine a motion to set aside such verdict and grant a new trial? The subject has been frequently discussed by the Supreme Court. We cite the following cases: Gropengiesser v. Lake, 103 Cal. 42, 36 Pac. 1036; Harrison v. Sutter St. Ry. Co., 116 Cal. 161, 47 Pac. 1019; Green v. Soule, 140 Cal. 102, 78 Pac. 337. In the Harrison Case it is said, through Mr. Justice Van Fleet: "That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse has become axiomatic and requires no citation of authority in its support. It is true that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules to the accomplishment of justice; but so long as a case-made presents an instance showing a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even, if as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn from the evidence." In the Green Case Mr. Justice Shaw says for the court: "There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. If the judge is not satisfied with the verdict, and is convinced that it is clearly against the weight of the evidence, it is his duty to set it aside, even though there may have been some conflict in the testimony. * * * Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where if submitted to him without a jury he might upon the evidence have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are en-

titled to the judgment of the jury in reaching a verdict, in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence."

It is clear therefore that, when the trial judge is satisfied that a verdict is wrong and opposed to the evidence, if he refuses to set it aside he violates his oath of office. If he acts, though, from the most conscientious consideration of his duty and sets aside the verdict, it does not necessarily follow that his order will not be disturbed by the higher court. It must stand, however, as we have seen, unless the appellate tribunal, exercising its judgment as to the record, is compelled to find that there has been an abuse of discretion; but how can we determine that the trial judge abused his discretion? We must assume, of course, that he followed his honest convictions in granting the motion. Indeed, we have no doubt that he was entirely satisfied that the verdict of the jury was wrong. He believed that the evidence, when properly considered, required a finding in favor of defendant, and in an elaborate opinion, a copy of which has been filed herein, persuasive reasons are given for that belief. After a careful examination of the voluminous record, we find no evidence of any bias or prejudice on the part of the trial judge. The case was fairly and fully tried, and the only possible justification for a reversal of the order would be the ground that the evidence cannot be fairly interpreted in harmony with the said action of the trial court; in other words, that no reasonable inference can be drawn from the evidence inconsistent with the finding of the jury. And this consideration must be viewed, of course, in the light of the obvious advantages possessed by the trial court in the determination of the weight of the evidence and the credibility of the witnesses.

Although of the opinion that the verdict of the jury finds support in some of the evidence, giving it full credit, and inclined, as we should be, not to interfere with his action, if the trial judge had denied the motion for a new trial, yet we are convinced that fair and impartial men might reasonably differ in their deductions from the evidence, and that it cannot be said that the order granting the motion is unsupported and unwarranted. The trial judge had confidence in the veracity of the motorman and attached much importance to his testimony. We cannot say that the confidence was misplaced, and it is obvious that the motorman was most favorably situated of all the witnesses to observe accurately just what occurred at and immediately prior to the time of the accident. The motorman relates the occurrence as follows: "When I rounded this curve [more than 600 feet from the scene of the accident] I threw off my current, as

was customary, and at the curve, rounding the curve, the car was going by its own speed or momentum from the trolley. After I left the curve I applied one or two notches of the current again; that is, about half the power. I did not increase that one or two notches up to the time I struck Mr. Kramm. As I emerged from the curve, I saw Mr. Kramm standing to the east of the east rail, and at the same time I saw a water wagon to the east of the east rail, and Mr. Kramm was standing between the east rail and the water wagon, at a distance of about three, three or four feet from the east rail. I rung my bell at intervals from the time I left the curve until the accident occurred. I was about 100 feet away from Mr. Kramm when he began to back across the track until I got within about 12 feet of him, and he apparently stopped. He hesitated, stopped, and then I again rung my bell and applied the brakes, but my car struck him. I did everything I could at the moment I saw Mr. Kramm stop on that track to prevent the accident. From the time I saw Mr. Kramm start to back across the track he had sufficient time to get across the track if he had not stopped. I believed that he was going to cross the track. If Mr. Kramm had remained in that place where he was standing when I first saw him he would not have been struck by my car." He said also that the car was traveling at the rate of eight miles per hour.

It cannot be said that there is anything inherently improbable in the foregoing statement. Giving it full credence, as the trial judge had a legal right to do, the conclusion followed not only that the deceased was guilty of contributory negligence, but that the motorman did everything to avert the accident that can be demanded of any reasonable man. The rule is universally recognized that it is to be presumed that a person of mature years will not stand still upon a railroad track and suffer himself to be run down. It is also a presumption that all men are in possession of their senses and will exercise ordinary diligence in times of danger to take care of themselves. It is in accordance with these presumptions held that, when the engineer of a locomotive engine sees ahead of him a man upon the track, he can presume that the man possesses ordinary capacity, that he can see and hear and reason from cause to effect, and that as a train approaches him he will step aside and not be run over. The engineer—and the same rule will apply to a motorman of an electric car—provided he gives the proper signals, has a right to act upon that presumption until it may be too late to avoid contact. Beach on Contributory Negligence (3d Rev. Ed.) § 203. There is undoubtedly some difference, from the nature of things, in the degree of care required in relation to a street car track and a steam railroad; but in either event common prudence requires from the one upon

the track the careful use of the senses of sight and hearing. In *Green v. Los Angeles, etc., Ry. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, it is held that "the engineer had the right to assume that a person seen in a place of safety was in possession of natural faculties, and would not recklessly move in front of the approaching train, and was not required to stop or check the train to ascertain whether such person was about to do so; and the engineer did his whole duty in giving the alarm and trying to stop the train as soon as the person was seen to step upon the track, though such effort was unavailing." See, also, *Lambert v. Southern Pacific Railway Co.*, 146 Cal. 231, 79 Pac. 873. Here not only had the motorman the right to assume, but it was an actual fact, as shown by the evidence, that the deceased was in possession of his natural faculties.

It is no answer to say that the attention of the deceased was engrossed by the water wagon, and therefore he did not see nor hear the approaching car. In *Wheat v. St. Louis*, 179 Mo. 572, 78 S. W. 790, 64 L. R. A. 292, it is said: "The contention of the plaintiff that he had a right to have his mind so engrossed in his business that he did not think of the obstruction, or that he had passed it, is wholly untenable. Persons traveling on a highway are charged with a duty to exercise reasonable care to observe and avoid obstructions and defects. They have no right to be so engrossed in their own affairs as to be negligent of their own safety." In *Brett v. Frank & Company*, 153 Cal. 267, 94 Pac. 1051, it is held that the preoccupation or forgetfulness which does not bar recovery as a matter of law, but raises a question for the jury, "only applies in exceptional cases having to do with abnormal risks and with the performance of duties under the high tension of emergency, and where the doing of one necessary thing under the stress of immediate action does not charge a person with contributory negligence because he has omitted or forgotten another." There is nothing in any of the cases cited by appellant discrediting the inference drawn by the trial court from the testimony of said motorman. For illustration, we refer to *Harrington v. Los Angeles Railway Company*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, to show the difference in the conditions. There the motorman discovered the perilous situation of the bicycle rider at such a time and in such circumstances that he could not by the exercise of ordinary care have avoided the collision; but, "notwithstanding the warnings and entreaties of bystanders to stop the car, he wantonly and recklessly pushed the car forward, whereupon the bicycle rider made all reasonable and practicable endeavors without success to avoid the collision." It was properly held that, notwithstanding the bicycle rider's negligence, the defendant was liable for the accident. It ought not to

be open to controversy that the mere negligence of one actor any more in law than in morals does not excuse his wanton killing by another. The *Harrington* and *Green* Cases are not inconsistent, as claimed by respondent. This is made manifest by an examination of the opinions, but the latter, and not the former, is applicable here to the facts as detailed by said motorman. We have thus treated the testimony of the motorman as acquitting the defendant of responsibility for the accident; but, when we reach the conclusion that a reasonable man might draw such an inference from the evidence, it is plainly our duty to affirm the order on the ground that there has been no abuse of discretion.

Appellant contends that the decision of this court on the former appeal determined the law of the case, and therefore necessitates a reversal of this order. The contention involves a misconception of the significance of "the law of the case" and of what was actually decided on the appeal from the judgment of nonsuit. The question of "the law of the case" has been recently discussed in *Allen v. Bryant*, 100 Pac. 704, wherein it is said, through Mr. Justice Henshaw, that: "The doctrine of the law of the case presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal. * * * But since the rule owes its very existence to error, it is not one whose extension is looked upon with favor. The ruling is adhered to in the single case where it arises, is not carried into other cases as a precedent, and the doctrine is rarely and in a very limited number of cases applied to matters of evidence as distinguished from rulings of law. The narrow class of cases in which the doctrine will be held to apply to evidence and the rigid limitation upon the application of the doctrine will be found well expressed in *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000. It is there said: 'But where the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, or the weight to which their testimony is entitled, or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented and is not controlled by the opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision.'"

Much less can it be said here that the decision of this court on the former appeal is a controlling factor now. The question of law decided there was that there was some evidence in favor of plaintiff which rendered her contention a proper one to be submitted to the jury—not that it required a favorable finding in her behalf. Indeed, it is well settled, as stated by this court through Justice

Hart in *Bush v. Wood*, 97 Pac. 709, that a motion for a nonsuit "is tantamount to a demurrer to the evidence, or an objection that admitting all the proved material facts to be true said facts do not in legal effect operate in favor of plaintiff," and it is further held that the evidence, whether erroneously admitted or not, must be given its full probative force, and that no question arising as to variance or the credibility of witnesses can be considered, and furthermore that the evidence must be taken most strongly against the defendant.

From what has already been said it is apparent that the question now is whether the judgment of the trial court as to the credibility of the witnesses and the weight of the evidence and the proper conclusion to be drawn therefrom can be sustained. The questions are entirely different and independent of each other. Appellant relies upon the case of *Horton v. Jack*, but it is not in point. Appellant says: "The case was first tried and the court granted a nonsuit. The appellate court (104 Cal. xvii, 37 Pac. 652) said this was error." The statement is inaccurate. There were two defendants, R. E. Jack and the First National Bank of San Luis Obispo. The court found for the former; a nonsuit having been granted as to the bank. The action of the court as to the nonsuit was upheld, but the judgment in favor of Jack was reversed; the Supreme Court holding that the undisputed facts demanded as a matter of law a judgment in favor of plaintiff. The second trial was before a jury, and resulted in favor of the defendant Jack, and the judgment and order denying the motion for a new trial was also reversed; the Supreme Court (115 Cal. 32, 46 Pac. 920) saying: "We are therefore unable to perceive that the facts on the second trial differ at all from those on which our former opinion was predicated, and the propositions of law there decided are therefore decisive of the case on this appeal." The third trial was also before a jury with the verdict in favor of Jack. He lost again upon appeal; the Supreme Court holding (126 Cal. 526, 58 Pac. 1053) that: "The testimony on the last trial being substantially the same as on the two former, under the previous decisions of this court in the case the lower court should have directed the jury, as requested, to bring in a verdict for the plaintiff for the amount admitted by defendant to be the value of the property converted." The fourth trial resulted as usual and was again reversed; the Supreme Court (140 Cal. 584, 74 Pac. 139, 355) holding that: "A decision rendered upon a former appeal becomes the law of the case upon a subsequent appeal when the facts and evidence are the same upon both appeals, with an immaterial exception."

Thus it will be seen there was no question

as to the credibility of the witnesses, no conflict as to the facts was involved, but the court determined that necessarily the same legal effect must follow from the same facts. The result of the decisions upholding the action of trial judges in setting aside verdicts is in many cases to deprive the right to a trial by jury of all significance and efficacy, but it is a part of our judicial system to permit the judge to exercise his own independent judgment as to the evidence, notwithstanding a finding by a jury. Of course, however, it is and must be assumed that the power to set aside a verdict will only be used when the judge is entirely satisfied that to do otherwise would be a gross injustice. That wrong may sometimes be done is necessarily incident to the administration of any system through human agency, but it has been deemed wise to leave this revisory power, under the limitations suggested, to the judgment and conscience of the local tribunal having the best opportunity to determine the value of the evidence.

The order is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

10 Cal. App. 352

BERGER et al. v. HORLOCK. (Civ. 612.)
(Court of Appeal, Second District, California.
March 30, 1909.)

1. JUDGMENT (§ 460*)—RELIEF—ACTION—PLEADING.

It is not sufficient in an action to vacate and set aside a judgment upon the ground of fraud simply to allege that the judgment debtor had a defense thereto, or that he had been released from the debt, but it is essential to set up the facts constituting the fraud, accompanied by an allegation that the complaining party has the ability to produce evidence upon any new trial to establish a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879-891; Dec. Dig. § 460.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS OF TRIAL COURT.

Where the evidence is conflicting, and there is any evidence tending to support the finding of the trial court, the same will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Alice Berger and another against Hattie M. Thompson Horlock. Appeal by plaintiffs from a judgment for defendant, and from an order denying a new trial. Affirmed.

C. W. Pendleton, for appellants. W. R. Hervey and W. W. Butler, for respondent.

ALLEN, P. J. Appeal by plaintiffs from a judgment and an order denying a new trial.

It is averred in the complaint that one Alexander in 1902 executed to Horlock a note for \$2,600, secured by chattel mortgage

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on certain household goods contained in the Hotel Catalina, in the city of Los Angeles; that thereafter, in 1903, plaintiffs purchased said property so described in the chattel mortgage, and in writing assumed and agreed to pay the note executed by Alexander, and, in addition, made another note for \$400, also secured by chattel mortgage on said property; that, said notes remaining unpaid in 1906, defendant Horlock brought an action to foreclose said mortgages, to which action plaintiffs were parties defendant, and summons duly served; that, after service of process, the attorney for Horlock notified plaintiffs herein that they were made parties defendant in the foreclosure as a matter of form, and that it was not the purpose of plaintiff to pursue them or look to them for any portion of the claim; that they could realize sufficient out of the sale of the property to satisfy the claim, and plaintiffs herein need give themselves no uneasiness about the suit; that, when said representations were made, the hotel was held by plaintiffs herein under a lease, and the attorney for Horlock represented that, if they would transfer the lease that from the use and occupation of the premises and the proceeds of the sale of the furniture, sufficient could be realized to reimburse the plaintiffs in the foreclosure to the extent of the claim, and plaintiffs herein need not answer in the foreclosure suit; that, acting upon these representations, they did assign and transfer the lease to Horlock; that, when said representations were made, the household furniture was worth \$4,000 and the unexpired term of the lease was worth \$1,200; that the plaintiffs herein had a meritorious defense to said foreclosure action, but did not interpose the same because of said representations, which said defense was that they had been released from the obligation sued on by the defendant herein; that they did not file any answer, and judgment went by default for \$3,200, a decree of foreclosure was duly entered, and the property covered by the chattel mortgages was sold for \$1,450. It is further averred that, prior to the sale, defendant Horlock informed plaintiffs herein that there was no necessity for their bidding on said property, but that she would bid it in and would credit them with whatever amounts she would afterwards receive from its sale; that plaintiffs herein had the money with which to bid in the property and refrained from such bidding upon the faith of such representation; that defendant Horlock, after bidding in said property, sold the same for \$3,750; that they relied implicitly upon the statements and representations as to the agreements hereinbefore made and refrained from answering to said action or from bidding upon said property at the time of the sale; that, after the payment of costs and expenses, a deficiency judgment of \$1,776 was entered against these plaintiffs, of which they had no notice until March 23,

1907. The prayer of the complaint is that the court decree the deficiency judgment satisfied, and such other relief as was proper in the premises. The answer denied each and all of the allegations of the complaint with reference to the representations claimed to have been made after the action in foreclosure was brought, and defendant denies that she received from the resale of the chattel mortgaged property any sum in excess of \$2,950.

The court found in favor of defendant as to all of the matters averred with reference to the representations made after the foreclosure proceeding was instituted, and especially that no representations were made at the time of the sale through which plaintiffs were induced to refrain from bidding upon the faith of any agreement to credit plaintiffs with the full amount received upon a resale of the furniture. The court further finds that the lease assigned and transferred to defendant had theretofore been transferred as additional security for a promissory note due the defendant Horlock upon which a balance of \$15 remained unpaid, but that, when said lease was so assigned and transferred, there was no agreement or representation as set forth in the complaint; that the unexpired term of the lease was worth \$2,700; and, further, that defendant only received on account of a resale of the property the sum of \$2,950, and that defendant herein and her attorneys did in all respects act in entire good faith toward the plaintiffs herein.

The only specifications of error relate to the insufficiency of the evidence to support the various findings of the court. An examination of the record discloses that the court was warranted in each and every finding made by it, and that the evidence is ample in their support. In so far as the evidence relates to an agreement to credit plaintiffs herein with the amount received from a resale of the mortgaged property, one of the plaintiffs in this action testified that Mrs. Horlock "agreed to take the property and run it and get her money out of it and sell it again. If I (plaintiff herein) would help her run it, but I could not help her owing to sickness," while the defendant in the case testified that she did not want to buy the property, but she had agreed with Mrs. Berger that, if she would run the house and charge nothing for her services, whatever was made out of the house, whether covered by the deficiency mortgage or not, she should have credit for, but that she failed to carry out her agreement on account of sickness, and that the agreement was made upon the condition that she should run the house and let Mrs. Horlock stay out; that she never made any agreement to credit plaintiffs with any notes or money received from a resale of the property.

It is scarcely necessary to notice the other specifications of error in regard to the in-

sufficiency of the evidence to support the findings in relation to the representations made after foreclosure and before the sale; for, were we to treat the complaint as one to vacate and set aside the judgment on the ground of fraud, there are no allegations in the complaint, nor anything, in fact, in the record, indicating that plaintiffs in this action had any defense to the original action upon the merits. It is not sufficient in an action to vacate and set aside a judgment upon the ground of fraud simply to allege that the parties had a defense thereto or that they had been released from the debt, but it is essential that they should set up the facts constituting the fraud, accompanied by an allegation that the complaining party has the ability to produce evidence upon any new trial to establish a meritorious defense. As said in *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 747, 91 Pac. 419, in an action to vacate a judgment, it must be shown, "not only the facts constituting the fraud which prevented a fair judgment from being rendered in the former action, but it must also show that there was a good defense to the original action upon the merits, and that the defendant will be able to present this defense upon a new trial. These matters must be alleged, not in the form of conclusions, or ultimate facts, but in the same manner as the facts constituting the fraud; that is, the particular facts which were not presented upon the trial of the original action, by reason of the fraud complained of must be set out, and accompanied by an allegation that the complaining party has the ability to produce evidence upon any new trial that may be granted to establish such facts as alleged." The complaint was therefore insufficient as the basis for a decree vacating the judgment, and, had the findings in relation to the representations which induced plaintiffs to refrain from answering been otherwise than as found by the court, upon such findings alone the court would not have been warranted in vacating the judgment; and, in view of the uncontradicted testimony, could make no finding warranting the application of the excess received from a resale to the satisfaction of the deficiency were such excess even shown to have been sufficient therefor.

All of the specifications of error, when considered in connection with the statement on motion for a new trial, indicate a desire to have this court substitute its findings for those of the trial court. The Supreme Court, and this court in conformity therewith, has so repeatedly said that where the evidence is conflicting, and there is any evidence tending to support the finding of the trial court the same will be sustained, that a time should arise when the bar will recognize the force and extent of this rule, and cease to burden appellate courts with appeals involv-

ing only the right of the trial court to give such weight and effect to the evidence, as, in its judgment, is proper under the circumstances of the case.

We see no prejudicial error in the record, and the judgment and order are affirmed.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 287

WHITE v. SPRECKELS et al. (Civ. 331.)

(Court of Appeal, First District, California.
March 19, 1909. Rehearing Denied
by Supreme Court May 17, 1909.)

1. LANDLORD AND TENANT (§ 165*)—INJURIES TO SERVANT OF SUBTENANT—LIABILITY.

An owner of a building who leases the same and surrenders possession and control thereof to his tenant cannot be held liable for injuries to an employé of a subtenant caused by the bursting of a steam radiator.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 165.*]

2. NEGLIGENCE (§ 121*)—EVIDENCE.

The mere fact that an accident occurred is not generally sufficient to authorize an inference of negligence. It must be proved by direct evidence, or by proof of facts from which the inference of negligence can be legitimately drawn.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 218, 225; Dec. Dig. § 121.*]

3. TRIAL (§ 139*)—QUESTION FOR JURY—NONSUIT—EVIDENCE.

Where the court grants the motion of defendant for a nonsuit, the test as to the correctness of the ruling must be determined by the evidence in the record, which, if sufficient to support a verdict for plaintiff, renders the ruling erroneous; but if such evidence taken by itself, with all inferences which can be legitimately drawn from it, would not sustain a verdict, then the ruling is correct.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 139.*]

4. LANDLORD AND TENANT (§ 169*)—INJURIES TO EMPLOYÉ OF TENANT—ACTION—EVIDENCE.

Where the complaint, in an action by an employé of a tenant against the landlord for injuries caused by the explosion of a steam radiator, alleged that the radiator exploded by reason of being negligently constructed and kept, and being allowed to remain in a defective and neglected condition, and it appeared that the radiator was not under defendant's exclusive management, but was being used by such employé for the tenant's purposes, and not for the purpose for which it was placed in the room, the rule of *res ipsa loquitur* does not apply.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

5. LANDLORD AND TENANT (§ 169*)—INJURIES TO EMPLOYÉ OF TENANT—EVIDENCE.

Evidence in an action against a landlord by an employé of the tenant for injuries caused by the explosion of a radiator held to sustain a nonsuit directed for defendant.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

6. LANDLORD AND TENANT (§ 169*)—INJURIES TO EMPLOYÉ OF TENANT—PLEADING.

Defendant's answer in such action, alleging that the lessee had exclusive management and control of the rooms and the fixtures therein, including the radiator and its connections, while

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not a specific denial, was equivalent to a denial, of the allegations of the complaint that defendant had exclusive management and control of the steam engine and steam radiators and connections.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 169.*]

7. APPEAL AND ERROR (§ 171*) — REVIEW—THEORY OF CASE—CHANGE.

Where the parties have proceeded on the theory that the answer raises an issue in the trial court, they will not be allowed to raise the question for the first time on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1056; Dec. Dig. § 171.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Irene H. White against John D. Spreckels and another. From a judgment for defendants, plaintiff appeals. On rehearing, judgment affirmed.

Louis S. Beedy (P. F. Dunne, of counsel), for appellant. J. J. Lermen, for respondents.

COOPER, P. J. In November, 1908, we filed an opinion in this case, in which we affirmed the judgment as to defendant Claus Spreckels, and reversed it as to defendant John D. Spreckels. Upon a petition for a rehearing being filed, we were doubtful of the correctness of our former decision as to John D. Spreckels, and the case has been reargued and additional briefs filed. After a careful consideration of all the authorities cited, we have reached the conclusion that our former opinion proceeded upon a theory which omitted an important element in the case, and was therefore erroneous. The action was brought to recover damages for personal injuries inflicted as the result of the bursting of a steam radiator in one of the rooms of the Claus Spreckels Building in the city and county of San Francisco. After plaintiff had introduced her testimony and rested the court granted a nonsuit, and judgment was entered for defendants. This appeal is from the judgment on the judgment roll and a bill of exceptions.

The facts as shown by the record are as follows: The defendant Claus Spreckels is the owner of the building known as the Claus Spreckels Building. In June, 1898, he leased to defendant John D. Spreckels the entire building, with the power house, heating plant, and appurtenances, and thereafter up to the time of the plaintiff's injuries the defendant John D. Spreckels retained possession and control of the entire building, power house, heating plant, engine, boilers, and appurtenances, and underlet rooms in the building to the many tenants, to whom he gave leases of the respective rooms so underlet. On the 28th day of February, 1902, defendant John D. Spreckels executed a written lease to Edith M. McLean of several rooms on the second floor of said building, to be used as hair physician's offices, said lease to continue

for one year at a specified monthly rental. This latter lease recited that the premises so leased were then in a tenantable condition; that they should not be altered, repaired, or changed without the written consent of the lessor; that all alterations, changes, or improvements should be done by or under the direction of the lessor. The lease further provided that the lessor should furnish to the lessee free of charge janitor service, steam heat, and electric lights, and that the lessor should have the right to enter upon the premises at all reasonable hours to examine the same, to make such alterations and repairs as should be deemed necessary for the safety or preservation of the building. The lessee entered into possession of said leased rooms, and so continued up to the time of the injuries to plaintiff. On the 11th day of December, 1902, plaintiff being a servant or employé of the said McLean, while in one of the said rooms engaged in the discharge of her duties, was severely burned and injured by the escape of steam and hot water from the steam radiator, which exploded, and thus allowed the steam and hot water to escape with great force into the rooms and on and over the plaintiff. No evidence was offered by plaintiff as to any direct act of negligence by the defendants or either of them, but she relied upon the maxim, "*Res ipsa loquitur*," claiming that the explosion of a steam radiator is something which does not ordinarily happen where reasonable and proper care is taken to avoid it, and that the bursting of the radiator under the circumstances of this case raised a presumption of negligence, and thus placed the burden of proof upon defendants to show that reasonable and proper care was used. As to defendant Claus Spreckels, he had surrendered possession and control of the entire building, engine, heating plant, and pipes to his co-defendant by and under the terms of the lease made to him. He was not in privity with, and owed no duty to, the tenant of John D. Spreckels. He had no right of supervision or of access to the building, nor had he the right to inspect or repair the pipes or heating apparatus. It was conceded in the argument on rehearing that the former decision was right as to defendant Claus Spreckels.

The complaint alleges that the radiator exploded by reason of being negligently constructed and kept, and being allowed to remain in a defective and neglected condition. The former opinion proceeded upon the theory that the defendant John D. Spreckels allowed an excessive pressure of steam to be conveyed through the pipes and into the radiator, thus causing the explosion, and being the sole cause of the explosion. We find upon a further examination that there is no allegation in the complaint as to any negligence other than as to the defective construction

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and condition of the boilers, machinery, pipes, and radiators. The burden was upon plaintiff to show by competent evidence that the accident or explosion was caused by defendants' negligence. The mere fact that an accident occurred is not generally of itself sufficient to authorize an inference of negligence. It must be proved by direct evidence, or by proof of facts from which the inference of negligence can be legitimately drawn by a jury. As the court granted the motion of defendants for a nonsuit, the test as to the correctness of the ruling must be determined by the evidence in the record. If the evidence is sufficient, or would have been sufficient, to support a verdict for plaintiff, then the ruling is erroneous; but if the evidence taken by itself, with all inferences which can be legitimately drawn from it, would not be sufficient to sustain a verdict, then the ruling is correct.

The evidence on the part of the plaintiff is brief. She testified as to the fact of her injuries by the escaping steam, and the fact that the explosion occurred on the 11th day of December, 1902. Her language is: "I was drying towels on the radiator. It was my duty to take the wet towels handed me by Miss Hopkins, and put them on the radiator to dry." She did not state any fact or circumstance tending to show why the radiator exploded, except the fact that it exploded while she was putting wet towels on it. Plaintiff further called one Scott, who testified that he was engaged in the hot water and steam heating business, and was in the years 1901 and 1902 employed by George H. Tay & Co., and that he worked in putting in pipes, heating apparatus, and radiators in the Claus Spreckels Building; and in his own language he states as follows: "All the drift piping from all of the radiators in the building are connected to a general air line that is open at the low end, and by opening this valve it was supposed to prevent any greater accumulation of pressure in the radiators. It was to prevent the accumulation of pressure in the radiators. The handle of that valve was sawed off by me to prevent its being used. There was no seat to the valve. It was a core. It would not operate when the handle was sawed off unless somebody put a wrench or pliers on the handle and turned it. It was in a position so that it afforded, unless tampered with, permanent relief to the radiators. It was wide open before I sawed the handle off. The handle was sawed off when I left. I sawed the handle off as a precaution of safety. Before leaving, I turned the steam on to see if our work was in good order and no leak. The firm I worked for received payment, I believe, and said it was all right. I did not find anything wrong with my work after I turned the steam on. I made that test before I left the work. To the best of my knowledge, the work was all right or we would not have left it. It was first-class work. I did this work about four years

ago." The evidence thus showed that the work of putting in the radiator was first-class, and that it subsequently exploded while plaintiff was putting wet towels on it. It shows that the explosion occurred while the radiator was being used for a purpose for which it was not designed. Whether the radiator exploded for the reason that it had not been kept in proper condition by the lessee of defendants, or for the reason that it had been weakened by its constant use by defendants' lessee in drying wet towels, or for the reason that it had been tampered with by the lessee after she had taken possession of the rooms, or for the reason that too great a pressure of steam was in the pipes and radiator, are matters of conjecture. There is no presumption that defendants were guilty of negligence from the mere fact that the radiator exploded without any regard to the circumstances, or the use to which it was being put by the lessee or her employes. The text of the doctrine of *res ipsa loquitur* which has generally been followed in the courts of England and this country is given in *Scott v. London Dock Co.*, 3 H. & C. (Com. L. R. U. S.) 134, as follows: "There must be some evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and that occurrence is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the occurrence arose from want of care." This case does not come within the text. The thing which exploded was the radiator. It was not under the exclusive management of the defendants or their servants. It was in the rooms of the lessee, being used by her servant for her own purposes, and not for the purpose for which it was placed in the room. The steam which was supplied to the radiator was under the exclusive management of the defendant John D. Spreckels; but there is nothing to show that the explosion was caused solely by too great a pressure of steam in the radiator. In fact, there is no such allegation in the complaint. The thing which injured the plaintiff was the escaping steam. It escaped for the reason that the radiator exploded. The cause of the explosion is a matter of conjecture from the evidence in this record.

This is in line with the leading cases. In *Peters v. Lynchburg Light Co.*, 108 Va. 333, 61 S. E. 745, the plaintiff was injured by receiving a shock from an overcharged wire while turning off an incandescent light in his kitchen; the electrical appliances being owned and controlled by the plaintiff. The court held that the doctrine of *res ipsa loquitur* did not apply, holding that the thing which caused the injury must be under the exclusive control and management of the defendant before the rule can be invoked. In

the opinion it is said: "But the doctrine of *res ipsa loquitur* can have no application where the accident is due to a defective appliance under the management of the plaintiff, nor to a case involving divided responsibility, where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible." In *Independent Brewing Ass'n v. Schaller*, 128 Ill. App. 533, it was held that the doctrine could not be applied where an explosion of gas occurred; the lamp and appliances being furnished by defendants, but were under the control of plaintiff. The court said: "But a fatal objection to the application of the doctrine contended for—the doctrine of *res ipsa loquitur*—in this case is that it is not applied unless the thing causing the accident is under the control of the defendant or his servants, and the electrical lamp and its appliances in this case were not under the control of the defendant or its servants. Thompson on Negligence, § 7635. Here the defendant only furnished the lamp, its appliances, and the current. Winkofsky and his servants had the control of the lamp, and they only were in the tank when the explosion occurred. The cause of the explosion is left by the evidence a matter of conjecture, suspicion, or surmise." The true rule, in our opinion, is laid down in *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 66, as follows: "Where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which defendant is responsible but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause. If under the testimony it was just as probable that it was caused by the one as the other, he cannot recover." In *Ryan v. Fall River Iron Works*, 200 Mass. 188, 86 N. E. 310, the Supreme Court of Massachusetts said: "The occurrence of an accident standing alone is not always evidence of negligence. It may be as consistent with the innocence as with the fault of the person controlling the agency by which the accident happened. When the precise cause is left to conjecture, and may be as reasonably attributed to a condition for which no liability attaches as to one to which it does, then a verdict should be directed against the plaintiff." To the same effect, see note to *Mitchell v. Chicago & A. Ry. Co.*, 132 Mo. App. 143, 112 S. W. 291; *Warner v. Railway Co.*, 178 Mo. 125, 77 S. W. 67; *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872; *Robinson v. Empire City Subway Co.*, 53 Misc. Rep. 593, 103 N. Y. Supp. 717; *Strasburger v. Vogle*, 103 Md. 85, 63 Atl. 202.

As we have before said, the evidence does

not clearly show that the accident was caused by an excessive pressure of steam. Nor is it so alleged in the complaint. If we rely on the doctrine of probabilities, we might as reasonably infer that the explosion was caused by the use of wet towels upon the radiator, or by reason of the radiator having been changed or weakened by its use by the lessee, as that it was caused by an excessive pressure of steam. The evidence is not such as to raise a presumption which shows that the defendants were guilty of negligence.

Plaintiff contends that the answer of defendants did not deny the allegation of the complaint that "the defendants had exclusive management and control of the steam engine and so forth and steam radiators and connections." While the answer does not specifically deny this allegation, it affirmatively and expressly alleges that the lessee of defendant had exclusive management and control of the rooms and the fixtures therein contained, including the radiator and its connections. This was an express averment in the answer contrary to the averment of the complaint, thus raising an issue, and was equivalent to a denial. *Miller v. Brigham*, 50 Cal. 615; *McDonald v. Davidson*, 30 Cal. 173. Not only this, but on the motion for a nonsuit no such suggestion appears to have been made; and, where the parties have proceeded upon the theory that the answer raises an issue in the court below, they will not be allowed to raise the question here for the first time.

It follows from what has been said that the judgment must be affirmed, and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

10 Cal. App. 300

CARLSON v. CARLSON. (Civ. 601.)

(Court of Appeal, Second District, California.
March 22, 1909.)

1. APPEAL AND ERROR (§ 842*)—REVIEW—FINDING OF FACT OR CONCLUSION OF LAW.

In an action for divorce and alimony, the court having found that defendant performed labor in erecting a house on plaintiff's land, and delivered money to plaintiff with which to pay a mortgage thereon, which payment was made, a further finding that the land was the community property of plaintiff and defendant was not a finding of fact, but a conclusion of law reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

2. DIVORCE (§ 249*)—ALIMONY—TRANSACTIONS BEFORE MARRIAGE.

In an action by a wife for divorce and alimony, proof that defendant performed labor in constructing a house on plaintiff's land, and paid off a mortgage on the land before their marriage, did not entitle defendant to any relief as against the land, or against plaintiff personally, since it showed no more than a

transaction between strangers, the remedy for which would be an ordinary action of debt.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 249.*]

3. HUSBAND AND WIFE (§ 258*)—COMMUNITY PROPERTY—IMPROVEMENTS.

In an action by a wife for divorce and alimony, proof that during the marriage relation defendant performed labor in constructing a house on land belonging to plaintiff, and gave her money with which to pay a mortgage thereon, was insufficient to establish a lien on the land in defendant's favor, so as to render the land community property, in the absence of an agreement that the acts of defendant should have that effect especially where the evidence showed that certain money of the wife, the amount of which was not determined, was expended in the improvement of land belonging to defendant.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 258.*]

4. DIVORCE (§ 287*)—DISPOSITION OF PROPERTY—APPEAL.

In an action for divorce and alimony, the appellate court having reversed the judgment ordering a sale of land, the title to which was in plaintiff, and a division of the proceeds, the judgment, being based on expenditures of labor and money by defendant in respect to such land, will remand the cause for a new trial for determination of the question whether such expenditures were made in pursuance of an agreement that defendant should receive an interest in the land, thereby rendering it community property.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 287.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Marietta E. Carlson against Charles Carlson. From a portion of the judgment, plaintiff appeals. Reversed, and new trial granted.

Powers & Holland, for appellant. Chas. S. McKelvey, for respondent.

ALLEN, P. J. The action was one for divorce and alimony based upon grounds of failure to provide and desertion. The answer denied all allegations of the complaint, and alleged that all of the community property, which was of the value of \$8,000, was in plaintiff's possession, and prayed for a dismissal of the action, with costs. The court found that all of the allegations of the complaint as affecting defendant's conduct were true, and granted to plaintiff an interlocutory decree of divorce. It also found: That plaintiff after her marriage with defendant, inherited about \$1,000, of which sum she applied \$450 to the purchase of certain real estate, taking the title thereto in her own name and as her separate estate. That the residue of such sum was employed in the construction of a house upon the separate property of defendant and in payment of certain household expenses. What amount of such residue was applied to each of these purposes is not disclosed. That, after plaintiff acquired the described property, she borrowed \$800 and executed a mortgage thereon as security, and used the money in constructing a house upon said lot. That in the

construction of such house the defendant labored about two months. That several months thereafter defendant delivered to plaintiff the sum of \$800 in money, and authorized and instructed her to use the same in paying off the mortgage theretofore executed, which plaintiff did. That plaintiff has been at all times in the possession of said property, claiming the same as her separate estate. That the value of the improvements placed by plaintiff on said lot is \$1,000. The court as a conclusion of law finds, and we think it but a conclusion of law (Levins v. Rovegno, 71 Cal. 278, 12 Pac. 161), that such improvements are community property, and defendant is entitled to one-half thereof, and directs plaintiff to pay defendant \$500 within 10 days, and, in default, that the premises be sold, and out of the proceeds defendant be paid \$500. The judgment awards to plaintiff a decree of divorce and directs the payment of the above-mentioned sum, or a sale of the premises upon default. From the portion of the judgment which directs the payment of the money, or the sale of the property, plaintiff appeals upon the judgment roll. The findings of fact above stated are not at all consistent with certain other findings, which are to the effect that plaintiff borrowed the money, executed the mortgage on the lot described, built the house thereon, and defendant delivered to her the money to pay off the mortgage all before their marriage, which, if true, would amount to no more than a business transaction between strangers and the relation of debtor and creditor be thereby created, and on account of which payment defendant's sole relief would be a civil action to recover the debt. There is nothing in the pleadings which would warrant a court under these last-mentioned circumstances in rendering a judgment in defendant's favor for the money so loaned. We have assumed, however, that the finding in relation to the date of the marriage is incorrect, occasioned by a typographical error, and that in truth all of the occurrences mentioned were subsequent to the marriage, as found by the court, and accordingly treat the matters as all being transactions between husband and wife.

The question for determination upon this appeal is whether or not the judgment directing the payment of said sum of \$500 and the sale of the premises is warranted by the findings; that is to say, had the court, under the facts found, any jurisdiction or authority to order the premises sold, or had it any jurisdiction or authority under the facts to declare a lien thereon, or an interest therein, in favor of defendant? That the property involved is and was at all times mentioned the separate property of plaintiff, unless some contract or agreement entered into between plaintiff and defendant with relation thereto changed its character, cannot

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

well be questioned. Labor or expenditures incurred in the improvement of the property have no operation upon the direction of the title. They, at most, but create a demand which under certain circumstances may be enforced as a claim against the owner. *Noe v. Card*, 14 Cal. 606. In the absence of any specific agreement, no lien would be created on account of money expended by a husband upon the separate property of the wife. *Peck v. Brummagin*, 31 Cal. 450, 89 Am. Dec. 195. The law will not infer from such expenditures alone an agreement either to change the character of the property or an intent to charge the same with a lien. It must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's estate, and that it was intended to accrue to her interest. *Flournoy v. Flournoy*, 86 Cal. 294, 24 Pac. 1012, 21 Am. St. Rep. 39. There is no finding of any fact, nor is there anything in the record tending to rebut the presumption, that the payment by the husband was to accrue to plaintiff's interest. The mere fact that the husband delivered to the wife a certain sum of money, under the circumstances found, may as well be said to indicate a repayment of the original investment by her in his separate estate, or a loan or a gift, as an intention to acquire a community interest in her property. The conclusion of law by the trial court deduced from the facts found, namely, "that the improvements upon the lot so purchased by said plaintiff is community property," seems to us to be without foundation. That in such divorce proceedings the court had no jurisdiction to make an order affecting the separate property of the wife is not questioned. The property ordered sold in default of the payment by plaintiff of \$500 was her separate estate, in which defendant had no interest and on which he had no lien, is made apparent by the findings of fact. We are of opinion that under such findings the court was without jurisdiction to order a sale of plaintiff's separate property, or, under the pleadings, to render a personal judgment against plaintiff, or to decree a lien against her property in favor of defendant. The law, however, being that by a valid agreement husband and wife may transmute the separate estate of either into community property (*Yoakam v. Kingery*, 126 Cal. 33, 58 Pac. 324), it may be that upon another hearing such an agreement may be proven, and the ends of the justice best subserved by ordering a new trial as to such property rights, rather than a modification of the judgment.

It is therefore ordered that that portion of the judgment appealed from be reversed and cause remanded to the superior court for a new trial as to the rights of the parties in relation to the property in controversy.

We concur: SHAW, J.; TAGGART, J.

10 Cal. App. 337
SIEVERS v. ROOT et al. (Civ. 567.)
(Court of Appeal, First District, California.
March 29, 1909.)

1. EMINENT DOMAIN (§ 101*)—CHANGE OF STREET GRADE.

An abutting owner is, under the Constitution, entitled to compensation for damages from the change of the grade of a street.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 269; Dec. Dig. § 101.*]

2. EMINENT DOMAIN (§ 271*)—CHANGE OF STREET GRADE—REMEDIES.

An abutting owner, damaged by the change of the grade of a street, may recover his damages in an action at law after they have been inflicted.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 729; Dec. Dig. § 271.*]

3. EMINENT DOMAIN (§ 275*)—CHANGE OF STREET GRADE—REMEDIES.

An abutting owner, who has not been compensated for damages from the change of the grade of a street, may enjoin the improvement.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 773; Dec. Dig. § 275.*]

4. EMINENT DOMAIN (§ 307*)—REMEDIES OF OWNERS—FINDINGS—EVIDENCE.

Where municipal authorities raised the grade of a street from 95 above to 120 feet above base, and in an action to enjoin the improvement by an abutting owner, who had not been compensated for his damages, the court found that the grade was 95 feet above base, the finding was not unsupported by evidence, since the finding treated the change as void as against plaintiff.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 824; Dec. Dig. § 307.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by John H. Sievers against Henry Root and another. Appeal by defendants from a decree in favor of plaintiff. Affirmed.

Alexander & O'Donnell, for appellants. Tum Suden & Tum Suden, for respondent.

HALL, J. This is an appeal by defendants from a decree adjudging that the lawful official grade of the crossing of Chestnut and Polk streets in the city and county of San Francisco is at 95 feet above base, and enjoining the defendants from filling in the said crossing above the said grade.

Plaintiff is and has been the owner for more than 20 years last past of a piece of land situate at the southwest corner of Polk and Chestnut streets, having a frontage of 137½ feet on the westerly side of Polk street, and a frontage of 275 feet on the southerly side of Chestnut street. The premises were and are used in carrying on the business of a florist and in growing flowers and plants, and are improved with hothouses, constructed of glass in large part, and containing furnaces and apparatus for warming and heating said houses. The entire property, land, and improvements, represents an investment of about \$45,000. At some time

prior to August 10, 1903, the official grade at said crossing had been fixed and established at 95 feet above base. The land of plaintiff was and is on said grade, and the improvements thereon were built and are in accordance with said grade. On the 10th day of August, 1903, the board of supervisors of the city and county of San Francisco adopted an ordinance, raising said grade 25 feet, and fixing it at 120 feet above base with true gradients to the grades at the four several next adjoining crossings. No compensation was ever made to plaintiff for any damage that might result to his property from the change in the grade of the streets or of said crossing, nor has he ever waived the right to such compensation or the prepayment thereof, or consented to such change. The defendants, as licensees of the city and county of San Francisco, commenced to fill in said crossing, with the intent and purpose of raising the grade thereof from 95 feet above base to 120 feet above base, and intended in connection therewith to raise the grade of Polk street as it adjoins the lot of plaintiff to correspond with such raise of the grade at the crossing. The court found: That, if the defendants complete the filling of said crossing as they threaten to do, plaintiff's lot will be 25 feet below the level of the street; that his buildings will be destroyed in part, and the remainder made useless; that his lot of land will lose in value, and will have to be filled to the new grade at great expense; and that by reason thereof plaintiff will be damaged in the sum of \$45,000.

While it may be true that the evidence hardly justifies the finding that plaintiff will be damaged in the full sum of \$45,000, yet there is ample evidence to justify the finding as made in substance. The defendant Root himself testified that the filling in as intended by him would destroy in part some of the buildings. It would necessitate the removal of 40 feet of the corner building. The grade of the streets at the crossing would be raised 25 feet above the base of the building. The base of the fill would encroach upon and over the lot at the corner from 38 to 40 feet unless restrained by a sufficient bulkhead. The fill as intended by defendant will raise the grade of Polk street along plaintiff's lot much above plaintiff's lot throughout its entire frontage on Polk street, as is disclosed by an examination of a diagram of the premises, thus shutting off all access to the street along that frontage except by stairways, unless the lot be filled to meet the raise in grade. As the land is now situate, the entire lot is easily approached over an easy grade along Chestnut street from Van Ness avenue. If the crossing at Chestnut and Polk street be raised the intended 25 feet, this approach beyond this crossing will be rendered very difficult, unless the grade along Chestnut street from Van Ness avenue be raised to correspond, in which case the entire lot of plaintiff will be enclosed along its two street

frontages by an embankment varying in height, at its lowest point of eight feet to a height of 25 feet at the highest point. It is thus perfectly apparent that the work being done by defendants will result in the absolute destruction of a considerable portion of the improvements on plaintiff's land, and will materially interfere with access to and from his land and the public streets adjoining his land. True, two real estate agents stated that in their opinion the lot of plaintiff would be enhanced in value by the contemplated change in the grade. This was but an opinion, however, and, as one of them very frankly stated, how much it would be increased in value was a matter of conjecture. No one could say how much, "as there is nothing to base it on." Doubtless the learned trial judge gave little weight to these mere opinions as against evidence of physical conditions, patent to the senses, and confessedly involving the actual destruction of a portion of plaintiff's buildings.

That a landowner is entitled to compensation, under the Constitution of this state, for such damages as were proved and found by the court in this case, is amply sustained by the following authorities: *Reardon v. San Francisco*, 66 Cal. 495, 6 Pac. 317, 56 Am. Rep. 109; *Schaufele v. Doyle*, 86 Cal. 107, 24 Pac. 834; *Eachus v. Los Angeles*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; *Geurkink v. Petaluma*, 112 Cal. 310, 44 Pac. 570; *Eachus v. Los Angeles*, 130 Cal. 494, 62 Pac. 829, 80 Am. St. Rep. 147; *Bigelow v. Ballerino*, 111 Cal. 566, 44 Pac. 307. He may recover his damages in an action at law, after they have been inflicted (*Reardon v. San Francisco*, supra; *Eachus v. Los Angeles*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; *Eachus v. Los Angeles*, 130 Cal. 494, 62 Pac. 829, 80 Am. St. Rep. 147), or he may prevent the threatened injury by injunction (*Schaufele v. Doyle*, supra; *Geurkink v. Petaluma*, supra; *Duncan v. Ramish*, 142 Cal. 694, 76 Pac. 661; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161). In *Brown v. Seattle*, supra, the injury threatened was by a cut in the grade of the street adjoining the plaintiff's lot. It was held that such grading might be enjoined unless the damage to the abutting owners' property has been ascertained, and compensation made, before the work is done. This case is on all fours with the case at bar, except in the *Washington* case the city was enjoined, and it did not appear that the work would result in any actual destruction of the plaintiff's property. The case has been cited with approval in *Bigelow v. Ballerino*, supra, and in *Guerkink v. Petaluma*, supra, especially to the point that injunction is the proper remedy. "Until compensation was made, the city [or its licensee] had no right to damage the plaintiff's property. Payment of such damage was a condition precedent to the creation of the right; and, until payment, the city was a trespasser. In such a case injunction

is the plain, ordinary, and best remedy." *Geurkink v. City of Petaluma*, supra.

The court found that the grade of the crossing in question was 95 feet above base. This finding is attacked as not supported by the evidence, in view of the adoption, by the board of supervisors, of the ordinance changing the grade to 120 feet. The court in making this finding treated the ordinance as invalid as against plaintiff, and the finding is, of course, to be read only as it affects the rights of the parties to this action. Until compensation has been made to plaintiff for the damage to his property, the ordinance changing the grade is as to him invalid and of no effect. The effect of this finding only is that as to plaintiff the grade remains as it was. Until he has been compensated for his damages, the mere paper change in the grade is of no effect, and the ordinance making such change "is without force or validity to work the taking or damaging" of plaintiff's "property until compensation has been made." *Bigelow v. Ballerino*, supra. But whether or not the grade has in legal effect been changed, and no longer can be said to be at 95 feet above base, it has not in fact been changed. Until compensation has been made to plaintiff, he may enjoin the actual change of the grade, though it has been officially established at 120 feet. The finding criticised cannot affect the judgment.

Appellant makes some minor points not affecting the judgment. The findings of the court, supported by sufficient evidence, show that defendants are attempting to change in fact the former established grade of the crossing in such a way as in part to destroy and greatly damage the property of plaintiff, without first making to him compensation for such destruction and damage. Under the well-settled law of this state this may not be done.

The judgment is affirmed.

We concur: COOPER, P. J.; KERRIGAN, J.

10 Cal. App. 357

Ex parte McKENNEY. (Cr. 122.)

(Court of Appeal, Second District, California.
April 1, 1909.)

CORPORATIONS (§ 324*)—OFFICERS—CRIMINAL RESPONSIBILITY.

Pen. Code, § 563, making it punishable for a corporate officer to make false entries in a book of account, or other record or document kept by the corporation, applies, not only to books of account, but also to minute book entries as to meetings of directors authorizing the transaction of business, in view of Civ. Code, § 377, requiring corporations to keep a record of their business transactions and a journal of all meetings, and section 316, imposing a liability for damages for false entries in the records or books.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1441; Dec. Dig. § 324.*]

Application by A. B. McKenney, for a writ of habeas corpus. Writ denied, and petitioner remanded.

Paul W. Schenck, for petitioner. W. S. Day, for respondent

PER CURIAM. An information was filed in the superior court of Santa Barbara county, charging petitioner, as acting secretary of a corporation, with intent to defraud the same, of willfully, unlawfully, and feloniously making and concurring and making certain false entries in the minute books of said corporation, which entries recited that certain special meetings of the board of directors had been held, at which meetings the salaries of certain officers had been fixed and certain persons had been appointed to occupy certain official positions in the corporation, and authorizing petitioner, as general manager and auditor of the company, to pledge certain promissory notes belonging to the company to secure the payment of a certain sum of money, and authorizing the issuance of certain shares of the stock of the corporation in payment of certain indebtedness, all of which entries were false, in that, in truth, no meetings had been held, as set out in said entries in the minute book, on the day specified or at any other time, and that the directors therein mentioned as being present were not present at any meeting so held, all of which was known to petitioner at the time of the making of said false entries. To this information a demurrer was filed and overruled, and a continuance of the hearing of the trial upon the information ordered until the 6th of April, 1909. Petitioner now seeks his discharge from confinement for the reason that, as he claims, the information does not state facts constituting a public offense, or charging petitioner with the commission of a public offense. The respondent, upon the hearing, made no objection to the consideration of questions involved in this form of proceeding.

The information is based upon section 563 of the Penal Code of this state, which provides that "every director, officer, or agent of any corporation * * * who, with intent to defraud, * * * makes, or concurs in making, any false entries * * * in any book of accounts, or other record or document kept by such corporation, * * * is punishable," etc. It is petitioner's contention that under this section the false entry to be criminal must have been in a book of account, or other record of account, and that unless the information shows that the book, record, or document in which the false entry was made was one containing accounts; that is to say, a detailed statement of mutual demands in the nature of debit and credit between the parties arising out of contract or fiduciary relationship, no offense is charged.

ed. With this we do not agree. Section 377, Civ. Code, requires all corporations for profit to keep a record of all their business transactions, a journal of all meetings of the directors, members, or stockholders, and the record must embrace every act done, or ordered to be done, who were present, etc.; and by section 316, Civ. Code, any officer making an entry in the records or books of a corporation false in any material representation is made liable for damages. We think the language of section 563, Pen. Code, broad enough to cover any record or document which by law is ordered to be kept by a corporation for profit, and especially should this be true with reference to a record embodying, as does the record alleged to have been falsified in this case, statements relative to the financial condition of the corporation, and involving contract rights with the corporation and the liability of the corporation with its servants and employes as to salary and compensation; that, even under the restricted construction contended for by petitioner, this record alleged to have been falsified was a record containing business transactions in the nature of debit and credit between the corporation and those dealing therewith arising out of contract; and, in a sense, while a record and minute book, was also a book containing memoranda of financial transactions which would render it, to a limited extent, a book of account.

Writ denied, and petitioner remanded.

10 Cal. App. 308

KIGER v. MCCARTHY CO. (Civ. 587.)

(Court of Appeal, Second District, California.
March 23, 1909.)

1. SPECIFIC PERFORMANCE (§ 114*)—PLEADING—ESSENTIALS OF COMPLAINT.

Civ. Code, § 3391, subd. 1, provides that specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration for the contract, and he who seeks such relief must show consideration in his complaint.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 358; Dec. Dig. § 114.*]

2. APPEAL AND ERROR (§ 1071*)—REVIEW—HARMLESS ERROR—FINDINGS.

In a suit for specific performance of a contract to sell land, where the complaint was insufficient for failure to allege adequate consideration for the contract, and there was no evidence on that question, a finding that plaintiff was entitled to specific performance, but that it could not be enforced because defendant could not convey the land as it agreed under the contract, if erroneous, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

3. VENDOR AND PURCHASER (§ 351*)—CONTRACT—ACTION BY PURCHASER FOR BREACH—DAMAGES.

Civ. Code, § 3306, provides that the detriment caused by the breach of an agreement to convey real property is deemed to be the price paid, with interest thereon, but in case of bad faith also the difference between the price agreed

upon and the value of the property at the time of breach. Held that, where a vendor undertook to convey land when the legal title was in another, he exhibited bad faith, and, where the purchaser had made a cash payment, together with monthly payments, and had paid interest on the deferred payments, she was entitled, in an action for breach of the contract, to judgment for the difference in the price of the lot and its value at the time of the breach, the payment made with interest thereon, and to interest paid upon the deferred payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1047-1053; Dec. Dig. § 351.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Pauline Lereto Kiger against the McCarthy Company. From a judgment granting insufficient relief and an order denying a new trial, plaintiff appeals. Reversed, and new trial ordered.

C. W. Pendleton (M. C. McLemore, of counsel), for appellant. C. Axtell and Edw. L. Payne, for respondent.

SHAW, J. An opinion affirming the decision of the trial court was filed herein December 21, 1908. Thereafter appellant's petition for a rehearing was granted, and the appeal is before us for further consideration. The action is to enforce specifically a contract for the purchase of real estate. The complaint, which contains a copy of the contract, alleges: That plaintiff tendered to defendant the amount due under and in accordance with the terms thereof, and that she fully performed all other conditions imposed thereby, and demanded from defendant a conveyance of the property in accordance with the terms of said contract; that defendant then and there refused to convey the same, and ever since has refused so to do. The answer admits the tender, denies that defendant refused and continues to refuse to convey the property, but alleges at the time of the tender defendant did execute and offer to deliver to plaintiff a deed of conveyance substantially in the form called for by the contract, but that plaintiff refused and still refuses to accept the same. Defendant further alleged "that it is now ready, willing, and able, and hereby offers, to execute and deliver to said plaintiff a deed as called for by said contract or agreement upon the payment to it by said plaintiff of the balance due under said agreement." The court found all of the issues in favor of plaintiff, and found that defendant had refused to comply with plaintiff's demand for a deed in accordance with the terms of the contract. It further found: "That plaintiff is not willing to accept a deed, except in strict compliance with the contract; that the plaintiff is entitled to specific performance, but specific performance cannot be enforced because the defendant cannot convey the property as it agreed to convey it under the contract." From these

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

findings the court found as a conclusion of law that plaintiff was entitled to judgment for damages only. Plaintiff appeals from the judgment so rendered, and from an order denying a motion for a new trial.

Appellant's chief contention is based upon the claim that the court's finding to the effect that defendant was unable to specifically perform the contract is not within the issues raised by the pleadings and contrary to the admitted facts alleged in the answer. It is unnecessary to consider whether or not the court erred in so finding, for the reason that the complaint fails to state a cause of action for specific performance, and hence, conceding the alleged error, plaintiff's rights were not prejudiced thereby. Section 3391, Civ. Code, provides that: "Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract." And in *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689, it is said: "He who seeks the specific enforcement of a contract must show in his complaint that such contract is not obnoxious to the foregoing inhibition of the Civil Code." In *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778, it is said: "In actions for the specific performance of contracts for the sale of lands, it is necessary to allege and show to the court an adequate consideration for the performance of the contract sought to be enforced." To the same effect is *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386, and *Arguello v. Bours*, 67 Cal. 447, 8 Pac. 49. Not only is there an entire absence of any allegation in the complaint showing adequacy of consideration for the purchase, but the record does not disclose a scintilla of evidence touching the subject. Therefore, in view of the fact that in no event could plaintiff be entitled under the pleadings to a decree for specific performance, she could not be prejudiced by said finding, even though conceded to be erroneous.

Regarding the complaint, then, by reason of the absence therefrom of any allegation as to the adequacy of consideration for said contract, as an action for damages for the breach thereof, it is apparent from the findings that the judgment in favor of plaintiff does not accord to her the full amount of damages to which she is entitled. By reference to section 3306, Civ. Code, we find that "the detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, * * * with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach. * * *" The evidence tended to show bad faith on the part of defendant, in that it appeared therefrom that the legal title to the lot was vested in

another (*Margraf v. Muir*, 57 N. Y. 155; *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 468), and the court gave judgment in favor of plaintiff for \$150, "the difference between the price agreed to be paid and the value of the lot described in the complaint on file herein." It also gave judgment in favor of plaintiff for \$191.80, "the sum paid on account of the contract price." It appears from the findings, however, that by the terms of the contract made on April 27, 1905, plaintiff paid in cash on account of the purchase price of \$850 the sum of \$50, and agreed to pay on the first day of each month thereafter the sum of \$10 or more, together with interest at 7 per cent. per annum, payable quarterly, on deferred payments until the balance of the purchase price of \$800 should be fully paid. It also appears "that plaintiff has fully performed all the conditions of said agreement required of her therein." It therefore appears that, commencing with May 1, 1905, down to August 7, 1906, plaintiff had paid in installments of at least \$10 on the first day of each month an aggregate of \$160, which, added to the first payment of \$50, made \$210. In addition, she was entitled, under the provisions of said section 3306, to interest on the amount so paid from the date of payment to the rendition of judgment, and also to an accounting for interest found to have been paid by plaintiff on the deferred payments pursuant to the terms of said contract. Hence it is apparent that, while plaintiff is given judgment for the difference in the price of the lot agreed to be paid and the value thereof at the time of the breach of said contract, the judgment does not accord her the amount of money paid upon the purchase price thereof, together with interest thereon, nor include the interest paid by her quarterly upon the balance of the purchase price due under the terms of said contract, which in the aggregate amounts to a sum that will not permit the application of the rule de minimis.

On this account, as well as by reason of the fact that it is manifest the case was tried upon a theory not authorized by the pleadings, the judgment and order are reversed, and a new trial ordered.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 325
WM. KNAPP & CO., Inc., v. SAN JOAQUIN CIGAR CO. (Civ. 522.)

(Court of Appeal, First District, California,
March 25, 1909. Rehearing Denied
April 22, 1909.)

1. SALES (§ 87*)—ACTION FOR PRICE—EVIDENCE.

Evidence held to support a finding that a contract for cigar bands to be manufactured did not provide that a sample of the work was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to be exhibited for the buyer's approval before the goods should be manufactured.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 246; Dec. Dig. § 87.*]

2. SALES (§ 194*)—PERFORMANCE OF CONTRACT—REFUSAL TO PAY INSTALLMENT OF PRICE.

If goods ordered to be manufactured and to be delivered and paid for in installments were all manufactured, and the buyer not only refused to pay for the first installment, but refused to accept the goods, he breached the contract as a whole.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 508; Dec. Dig. § 194.*]

3. APPEAL AND ERROR (§ 731*)—REVIEW—FINDINGS.

In reviewing the sufficiency of the evidence to support findings, a matter not specified as a particular wherein the evidence is insufficient cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3021; Dec. Dig. § 731.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Wm. Knapp & Co., Incorporated, against the San Joaquin Cigar Company. Judgment for plaintiff, and defendant appeals. Affirmed.

El. S. Van Meter, for appellant. Henry Hawson, for respondent.

KERRIGAN, J. Plaintiff recovered judgment, from which defendant appeals; the appeal being taken within 60 days after the entry of judgment.

On December 13, 1906, the defendant was engaged in the manufacture of cigars in the city of Fresno, and the plaintiff was in the lithograph business in San Francisco. On that date the defendant, through H. E. Mootz, gave the plaintiff an order for the manufacture of a large number of cigar bands and labels of certain designs and colors, with the picture of the head of Mootz in the center of said bands. The plaintiff exhibited to Mootz at that time a sample of the labels that it manufactured. They were to be manufactured in Germany, and, according to the contract, to be delivered to the defendant in five equal installments at specified times, each installment to be paid for when delivered. June 16, 1907, the first installment of labels and bands was forwarded to Fresno through the post office. Frederick Knobloch (who had meanwhile succeeded Mootz as president of the defendant company) refused to accept the goods, placing his refusal upon the ground that plaintiff had agreed to submit to defendant before manufacturing said goods a sample thereof for approval, and that no such sample or proof had been submitted. In addition to these facts, the complaint alleges that the goods manufactured are of a special design and of no value to any person other than the defendant, and that, by reason of the refusal of defendant to accept delivery of said goods and to pay therefor, the plaintiff has been

damaged in an amount equal to the contract price of the five installments, less certain expenses of shipment and custom duties.

The defendant does not contend that the goods were not delivered at the proper time, or at the agreed price, or in the stipulated quantity, nor indeed that they were not according to sample. Its sole contention in this connection appears to be that the parties to this action agreed that a proof of the labels and bands was to be submitted to the defendant for inspection before the manufacture thereof. To support this contention Knobloch testified that Mootz, the former president of the company, in the presence of the attorney for the plaintiff, at a named conversation, said that he (Mootz) had not waived an opportunity to look at the bands. Mootz was not called as a witness, and Knobloch's testimony in this regard was contradicted. On the other hand, Fricke, a director of the corporation plaintiff, testified: "The written orders embraced the whole of the agreement that I had with Mootz at that time. They did not provide for, nor was there any understanding between Mootz and me in regard to, anything else being done by me before the goods were delivered. There was nothing said or done in regard to furnishing proof. I showed Mootz at that time a sample of the labels we manufactured. There was nothing said between us as to proof. We sold many thousand of labels, and we always sell the labels just the way we show them." From this evidence the court, we think, correctly found that the contract did not provide, as alleged in the answer, that a sample of the work was to be exhibited for approval before the goods should be manufactured.

Defendant's next contention is that the complaint does not state facts sufficient to constitute a cause of action, in that it fails to allege any breach of the contract other than the refusal to accept the first installment of goods tendered, and that the refusal to accept that installment did not in itself constitute such a breach of the contract as to give plaintiff the right to sue for damages for a breach of the entire contract. There are authorities which hold—and no doubt correctly—that, inasmuch as a failure to pay an installment promptly according to contract often results from forgetfulness, mere nonpayment may not of itself show an intention to abandon and renounce the contract. Benjamin on Sales (7th Ed.) pp. 604, 605. In the case at bar, however, the complaint alleges that all the goods had been manufactured, and that the defendant not only refused to pay for the first installment of labels and bands as agreed, but also distinctly and absolutely refused to accept said goods. Under the authorities we have no doubt that this was such a refusal as authorized the plaintiff to sue for damages, not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

only for the breach as to the first installment, but as for a breach of the entire contract. To quote from Benjamin on Sales (7th Ed.) p. 605: "There is abundant authority in America, as in England, that, if the buyer not only refuses to pay for one installment, *but puts his refusal on such ground as justifies the inference that he repudiates the entire contract* [the italics are Mr. Benjamin's], or insists upon new terms different from the original contract, the vendor may be released from any subsequent delivery." And on the same point it is stated in 24 Am. & Eng. Ency. of Law, at page 1083: "There has been some conflict of authority where the delivery is by installments, but the rule now seems to be settled in the United States that where the contract of sale is entire, delivery to be made by installments, the failure of the seller to deliver, or of the buyer to accept, one installment, constitutes such a breach of contract as will give the other party the right to rescind the contract and sue for damages"—citing many cases. See, also, Benj. on Sales, 603.

The complaint alleges that the plaintiff manufactured all of said goods, wares, and merchandise agreed to be supplied to defendant in accordance with said agreement. The testimony introduced at the trial to prove that the last two installments of the goods had been manufactured was, it may be conceded, inadmissible; but the ruling on the motion of the defendant to strike out such testimony was reserved by the court, to be made later. The ruling was not made, and the testimony remains in the record. If the motion had been insisted upon and granted, the plaintiff might have introduced other evidence in the place of that stricken out. However that may be, the testimony was before the court, and we think it of some weight and entitled to consideration.

The defendant claims that the evidence does not show that the labels and bands were manufactured in conformity to the contract. The defendant does not specify this as one of the particulars wherein the evidence is insufficient to justify the findings, and therefore we cannot consider this point.

We have carefully examined the other points discussed in the briefs, but they call for no special comment.

The judgment is affirmed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 330

GREEN et al. v. GAVIN et al. (Civ. 525.)
(Court of Appeal, Third District, California.
March 27, 1909.)

1. APPEAL AND ERROR (§ 351*)—TIME FOR TAKING APPEAL.

Under Code Civ. Proc. § 939, subd. 1, requiring an appeal to be taken within six months after rendition of judgment, an appeal from a

judgment could not be considered where the notice of appeal was served and filed more than six months after the judgment was entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1918; Dec. Dig. § 351.*]

2. MINES AND MINERALS (§ 19*)—LOCATION OF PLACER CLAIM SUFFICIENCY OF NOTICE.

A notice of location of a placer claim read: "Commencing at the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. —, " etc. The words "Commencing at" were printed on a form, and the remainder of the description written. The notice was posted on the ground a little east of the middle of the west line and locator built a house on the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, occupied it, and worked on the claim, drove stakes at the corners, and blazed trees so that no one would have difficulty in locating the boundaries. *Held*, that the notice was sufficient as against a subsequent locator.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37-39; Dec. Dig. § 19.*]

3. MINES AND MINERALS (§ 19*)—LOCATION NOTICES.

Location notices should be liberally construed with reference to the circumstances under which and the character of the parties by whom they are generally made and, in the determination of the sufficiency of the notice, the important guide is its purpose to identify the land with reasonable certainty.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37-39; Dec. Dig. § 19.*]

4. MINES AND MINERALS (§ 19*)—LOCATION NOTICES—SUFFICIENCY.

Where a notice of the location of a placer claim described it as the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, etc., the fact that a portion of such subdivision was at the time included in a prior patented claim did not render it invalid.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37-39; Dec. Dig. § 19.*]

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by J. F. Green and others against James Gavin and others. Appeal by plaintiffs from a judgment for defendants, and from an order denying a new trial. Appeal from the judgment dismissed. Order denying a new trial affirmed.

Wm. Singer, Jr., for appellants. Tabor & Tabor, for respondents.

BURNETT, J. The appeal is from the judgment and the order denying the motion of plaintiffs for a new trial. The judgment was entered April 30, 1907, and the notice of appeal was served and filed December 10, 1907. The appeal from the judgment therefore cannot be considered, as it was taken more than six months after said judgment was rendered. Code Civ. Proc. § 939, subd. 1; County of Contra Costa v. Soto, 138 Cal. 57, 70 Pac. 1019. The action was brought to quiet title, and the determination of the controversy depends upon the validity of the location by defendants of a certain placer mining claim designated as lot No. 5 and situated in section 23 of township 14 north, range 10 east, M. D. M., in the county of Placer.

The principal reviewable contention of ap-

pellants is that the notice of the prior location by defendants was so uncertain and obscure as to amount to no notice at all. The said notice was partly printed and partly written, and was in the following form: "Notice is hereby given that the undersigned, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described placer mining ground, viz.: Commencing at the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section twenty-three (23) T. 14 N., R. 10 E., situate in the Brushy mining district, county of Placer, state of California. This claim shall be known as the Canothus Placer Mining Claim. Located on the seventh day of September, 1905. Jas. Gavin. C. H. Wasson." In reference to this notice the defendants allege in their answer that the words "Commencing at" were in the printed form used by them, and through the inadvertence and mistake of the one preparing said notice these words were not erased, and that the further words of description, "the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$," etc., were written in the notice, and that it was the purpose and intention of said locators to locate and claim as a placer mining claim under said location the said "S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$," etc. There is no direct evidence that the words "Commencing at" were "inadvertently" left in said notice. It does appear, however, that said notice was partly printed and partly written. It was received in evidence and was no doubt inspected by the learned trial judge who probably observed that these words were included in the printed matter. From the testimony of James Gavin it is clear that the defendants intended to locate said S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$. Their acts show that beyond peradventure. No one believing said testimony could reach any other conclusion than that said defendants intended to describe in said notice said land which they actually did locate on the ground. It therefore follows that the words were inadvertently left in, as the notice without them would perfectly describe said legal subdivision—the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, etc. The court's finding as to the inadvertence was therefore justified, but the finding is immaterial, as there was a substantial compliance with the requirement of the law in reference to notice, and no one could possibly suffer any prejudice in consequence of the obvious oversight as to said words. It is universally held that "location notices should be liberally construed, having reference to the circumstances under which and the character of the parties by whom they are generally made." In the determination of the sufficiency of the notice, the most important guide is the purpose of said notice, which is to identify the land claimed with reasonable certainty, and it would seem, as stated by the Supreme Court in *Donahue v. Meister*, 88 Cal. 131, 25 Pac. 1099 (22 Am. St. Rep. 283), that "the notice is valuable chiefly

as a temporary protection to the locator while the other acts are being performed. Under the law of Congress 'distinctly marking the location upon the ground so that the boundaries may be readily traced' is necessary and is the main act of original location. *Holland v. M. A. G. Q. M. Co.*, 53 Cal. 149. In *Gleeson v. Martin White Co.*, 13 Nev. 464, Beatty, J., delivering the opinion of the court, speaks of congressional legislation on the subject as introducing 'a system in which the preliminary posting and recording of notice is entirely out of place, except as a means of protecting a claim during the time necessary for protecting the ledge and marking the boundaries of the location. When the location is thus marked, all that the notice and record were ever intended or expected to accomplish is effected in a manner far more satisfactory and complete.' Of course, as held therein, mining customs and the requirement of the law in relation to the posting of notices cannot be disregarded, but the whole question must be viewed in the light of the beneficent purpose of the regulations, and the acts performed by the parties in pursuance of the location notice must be considered if they tend to clarify and render certain what under the notice itself might be somewhat obscure and uncertain. This is true of a placer location as well as of a quartz mining claim considered in the *Donahue Case*, supra. Among the cases illustrating the indulgent consideration shown locations in good faith may be mentioned *Block v. Justice* (C. C.) 58 Fed. 114; *Duryea v. Boucher*, 67 Cal. 141, 7 Pac. 421; *Doe v. Tyler*, 73 Cal. 21, 14 Pac. 375; *Kern Oil Co. v. Crawford*, 143 Cal. 302, 76 Pac. 1111, 3 L. R. A. (N. S.) 993; *West Granite Mountain Co. v. Granite Mountain Mining Co.*, 7 Mont. 356, 17 Pac. 547.

Considering, as we should, the evidence in the light most favorable to the judgment of the trial court, we find that the said notice was posted on the ground a little east of the middle of the west line. The defendant Gavin built a house upon said land and entered into the occupancy of it, and has so remained and has worked the claim ever since. He surveyed the land, drove stakes at the corners, cut the brush between, and blazed trees so that no one would have any difficulty in locating the boundaries of the claim upon the ground. All this was apparent to plaintiffs when they entered upon said land. If a third party, intending to locate, can readily ascertain from what has been done by the prior locator the extent and boundaries of the claim so located, then the object of the statute has been accomplished. *Kern Oil Co. v. Crawford*, supra. In *Duryea v. Boucher*, supra, the notice erroneously described the land in the wrong government subdivision. The court held the notice sufficient, saying: "As the claim was for 30 acres, its boundary on the west could be easily determined. It makes no difference that the wrong legal sub-

divisions are inserted in the notice. These must be rejected as false when the remaining description sufficiently identifies the land in accordance with the maxim, 'Falsa descriptio non nocet cum corpore constat.'"

There seems to be no substantial merit in the contention that the notice is invalid because it does not refer to some natural object or permanent monument. The only purpose of requiring such a reference is for identification of the claim. The identification is complete when the legal subdivision is designated; the land having been previously surveyed. The case of *Fuller v. Harris* (D. C.) 29 Fed. 814, cited by appellants, is not in point. It involved an entire failure to identify the land. The court says: "There is neither a natural object, or permanent monument, or any designation or mark, by which the placer claim can be identified."

It is also contended that the location is invalid because not in conformity with the United States system of public land surveys or the rectangular subdivision of such surveys. As a matter of fact, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ is a rectangular subdivision, and its designation as such in the notice of location would appear to be sufficient. The point of the objection, however, lies in the fact that a portion of this subdivision is included in a patented claim known as the Coates claim designated as lot 49. The residue of said S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ thereby became fractional, and was designated as lot 5. There is, however, as we understand it, no provision in the law or in the regulations of the land department for the official subdivisions of rectangular government tracts made fractional by the survey of a lode or placer claim which takes a portion of said subdivision, and this lotting is made by the land department not from any official survey of the lotted land, but, as said in the *Mary Darling Placer Claim Case*, 31 Land Dec. Dep. Int. 64: "It is apparently based upon data reported in or connected with the surveys of mining claims by deputy mineral surveyors." This inclusion, therefore, of a little over one acre of the 40-acre tract in said lot 49 and the designation of the residue as lot 5 do not affect the legal aspect of the attempted location of said rectangular subdivision by defendants. Again, there is no pretense that appellants have succeeded to any interest in the Coates claim, and it is difficult to understand how there is ground for them to complain because of the admitted fact that a small portion of said claim is included in respondents' location. While the controversy is really over lot 5, it is admitted that section 23 is a full section of 640 acres, and that said lot 5 consists of a little less than 39 acres, and is entirely embraced within said S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 23.

The course pursued by defendants is approved and supported by authority. In *Lindley on Mines*, § 4486, it is said: "The prac-

tice now sanctioned by the department may be briefly summarized: A placer locator may locate a given subdivision of the public surveys not exceeding the statutory limits of 20 acres, * * * and the location may properly describe the land located by the proper legal subdivision, although the tract so located may embrace within its exterior limits prior segregated and patented lode claims, thus dividing the placer claim into noncontiguous tracts. The patent when issued will describe the land by proper legal subdivisions, excepting, however, the tracts which have been previously segregated. In other words, the government may grant to the placer claimant the particular subdivision less what it has heretofore conveyed to others. * * * It had at one time been held that the segregation of lode claims within a given subdivision of the public surveys would result in leaving certain fractional areas, which were subsequently designated by lot numbers, and that the placer claimant was compelled to have these irregular fractions surveyed for the purpose of ascertaining the quantity and enter them as separate tracts, but this ruling subsequently was abrogated, and the practice heretofore noted of applying for the original government subdivision less the area covered by prior segregated area was sanctioned. So far as the courts are concerned, the question has not been definitely determined, but the application of the principles applicable therein to lode claims is not accompanied with any serious difficulty." In *Rialto No. 2 Mining Claim*, 34 Land Dec. Dep. Int. 44, it is said: "The fact that a placer location, if made to conform to legal subdivisions of the public surveys, would embrace all or a portion of the land covered by a prior location is not a sufficient reason for failure to conform the placer location to legal subdivisions as required by section 2331 of the Revised Statutes (U. S. Comp. St. 1901, p. 1432). The fact that portions of other claims already entered may be embraced in a placer location by conforming the same to legal subdivisions does not make such conformity 'impracticable' within the meaning of section 2331 of the Revised Statutes, inasmuch as under the law such entered claims may be excluded from patent proceedings involving the placer." We think the court below was justified in concluding that there was an honest attempt by defendants to locate said land; that there was a substantial compliance with the requirements of the law and with the local mining rules and customs; that plaintiff had full knowledge of the extent of defendants' claim, and that it would be unjust to deprive defendants now of the fruits of their enterprise and diligence.

The appeal from the judgment is dismissed. The order denying the motion for a new trial is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

10 Cal. App. 304

VARNI v. DEVOTO et al. (Civ. 565.)

(Court of Appeal, First District, California.
March 22, 1909.)

1. APPEAL AND ERROR (§ 195*)—AMENDMENT OF PLEADING.

Appellant cannot first complain on appeal that he was not permitted to amend his complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1490; Dec. Dig. § 195; *Pleading, Cent. Dig. §§ 1403-1413.]

2. PARTITION (§ 16*)—TITLE TO SUSTAIN—EQUITABLE TITLE.

Under Code Civ. Proc. § 752, providing that where several co-tenants are in possession of real property, and one or more of them have an estate of inheritance, a suit in partition may be brought, the holder of an equitable title may sue.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 52; Dec. Dig. § 16.*]

3. TENANCY IN COMMON (§ 13*)—POSSESSION OF CO-TENANT.

The seisin of a co-tenant, unless adverse, is the seisin of his co-tenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 23, 29; Dec. Dig. § 13.*]

4. PARTITION (§ 20*)—RIGHT OF ACTION—POSSESSION.

Under Code Civ. Proc. § 752, providing that where several co-tenants are in possession of real property, and one or more of them have an estate of inheritance, a suit in partition may be brought, and section 759, declaring that the rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such an action, a co-tenant not in possession may bring partition against his co-tenant whose possession is adverse and hostile.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 65-67; Dec. Dig. § 20.*]

5. PARTITION (§ 55*)—TITLE TO SUSTAIN—PLEADING.

Plaintiff in partition alleged that defendant M. was his wife, and that with money earned by him during their marriage she purchased an estate of inheritance to the extent of an undivided one-half interest in land described, and caused the legal title to be conveyed to her, that she was in possession as trustee for him, that he was the equitable owner thereof, that defendant D. was the owner of the other undivided one-half interest, and that plaintiff and D. were the only persons having any interest therein. *Held*, that such complaint did not allege an express trust, within Code Civ. Proc. § 863, vesting the trustee of an express trust with the whole estate, so as to defeat the suit, but stated a cause of action.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 55.*]

Appeal from Superior Court, City and County of San Francisco; J. C. B. Hebbard, Judge.

Action by Stefano Varni against Antonio Devoto and others. From a judgment for defendants on sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Joseph F. Cavagnaro, R. T. Harding, and Harding & Monroe, for appellant. Cochrane & Henshall and Devoto & Richardson, for respondents.

KERRIGAN, J. This is an action in partition. It is alleged in the complaint: That Stefano Varni and the defendant Maria Varni are husband and wife; that with money earned by him during their marriage she purchased an estate of inheritance to the extent of an undivided one-half interest in the land described in the complaint, and caused the legal title thereto to be conveyed to her; that the same now stands of record in her name; that she is in possession thereof as trustee for him, and he is the equitable owner thereof; that Antonio Devoto is the owner and holder of the other undivided one-half interest; and that plaintiff and the defendant Devoto are the only persons having any interest therein. Both the defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. Based upon these demurrers a judgment of dismissal was entered, and from that judgment plaintiff prosecutes this appeal.

Plaintiff suggests that if, as an abstract legal proposition, he is entitled to maintain this action, he should have been given an opportunity to amend the complaint. That is true; but, if he desired to amend it, he should have applied to the court for such permission, and taken an exception if permission had been denied. It is too late to make the point for the first time in this court when nothing appears in the record to show an abuse of discretion. Section 427, Code Civ. Proc.; *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132; *Schaacke v. Eagle*, etc., 135 Cal. 480, 63 Pac. 1025, 67 Pac. 759.

In support of the judgment, defendants first claim that the plaintiff, being the holder of the equitable and not the legal title to the property, cannot maintain this action; but in this state it is held to the contrary. Section 752, Code Civ. Proc., provides that where several co-tenants are in possession of real property, and "one or more of them have an estate of inheritance," a suit in partition may be brought, and in the case of *Watson v. Sutro*, 86 Cal. 527, 24 Pac. 172, 25 Pac. 64, it was held that an equitable estate was an estate of inheritance, and that therefore an action for partition could be maintained by the owner of such a title; that as legal and equitable remedies may be sought and had in the same case, the owner of the equitable title to an undivided interest may sue to establish his right and to obtain a division of the common estate. See, also, *Luco v. De Toro*, 91 Cal. 422, 27 Pac. 1082; 30 Cyc. 195, 196.

Defendants next contend that, as it appears from the complaint that plaintiff is not in possession of any of the land, this suit is not maintainable. The seisin of plaintiff's co-tenant Devoto, unless adverse, is the seisin of the plaintiff; but, assuming that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the complaint shows that the possession of Devoto is adverse and hostile to plaintiff, still the point has no force in this state. At the common law, and under some American statutes, if property be held adversely to the claimant, he must, before instituting partition proceedings, establish his right to the land by an action to recover possession. And the language of section 752, Code Civ. Proc., standing alone, lends countenance to the argument that such is the law here; but section 759, Code Civ. Proc., provides that "the rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such an action." And the Supreme Court has held, resting its decision on this section, that a co-tenant not in possession of the land may bring a partition suit against his co-tenant whose possession is adverse and hostile; that a proceeding in partition is one in which the rights of all the parties may be fully inquired into and determined. *Martin v. Walker*, 58 Cal. 590, 594; 30 Cyc. 204.

Under section 863, Code Civ. Proc., the trustee of an express trust is vested with the whole estate, and respondents contend that the trust alleged in the complaint is an express trust, and that therefore the plaintiff has not an estate of inheritance, and cannot maintain this action. One cannot, of course, by a suit for partition, put an end to an express trust or defeat its lawful purposes, nor usurp the functions of the trustee. Here, however, the property does not appear to be held by Maria Varni under an active trust, or under an "express trust" such as is defined in section 857, Code Civ. Proc., referred to in section 863, Code Civ. Proc. According to his pleading, the plaintiff is entitled to a conveyance of the property from his wife, or to possession thereof without such conveyance. Therefore he may compel partition (30 Cyc. 196), and we therefore think that the complaint not only states a cause of action against defendant Devoto, but, as the allegations of the complaint show that Maria Varni is at least a proper party defendant, that it also states a cause of action against her. *B. C. Mining Co. v. S. C. Mining Co.*, 83 Cal. 606, 23 Pac. 1102; 30 Cyc. 202, 203.

The judgment is reversed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 342

CROWLEY LAUNCH & TUGBOAT CO. v. SUPERIOR COURT et al. (Civ. 619.)

(Court of Appeal, First District, California. March 29, 1909.)

1. JUSTICES OF THE PEACE (§ 155*)—APPEAL—TIME FOR PROCEEDINGS.

The filing of a notice of appeal from a justice's court to the superior court, the service

of a copy thereof, and the filing of a written undertaking within the 30 days allowed by Code Civ. Proc. § 974, for taking such an appeal, are all jurisdictional prerequisites, and, unless all are completed, the appeal is ineffectual for any purpose.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 530; Dec. Dig. § 155.*]

2. JUSTICES OF THE PEACE (§ 159*)—APPEAL—UNDERTAKING—JUSTIFICATION OF SURETIES.

Under Code Civ. Proc. § 978, providing that, unless sureties on an undertaking on appeal from a justice's court justify within five days after their sufficiency is excepted to, the appeal must be regarded as if no such undertaking had been given, the superior court has no jurisdiction where the justification of sureties was not within the prescribed time.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 555; Dec. Dig. § 159.*]

3. JUSTICES OF THE PEACE (§ 159*)—APPEAL—UNDERTAKING—WAIVER OF EXCEPTION.

Unless the waiver of an exception to sureties on an undertaking on appeal from a justice's court who fail to justify within the five days after such exception allowed by Code Civ. Proc. § 978, occurs within such time, it does not give the superior court jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 578; Dec. Dig. § 159.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Original proceeding by the Crowley Launch & Tugboat Company for a writ of prohibition to the superior court of the city and county of San Francisco, and Hon. John Hunt, the judge presiding in Department 5 thereof. Writ granted.

S. C. Wright, for petitioner. W. H. H. Hart, for respondent.

KERRIGAN, J. This is an original proceeding for a writ of prohibition. The petitioner recovered judgment against the Richmond Dredging Company (a corporation) March 20, 1908, in the justices' court of the city and county of San Francisco. March 31st the dredging company served and filed a notice of appeal therefrom, and on the same day filed in the said justices' court an undertaking on appeal. Later that day petitioner excepted to the sufficiency of the sureties on the undertaking. On the next day, April 1, 1908, the dredging company served notice on petitioner that the sureties would justify April 7th, on which day they, having appeared, were examined touching their qualifications. There is a conflict in the affidavits as to whether or not the attorney for the petitioner stated that he was satisfied of their sufficiency, but no objection was made to them, and the bond was approved. The cause was thereupon transmitted to the superior court, where on May 29th the petitioner moved to dismiss the appeal upon the ground that the sureties on the undertaking had failed to justify within five days after the filing and serving of exceptions to their sufficiency, as required by section 978 of the Code of Civil Procedure. The motion was denied,

and the case was set down for trial; the denial of the motion being upon the ground that the conduct of the attorney for the petitioner at the hearing when the sureties appeared for justification amounted to a waiver of their failure to justify within the time prescribed in said section 978.

We are of the opinion that the requirement of this section that the sureties are to justify within the time specified is jurisdictional, and that, as the sureties did not comply with the section in this respect, the appeal attempted to be taken is ineffectual, and that, therefore, the writ prayed for must issue. An appeal may be taken from a justice's court to the superior court at any time within 30 days after the rendition of judgment. Code Civ. Proc. § 974. To effectuate the appeal, three things are necessary, viz.: The filing of the notice of appeal, the service of a copy of the notice upon the adverse party, and the filing of a written undertaking; and all of these things must be done within 30 days after the rendition of judgment. *McCracken v. Superior Court*, 86 Cal. 75, 24 Pac. 845. All of these are jurisdictional prerequisites, and until all of them are completed the appeal is not effectual for any purpose. *Coker v. Sup. Ct.*, 58 Cal. 178. Section 978, Code Civ. Proc., provides: " * * * The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." "If no undertaking in this case had been filed within 30 days, the superior court would have acquired no jurisdiction of the appeal. Here an undertaking on appeal was filed in time, but the sureties failed to justify within the prescribed time, and, according to the express provision of section 978, Code Civ. Proc., 'the appeal must be regarded as if no such undertaking had been given.' In contemplation of law the undertaking did not exist. It was a nullity; and the superior court had no jurisdiction of the appeal at the time the motion was made to dismiss the same. *McCracken v. Sup. Ct.*, supra; *McDonald v. Paris*, 9 S. D. 310, 312, 68 N. W. 737; *Pratt v. Jarvis*, 8 Utah, 5, 28 Pac. 869.

In the case last cited, the sureties, three days after the exception to their sufficiency appeared before a commissioner, and were sworn and examined as to their qualifications as sureties. They were found satisfactory, and the bond was approved. The district court dismissed the appeal because the sureties had not justified within two days from the day of notice of exception to their sufficiency. The Supreme Court of Utah, after stating that an appeal from a commissioner's court is governed by the

same rules that apply in justices' courts, said: "Section 3660, 2 Comp. Laws, 1888, provides that 'an appeal from a justice's court shall not be effective for any purpose unless an undertaking be filed within five days after filing the notice of appeal, with two or more sureties,' etc. * * * 'The adverse party may, however, except to the sufficiency of the sureties within two days after the filing of the undertaking; and unless they, or other sureties, justify before the justice from whose court the appeal was taken, within two days thereafter, upon notice to the adverse party, the appeal shall be regarded as though no undertaking had been given.' These provisions of the statute in relation to appeals are mandatory, and, no sufficient undertaking having been given within the time required, the appeal was properly dismissed." In *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. 200, it was held that, if the sureties fail to justify within the time prescribed, the "appeal is ineffectual for any purpose." In *Roush v. Van Hagen*, 17 Cal. 122, an undertaking was filed April 18th, and the sufficiency of the sureties was excepted to April 20th, whereupon a notice was given that the sureties would justify before the county judge of Sacramento county on April 25th. Orders were made, however, extending the time, and they did not justify until May 1st. The court said: "It was necessary that the sureties should justify within five days after the notice of exception, and the failure to do so rendered the appeal a nullity. The statute provides that, on failure to justify within the time limited, the appeal shall be regarded as if no undertaking had been given. The orders given extending the time were in contravention of its provisions, and were therefore inoperative." So in *McCracken v. Superior Court*, supra, the court, at page 77 of 86 Cal., at page 846 of 24 Pac., in speaking of the time within which sureties must justify, said: "The statute is peremptory in its terms, and the consequence of a violation is that the party loses the benefit of his appeal."

Respondent argues that the petitioner, by appearing at the hearing of the justification of the sureties, and substantially saying after their examination that it was satisfied with their pecuniary ability, waived its right both to have them justify within five days, and to have the appeal dismissed. We have no doubt that after excepting to the sufficiency of sureties their justification may be waived, but we apprehend that such waiver must be made within five days, or else the superior court will lose jurisdiction of the appeal. This position finds support in *Re Skerrett*, 80 Cal. 63, 22 Pac. 85, where it was held that, in order to entitle certain parties to appeal without filing an undertaking under section 946, Code Civ. Proc., the order dispensing with the undertaking must be

made within the time fixed by law for filing the same. So in *Perkins v. Cooper*, 87 Cal. 244, 25 Pac. 411, it was said that, unless an undertaking is waived within the time for its filing, the appeal is lost.

Let the writ issue as prayed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 347

LANE v. STORKE. (Civ. 617.)

{Court of Appeal, Second District, California.
March 29, 1909.}

1. ATTORNEY AND CLIENT (§ 129*)—BREACH OF CONTRACT OF EMPLOYMENT—RECOVERY.

Under Civ. Code, § 3301, providing that no damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and origin, recovery cannot be had against an attorney for breach of contract of employment, on the ground that proceedings in which he was engaged to act terminated adversely because of such breach.

[Ed. Note.—For other cases, see *Attorney and Client*, Dec. Dig. § 129.*]

2. ATTORNEY AND CLIENT (§ 112*)—NEGLIGENCE IN CONDUCT OF SUIT.

Where plaintiff purchased an interest in a business for a certain sum in cash and a note for an additional sum, securing the same by a mortgage on the interest so purchased, plaintiff's attorney, in an action for the rescission of the purchase and recovery of the cash paid, was not grossly negligent in pleading the note and asking that it be surrendered and canceled, as thereby enabling defendant to set up the note in his cross-complaint, and ask judgment thereon, as no judgment of rescission would be complete without involving the disposition of the note.

[Ed. Note.—For other cases, see *Attorney and Client*, Dec. Dig. § 112.*]

3. ATTORNEY AND CLIENT (§ 129*)—NEGLIGENCE IN CONDUCT OF SUIT—ACTION—PLEADING.

A complaint, alleging that defendant agreed to act as plaintiff's attorney in recovering money paid to a third person for a half interest in a business, that defendant commenced an action therefor, and instituted proceedings to declare plaintiff, such third person, and the partnership, bankrupt, that, before the hearing of such proceedings or the trial of the action, defendant abandoned both matters and refused to act as plaintiff's attorney, failed to state a cause of action, in that no damage was shown to have accrued to plaintiff from defendant's conduct.

[Ed. Note.—For other cases, see *Attorney and Client*, Dec. Dig. § 129.*]

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by H. P. Lane, as trustee of the estate of Addie L. Allen, bankrupt, against C. A. Storke. From a judgment for defendant, plaintiff appeals. Affirmed.

Ralph W. Schoonover, for appellant. C. A. Storke, for respondent.

SHAW, J. The second amended complaint contains three counts, to each of which defendant interposed a demurrer. The demurrer was sustained, and, plaintiff electing to stand upon his complaint, the court gave judgment for defendant, from which plaintiff appeals.

The facts disclosed by the complaint, and which are applicable to each count, are as follows: On March 17, 1904, Addie L. Allen purchased of one A. C. Williams a half interest in a certain dairy property, at which time she and Williams entered into a full and equal partnership for the purpose of operating said dairy. The consideration for such purchase was \$4,000 cash and the promissory note of Allen for \$2,500, the payment of which was secured by a chattel mortgage upon said half interest so purchased, executed by said Allen to Williams. Thereafter Williams excluded Allen from any participation in the management of said dairy and appropriated the profits of the business to his own use. Defendant is an attorney at law, and on January 2, 1905, Allen sought his professional advice and counsel as to her legal rights in the premises against Williams, and at her request he agreed, in consideration of a fee paid to him by said Allen, to act as her attorney in certain matters. On December 5, 1905, Allen was by an order of the United States District Court adjudged a bankrupt, and plaintiff was duly appointed sole trustee of said bankrupt's estate. On April 17, 1905, defendant, without just cause, refused to longer act as attorney for said Allen, and, although so requested by her, refused to give her the benefit of his legal counsel, skill, and advice.

By the first count it is sought to recover a judgment against defendant for damages in the sum of \$4,561.07 for a breach of contract. The right to such recovery is based upon the facts that for a sufficient consideration defendant accepted employment as Allen's attorney and entered into a contract with her whereby he agreed to undertake the recovery from Williams of the \$4,000 so paid him on account of the purchase price of the interest in said dairy, that with such end in view he did commence an action for the recovery thereof, but before the trial he notified Allen that he would no longer act as her attorney in said action and, contrary to her will and without her consent, withdrew therefrom. Allen employed other counsel who tried the case, with the result that she not only failed to obtain judgment against Williams for the \$4,000, or any other sum, but, on the contrary, judgment was rendered on cross-complaint in favor of the latter and against Allen for \$561.07; whereas, it is alleged that, had defendant performed his part of the contract and conducted the trial of said action, his thorough acquaintance with the facts thereof, coupled with his superior skill and legal ability as a trial lawyer, would not only have prevented Williams from recovering judgment against Allen for \$561.07, but have secured for Allen a judgment against Williams for the sum of \$4,000 and interest.

By the second count it is sought to recover a judgment for damages in the sum of \$500 for a like breach of contract on the part of defendant. It is alleged: That defendant agreed with Allen to act as her attorney in certain proceedings in the United States District Court having for their purpose a decree and adjudication declaring the copartnership of Williams & Co. and the individual members thereof bankrupts; that defendant did file a petition therein under which the firm of Williams & Co. and the members thereof were declared insolvent; that as to said Williams and the said firm a rehearing in said matter was granted and at a subsequent hearing thereof, had after defendant wrongfully withdrew as attorney in said proceedings against the wishes of Allen, Williams & Co., as well as Williams, were adjudged solvent, and the property and assets of said firm delivered to Williams as the solvent member of said copartnership. Notwithstanding this judgment of the court, it is alleged: That in fact said Williams and said Williams & Co. were bankrupt, and that had not defendant withdrawn as attorney in said matter said rehearing would not have been granted, or, if granted, upon further hearing said firm and the individual members thereof would have been adjudged insolvent; that had said Williams & Co. been adjudged bankrupt, and the firm's assets placed in the custody of said district court, Allen's estate in bankruptcy would have been enabled to recover the whole of the money so paid Williams & Co., with damages for the many wrongs done her. It is alleged: That by reason of subsequent fraudulent acts of Williams as the adjudged solvent member of said firm the interest of Allen in the firm's assets and the money paid Williams were thereby lost to her estate; that, in an effort to recover from Williams the money so paid him by Allen, plaintiff has been compelled to prosecute various and sundry actions at an expenditure of \$500, for which sum he asks judgment against defendant.

Defendant demurred to each of these counts upon the ground that neither count set forth facts sufficient to constitute a cause of action. Section 3301, Civ. Code, provides that "no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." The damages claimed in both counts are based solely and alone upon the alleged fact that the result of the trial in the case of Allen v. Williams and the proceedings in bankruptcy against the firm of Williams & Co. and Williams would have been different under the management of defendant. There are no means whereby such question can be determined. Observation teaches us the result of a trial cannot be predicted with any degree of certainty, even though conducted by lawyers possessing the marked skill and ability attributed under oath, upon informa-

tion and belief, to defendant. While defendant might have obtained a judgment against Williams for the \$4,000, or secured an adjudication of his insolvency, all as contended by plaintiff, still we cannot say the result might not have been even more disastrous to his client had he not withdrawn as her attorney. Judgment for a greater sum might have been obtained against her in the one case, and in the other she, too, as well as Williams and the copartnership, might have been adjudged solvent. Moreover, in view of the fact that it is not made to appear that Williams was in fact solvent, but, on the contrary, alleged that in truth he was a bankrupt, the judgment might be wholly worthless. We think, aside from other reasons which might be suggested, the damages set out in the first and second counts of the complaint clearly fall within the provisions of said section 3301, Civ. Code. Hence neither of said counts stated a cause of action, and as to both of which defendant's demurrer was properly sustained.

The action brought against Williams, as appears from the first count, had for its purpose a rescission of the transaction of purchase, the recovery of the \$4,000, the surrender and cancellation of the note for \$2,500, the dissolution of the existing partnership, and an accounting. Appellant contends that defendant was guilty of gross negligence in thus pleading the note and asking that it be surrendered and canceled, alleging that Williams was thereby enabled to set up the note in his cross-complaint and ask judgment thereon. We are unable to perceive how recovery of the \$4,000 could be had without a rescission of the transaction wherein it was paid. Hence, as the note constituted a part of the purchase price, no judgment of rescission could be complete without involving the disposition of such note. The allegations of the first count fail to disclose any negligence on the part of defendant in so pleading said note. Indeed, counsel for appellant states: "The real gist of the action is not so much the negligence or carelessness of the defendant as it is the positive refusal upon his part to proceed at all in either of said matters."

The third count sets forth the contract of employment, alleging: That in consideration of certain sums of money by said Allen paid to defendant he agreed to give her the benefit of his legal knowledge, skill, and advice and to act as her attorney in recovering from Williams the sum of money so paid him by Allen in the purchase of said property; that pursuant to said agreement he did, on the 3d day of March, 1905, commence an action in the superior court of Santa Barbara county against said Williams for the recovery of said money so paid to Williams, as well as for other relief; that in the further discharge of his duties he instituted proceedings in the United States District Court having

for their purpose the procuring of an order and decree adjudging Williams, Allen, and the said copartnership of Williams & Co., and each of them, bankrupt; that before the hearing of said bankruptcy proceedings or trial of said action against Williams, to wit, on April 17, 1905, he, without cause and against the will and protest of Allen, abandoned each and both of said matters and refused, and ever since has refused, to further act as her attorney or give her the benefit of his counsel and advice. There is nothing in the count disclosing wherein Allen was damaged by reason of the defendant's neglect and failure to proceed with the bankruptcy proceedings or the trial of the case of Allen v. Williams. It is not alleged that she sustained any loss by reason thereof. It does not appear that she was compelled to, or did, employ and pay other counsel to act for her in said matters. Indeed, there is nothing in the count inconsistent with the fact that Allen might not have received from Williams the full amount which she claimed due her. She was entitled to damages "for all the detriment proximately caused" (section 3300, Civ. Code) by the breach of the obligation assumed by defendant. None is shown to have been caused. Hence, conceding that Allen's rights in the premises, whatever they may have been, passed by operation of law to her trustee in bankruptcy, defendant's general demurrer to the third count of the complaint was properly sustained.

The judgment is affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 372

LINTOTT v. SAN FRANCISCO CONST. CO.
(Civ. 544.)

(Court of Appeal, First District, California,
April 7, 1909. Rehearing Denied by
Supreme Court June 3, 1909.)

**BAILMENT (§ 31*)—LETTING OF HORSES—IM-
PROPER CARE.**

In an action for injuries to certain horses, evidence held to sustain a finding that the horses were hired by defendant and not by another.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 31.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by H. Lintott against the San Francisco Construction Company. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

J. C. Bates, for appellant. Cassin & Lucas, for respondent.

KERRIGAN, J. This case is here for review on an appeal from the judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial.

The action is to recover damages for injuries to certain horses, the property of plaintiff. In August, 1905, the plaintiff, in answer to an advertisement of John McQueston, an employment agent, stating that horses were desired for work upon the Ocean Shore Railway in Santa Cruz county, called upon McQueston, and as the result of the interview 22 head of horses belonging to plaintiff were put to work plowing, grading, and scraping

on the roadbed of said railroad; plaintiff to receive a given price per day for each horse. The complaint alleges: That, by reason of the carelessness and negligence of defendant, one of the horses was killed, another severely injured; that, by reason of the failure of the defendant to keep its contract to properly shelter the horses, two of them became sick and died; and that the others were injured in health and rendered less fit to work. The jury brought in a verdict for the full amount demanded in the complaint. Defendant asserts that there is no evidence that the horses were hired by it, but, on the contrary, shows that they were hired "by another distinct company—or person."

McQueston was called as a witness, and testified: "I got Lintott to come over here and rent his horses to the construction company. I made arrangements for him to go to work up here at the Ocean Shore Road for the San Francisco Construction Company. Livingston was the man I engaged them for. The San Francisco Construction Company paid me for anything I did for them, everything in a lump. I did work for them. They paid me by check. * * * I got a check from the San Francisco Construction Company for it. * * * I hired other horses for this company besides those from Mr. Lintott. * * * The San Francisco Construction Company paid me. I was paid for the work I did in hiring these horses by check (indicating the form of check). Q. By the San Francisco Construction Company? A. By that company, signed like that."

The plaintiff himself testified: "I went to what was known as the San Francisco Construction Company's camp. There I met a man named Livingston. Livingston wanted to give me a contract on a piece of the road. I told him I didn't want to take it. I stated to him that I was going to rent the horses, or had rented them, to the S. F. Construction Company. I told him that I had made arrangements with McQueston."

For the work his horses did there plaintiff was paid by time checks, at the bottom of which there was a form of receipt reading as follows: "Received payment from the San Francisco Construction Company in full of all demands to date." The time checks also provided that, when countersigned by Livingston, and receipted by the payee, they would be paid by any San Francisco bank. They were so countersigned by Livingston, and were cashed by the Bank of Santa Cruz County.

A witness, Dean, testified: "I went to work for the San Francisco Construction Company. Livingston employed me to go to work there. It was my understanding that the San Francisco Construction Company employed Livingston. Of course, I don't know. I was paid by check. Livingston's name was on the check."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Livingston, on behalf of the defendant, testified that he was superintendent of the construction work at the time when plaintiff's horses were working on the Ocean Shore Railway, but that he was employed by the United Construction Company. In his cross-examination he also said: "I don't know who graded after the San Francisco Construction Company quit grading. I don't know. I was not there."

A. J. Raisch, secretary of the defendant, testified on its behalf that the defendant had a contract to do some of the work for the Ocean Shore Road, but it was assigned immediately to the United Contracting Company. Some of the members of the defendant corporation, including Raisch, are also members of the United Contracting Company. He further testified: That the defendant did none of the work on the contract; that while he, as secretary of the defendant, was familiar with all the details of its affairs, he did not know Livingston, whose name, as superintendent of the defendant, was printed on "millions of time checks." He explained that the time checks of the defendant company were loaned to the United Contracting Company.

In rebuttal, Fred M. Fairchild, superintendent of construction for the Ocean Shore Railway, testified that the United Contracting Company did no work there to his knowledge, but that the defendant company received payment from the Ocean Shore Railway Company for work done on the road, and that he believed Livingston was the superintendent of the work and represented the defendant company.

The employment agent, McQueston, told plaintiff that he was acting for the defendant. The plaintiff, pursuant to arrangements with McQueston, visited what was known—so he said—as the "San Francisco Construction Company's camp." There he met Livingston, and after some negotiations the horses were rented. Livingston himself, on cross-examination, admitted that defendant had done some grading, and thus contradicted the testimony of Raisch to the effect that defendant had done none of that work. Besides all this, Livingston's name and the name of the defendant company were printed on the time checks given to men who were employed there. There are three corporations mentioned in the record in connection with this work—the defendant, the Warren Company, and the Union Contracting Company. Four of the five directors of the defendant are directors of the Warren Company, and two of them are also members of the Union Contracting Company. The jury, in arriving at their verdict, must have discredited the testimony of Raisch, to the effect that defendant assigned the contract immediately to the Union Contracting Company. It is plain that there was evidence to sustain the

view that the horses were hired by the defendant, so we think further discussion of the point is unnecessary.

Other points are urged by the defendant, but are devoid of merit, and need not be noticed in detail.

The judgment and order are affirmed.

We concur: COOPER, P. J.; HALL, J.

10 Cal. App. 360

HOLT v. JAMES et al. (Civ. 684.)

(Court of Appeal, Second District, California.

April 5, 1909.)

PROHIBITION (§ 3*)—WHEN WRIT LIES—APPEALABLE ORDER.

Prohibition will not lie to prevent the superior court from making and executing an order requiring sureties on an undertaking, on appeal after a money judgment in an attachment suit, to justify before the expiration of 20 days from filing of an exception to their sufficiency, since such order, even if made without jurisdiction, was a special order made after final judgment and therefore appealable under the express provisions of Code Civ. Proc. § 963.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 5; Dec. Dig. § 3.*]

Prohibition by H. R. Holt against W. P. James and the Superior Court in and for the County of Los Angeles. Writ denied.

V. T. Watkins and Watkins & Blodget, for petitioner. John W. Kemp and John S. Mitchell, for respondents.

PER CURIAM. Application for writ of prohibition.

It is made to appear by the record filed herein: That in a certain action pending in the superior court of Los Angeles county, entitled "R. L. Coutts, Plaintiff, v. H. R. Holt, Defendant," a writ of attachment had been duly issued and levied upon certain personal property; that said superior court duly made and entered its judgment in favor of plaintiff and against defendant for \$631; that thereafter, within due time, an undertaking on appeal was filed, and an additional undertaking to stay execution; that thereafter, on the 29th day of March, 1909, the plaintiff in said action duly excepted to the sufficiency of the sureties on said last-named undertaking, and the court thereupon made its order directing said sureties to appear and justify on a day fixed by the court, to wit, on the 30th day of March, 1909, which date was before the expiration of 20 days from the day the exception was filed, and further made its order that, unless such sureties appeared and justified, execution should issue upon said judgment.

Petitioner asks this court to prohibit the superior court from making and executing its order requiring the sureties to justify before the expiration of 20 days from the date of the filing of the exception, and from directing the issuance of execution upon de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fault of such justification. If it be conceded that such order was made without jurisdiction, and that justification cannot be compelled until 20 days after the filing of the exception to the sufficiency of the sureties, nevertheless this writ must be denied for the reason that any order made by the court in reference thereto would be an order after judgment, as contemplated by section 963, Code Civil Proc., and therefore appealable, and under the established rule, where other adequate remedy exists, the writ of prohibition cannot be invoked. *Southern Cal. Ry. Co. v. Superior Court*, 127 Cal. 418, 59 Pac. 789.

Writ denied.

10 Cal. App. 362

WEGERER v. JORDAN et al. (Civ. 603.)

(Court of Appeal, Second District, California.
April 5, 1909.)

1. TRIAL (§ 396*)—FINDINGS—APPLICABILITY TO ISSUES.

Where a note and mortgage sued on was defended on the ground of fraud, and the only allegation was that the mortgagees represented that the mining stock for which the note and mortgage was given was "of great value," a finding that they also falsely represented that the stock would pay immense dividends was without the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

2. FRAUD (§ 11*)—FALSE REPRESENTATIONS—OPINIONS.

False representations that mining stock would pay immense dividends, and that it would bear 6 per cent. interest on the investment, were mere expressions of opinion as to future profits, which, if not realized, would afford no basis for a recovery.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

3. FRAUD (§ 9*)—DECEIT—REPRESENTATIONS—GENERAL STATEMENTS.

A representation that mining stock sold was of "great value" was too indefinite to be actionable.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.*]

4. FRAUD (§ 58*)—DECEIT—EVIDENCE.

Evidence held insufficient to support a finding that representations as to the value of a mine and mining stock for which the mortgage sued on was given were false.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

5. EVIDENCE (§ 265*)—ADMISSIONS—TIME.

An admission that certain mining stock was practically worthless had reference to the time of the admission, and not to the date when the stock was sold.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 265.*]

6. FRAUD (§ 58*)—DECEIT—REPRESENTATIONS.

Representations contained in a prospectus issued to assist in the sale of mining stock were immaterial in the absence of evidence that they were false, and that they induced defendants to purchase the stock.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 58.*]

Appeal from Superior Court, Los Angeles County; B. N. Smith, Judge.

Action by Ida Wegerer against D. P. Jordan and others. Judgment for defendants, and plaintiff appeals. Reversed.

Kendrick, Knott & Ardis, for appellant.
Graham & Woodward, Ralph F. Graham, and Theodore Martin, for respondents.

SHAW, J. This is an action to foreclose a mortgage on certain real estate given to secure the payment of a nonnegotiable promissory note, which note and mortgage had been by defendants D. P. and Louise Jordan made and executed to their codefendants W. V. Holley and Jacob Meyer, and prior to the delivery of which defendants A. L. and Dora Rowe indorsed the same. The court gave judgment in favor of plaintiff against Holley and Meyer as prayed for, and gave judgment against plaintiff in favor of the other defendants, from which, and an order denying her motion for a new trial, plaintiff prosecutes this appeal.

The note and mortgage bear date May 19, 1905, and Holley and Meyer on June 13, 1905, for a valuable consideration, indorsed, transferred and assigned the same to plaintiff. The complaint is in the usual form. The defense of respondents, other than Holley and Meyer, is based upon the alleged fraud of the latter in procuring the note and mortgage signed by defendants Jordan, as well as the indorsement thereof by defendants Rowe. It appears that the note was given in payment for 10,000 shares of the capital stock of the Imperial Gold Mines Company of Mexico, which stock and the mines of said company Holley and Meyer represented "to be of great value," and that, by reason of such representations, their codefendants were induced to give said note so indorsed by defendants Rowe, together with the mortgage securing payment of the same. The answer alleges "that the said representations as to the value of said mining stock were false, and it is the information and belief of these defendants that the said Imperial Gold Mines Company have never had any mines in the Republic of Mexico, and that the mining stock had no value whatever."

The court among other facts, found "that the stock was of no value," and "that the note and mortgage were obtained by false and fraudulent representations, which representations were as follows: Holley and Meyer represented to defendants Jordan and Rowe that the said mining stock was of great value; that the mine owned by the Imperial Gold Mines Company was of great value; that the stock would bear 6 per cent. interest on investment; that the stock would pay immense dividends, all of which said representations being false and fraudulent and being intended to deceive and defraud the defend-

ants Jordan and Rowe, and that said Jordan and Rowe were deceived by said representations of Holley and Meyer which were false and fraudulent, and that defendants Jordan and wife were induced by said false and fraudulent representations to execute the note and mortgage, * * * and by means of said false and fraudulent representations A. L. Rowe and his wife, Dora Rowe, were induced to sign the same as guarantors." That the representations were made and defendants thereby induced to make the purchase, and to make and execute the note and mortgage in payment of such purchase, is sufficiently shown.

That part of the finding to the effect that Holley and Meyer represented the stock would pay immense dividends is not responsive to any issue and finds no support in the pleadings, for the reason that it is not alleged that Holley and Meyer, or either of them, ever made such representation. Moreover, such representation, and that to the effect that the stock would bear 6 per cent. interest on the investment, are not statements of fact, but mere expressions of opinions as to future profits, which, if not realized, afford no basis for recovery. *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Smith on the Law of Fraud*, § 68. The only representation alleged in defendants' answer to have been made by Holley and Meyer is that the stock was of great value, and that the mine was of great value. Aside from the fact that the term "great value" is indefinite and too general in its meaning to form a basis for an action, it might well be contended that such representation was more in the nature of an opinion than the representation of fact affecting the value. *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; *Veazie v. Doton*, 85 Mass. 380. However this may be, the record discloses no evidence whatever touching the value of the mine. From all that appears therein to the contrary, the mine may have been "as rich as the Rosario Mine, which produced forty million dollars pure gold." No effort was apparently made to produce any evidence tending to show the fact, if it was a fact, that the mine was, at the time of the transaction, without value. Therefore the finding to the effect that the representation as to the value of the mine was false and fraudulent is wholly without support of evidence.

Neither is the finding that the representation as to the value of the stock was likewise false and fraudulent supported by sufficient evidence. Defendant Jordan testified: "I have received no dividends and no interest on this stock." Another witness testified: "There has been no dividends or notice of any." The payment of dividends and amount thereof are elements affecting the value of corporate stock, but it by no means follows

that such stock has no value because of a failure to pay dividends thereon. There was testimony tending to show that about one year after the date of the sale Holley, one of the payees of said note, admitted that the stock was then practically worthless. Inasmuch, however, as Holley and Meyer had at the time of making the admission transferred all interest in the property to plaintiff, it is questionable whether she could be bound by such admission. *Cohn v. Mulford*, 15 Cal. 52; *Walden v. Purvis*, 73 Cal. 519, 15 Pac. 91. But, conceding its competency as evidence, it is not, indeed cannot be, claimed that such admission had reference to the value of the stock at the time of the transaction, but related to its value about one year after the making of the representation. That it was then worthless was not a fact tending to prove that it was valueless twelve months prior to such time.

The prospectus offered in evidence contains representations as to the amount of ore on the dump, as well as the amount blocked out, and also purports to give the mill assays of such ore; but it is not alleged nor found that such representation of these and other facts affecting the value of the mine induced defendants to purchase the stock; nor is it alleged or attempted to prove that they were false.

The judgment and order are reversed.

We concur: ALLEN, P. J.; TAGGART, J.

10 Cal. App. 366

DANE et al. v. LAYNE et al. (Civ. 615.)

(Court of Appeal, Second District, California.)

April 6, 1909. Rehearing Denied by
Supreme Court June 3, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 336*)—
SALE OF REAL ESTATE—SUFFICIENCY OF PETITION—STATUTORY PROVISIONS.

Code Civ. Proc. § 1537, enumerates the matters necessary to be stated in the petition by an administrator for the sale of real estate, among them "the condition and value" of the property, and provides that, if any of the matters cannot be ascertained, it must be so stated, but that a failure to set forth the facts will not invalidate subsequent proceedings if the defect be supplied by the proofs at the hearing and the general facts showing the sale necessary and for the best interests of the estate be stated in the decree. *Held*, that the sale will not be invalid for omission to state in the petition the condition and value of the property or any other of the matters enumerated, provided the facts showing the necessity for the sale are proved and found; the question of value being at most a matter required to be stated to enable the court to more intelligently exercise its discretion as to the amount of property which should be sold after it has determined the sale to be necessary.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1385-1396; Dec. Dig. § 336.*]

2. EXECUTORS AND ADMINISTRATORS (§ 333*)—SALE OF PROPERTY — JURISDICTION OF COURT.

In proceedings by an administrator to sell real estate, proof of compliance with the order of court as to publication of notice to persons interested in the estate to show cause as expressly required by Code Civ. Proc. § 1539, confers jurisdiction of all parties interested in the estate, and the court's subsequent action upon the petition of the administrator is a movement within its jurisdiction, to be reversed only for error of law to be shown upon direct appeal.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 333.*]

3. EXECUTORS AND ADMINISTRATORS (§ 349*)—ADMINISTRATION SALE — ORDER — COLLATERAL ATTACK—PRESUMPTIONS.

In acting upon an administrator's petition to sell real estate after jurisdiction is acquired by due process of law, the superior court, though sitting in probate, is a court of general jurisdiction, and its action therein is entitled to the same presumptions that attach to its action in other cases, when collaterally attacked.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1449-1455; Dec. Dig. § 349.*]

4. EXECUTORS AND ADMINISTRATORS (§ 349*)—ADMINISTRATION SALE — COLLATERAL ATTACK.

If an action brought by heirs against decedent's administrator and persons claiming an interest in land of the estate sold by the administrator, in which the validity of the sale was questioned, be treated as an action to quiet title, the attack upon the proceedings for sale would be collateral.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 349.*]

5. JUDGMENT (§ 443*)—EQUITABLE RELIEF—GROUNDS—FRAUD EXTRINSIC TO QUESTIONS DETERMINED.

If the action be considered as one to vacate the judgment in the proceedings to sell the land, the frauds which could be the basis of the action must be frauds, extrinsic or collateral to the questions examined or determined.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 443.*]

6. EXECUTORS AND ADMINISTRATORS (§ 365*)—SALE OF LAND BY ADMINISTRATOR—SALE TO APPRAISER.

If land sold by an administrator was in effect sold to an appraiser, the sale would be at most only voidable.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1503; Dec. Dig. § 365.*]

7. EXECUTORS AND ADMINISTRATORS (§ 349*)—ADMINISTRATION SALE — ORDER — COLLATERAL ATTACK—ERRORS REVIEWABLE BY APPEAL.

Action of the court in proceedings by an administrator to sell land, in ordering the sale of all the property while the petition asked for a sale of only so much as was necessary, and a direction to sell in a single parcel, though not contiguous, being matters within the court's jurisdiction, any irregularity connected therewith would be only an error of judgment and not subject to collateral attack, but remediable only by review as provided by law.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 349.*]

Appeal from Superior Court, San Diego County; E. S. Torrance, Judge.

Action by Joseph A. Dane and others against P. J. Layne, administrator of Joseph

F. Dane, and others. From an order vacating a judgment for defendants, amending conclusions of law theretofore filed, and ordering judgment for plaintiffs, defendants appeal. Reversed and remanded, with instructions to enter judgment for defendants.

W. A. Sloane and Luce, Sloane & Luce, for appellants. J. B. Mannix, for respondents.

ALLEN, P. J. Appeal by defendants from an order vacating a judgment theretofore rendered in favor of defendants and amending the conclusions of law theretofore filed, and ordering judgment in favor of plaintiffs. The action was brought by the heirs of Joseph F. Dane, a nonresident, who died intestate in Massachusetts seized of certain premises in San Diego county, against the defendant Layne, as administrator of the estate, appointed by the superior court of San Diego county, and against certain persons claiming to have acquired an interest in said premises under a sale made by their codefendant, the administrator, acting under an order of the superior court of San Diego county sitting in probate.

Upon the trial of the action the court found that on March 14, 1905, subsequent to his appointment, the administrator presented to the superior court of San Diego county a petition for the sale of the real estate of said deceased situate in San Diego county; that such petition did not set forth the value of said real estate, or any part thereof, or any statement of such value, nor was it stated in said petition that such value could not be ascertained; that, upon the filing of said petition, the superior court made an order to show cause why an order should not be granted the said administrator to sell so much of said real estate at public auction as should be necessary; that the petition developed that there were no debts of the estate, and that the necessity for a sale of the real estate was occasioned by the costs and expenses incident to the administration, aggregating about \$123; that in the matter of said estate one Dickenson was appointed one of the appraisers and did appraise the property of said estate; that in April, 1905, the superior court, upon due proof to the satisfaction of the court of the due publication of a copy of said order as required by law, made its order authorizing the administrator to sell, either in one parcel or in subdivisions, as the said administrator should judge most beneficial to said estate, the real estate belonging to said estate; that said real estate consisted of various town lots lying in different blocks, and not contiguous to each other; that after due notice, under said order, the administrator sold all of the real estate belonging to said estate in one parcel to said Dickenson, who purchased the same

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the name of a corporation, of which said Dickenson owned 1000/1004ths of all its outstanding capital stock; that such premises were sold for \$495, an adequate and fair price; that thereafter the defendants Benjamin and Heilbron purchased the same of said corporation in good faith for value without notice or knowledge of any adverse claims of any person or persons whomsoever. Under these findings and others, which we do not regard as material to a decision of the questions involved upon this appeal, the court, as a conclusion of law, found that the sale of said real property was good and valid, and that plaintiffs had no interest in said property or any part thereof, and rendered judgment accordingly in defendants' favor. Thereafter, upon motion made in May, 1907, the court vacated the judgment, and amended and corrected its conclusions of law on the ground that the same were incorrect and erroneous and not consistent with or supported by the findings of fact, and ordered judgment in favor of plaintiffs, quieting plaintiffs' title against all of said defendants except the administrator. From this order vacating the judgment and amending the conclusions of law and ordering judgment in plaintiffs' favor, defendants appeal.

The principal question for determination upon this appeal relates to the jurisdiction of the court to order the sale under the petition filed; respondents' contention in support of the judgment rendered in plaintiffs' favor being that such petition for the sale of the real estate omitting to state the value of the property, or any part thereof, or any statement in relation to such value, was a fatal defect and by reason of which the court was without jurisdiction to order the sale, and as a consequence no title passed to the purchaser. Section 1537 of the Code of Civil Procedure enumerates the several matters and things necessary to be stated in the verified petition by the administrator for the sale of real estate, among which is that he shall state "the condition and value thereof." It is further provided in that section that, if any of the matters enumerated cannot be ascertained, they must be stated in the petition, but a failure to set forth the facts so enumerated will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing and the general facts showing that such sale is necessary, or that such sale is for the advantage, benefit, and best interest of the estate and those interested therein, be stated in the decree. We regard the case of *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458, as being decisive of the question presented. If it be admitted, as claimed by respondents, that some of the expressions in that opinion were not necessary to a determination of the case, the fact remains, however, that the reasoning employed by the distinguished justice who in that opinion spoke for the court is most con-

vincing. It is there held that no sale is invalid on account of the omission to state in the petition any of the matters enumerated, provided the general facts showing that a sale is necessary are proven and found; that the necessity for a sale is the prime factor for consideration; that the question of value can throw no light upon such question of necessity; that, at most, it is a matter required to be stated to enable the court to exercise its discretion more intelligently after it has determined the sale to be necessary; that a petition setting forth the facts showing the necessity for a sale and a decree thereon imports a finding of their truth; and that evidence to that effect was given at the hearing—and it must follow that a like intendment exists in relation to those matters about which the court should take testimony that it might intelligently exercise a discretion as to the amount of property which should be ordered sold under the circumstances of the case, for it is manifest that the statement of value could only be important in connection with the exercise of such discretion.

Proof of compliance with the order of court as to the publication of notice to show cause, as required by section 1539, Code Civ. Proc. (In re Courts, 100 Cal. 403, 34 Pac. 865), conferred jurisdiction on all parties interested in the estate, and its subsequent action upon the petition was a movement within its jurisdiction, to be reversed only for some error of law which might be shown upon direct appeal. In acting upon such petition, after jurisdiction to hear and determine was acquired by due process of law, the superior court, although sitting in probate, was still a court of general jurisdiction, and its action therein is entitled to the same presumptions that attach to its action in other cases when collaterally attacked. Treating the action as one to quiet title, the attack upon the proceedings is collateral. *Estate of Cook*, 137 Cal. 186, 69 Pac. 968. Were we to consider the petition herein as one to vacate and set aside the judgment, as distinguished from an action to quiet title, nevertheless the frauds which can be the basis of such action must be extrinsic or collateral to the questions examined or determined. *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760. The matters at issue in this proceeding which in any sense could be denominated collateral questions were all decided adversely to plaintiffs' contention, unless it can be said that the finding of the court that the purchaser at the administrator's sale was an appraiser would be sufficient to invalidate such sale. Without classifying this objection, and conceding that the sale to Dickenson through the interposition of the corporation which he controlled was virtually a sale to Dickenson, it would only under any circumstances render the sale voidable. *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146. The action of the court

in ordering the sale of all of the property under a petition asking for a sale of only so much as was necessary, and the direction to sell in a single parcel, although not contiguous, were all matters within the jurisdiction of the court, and any irregularity connected therewith would be but an error of judgment, and is not subject to collateral attack. If the court errs in its conclusion, "it is simply error in the exercise of its jurisdiction, which can be corrected only in the way provided by law for a review of the action of the trial court, and which cannot be reached on collateral attack or even reviewed in any other action." In re Estate of James McNeil, 100 Pac. 1086.

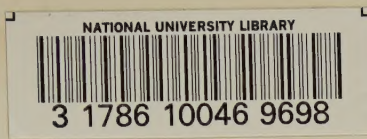
We refrain from commenting upon the many criticisms indulged in by counsel for respondents, which may be said to illustrate the possibility of predatory raids upon the estates of deceased persons through our system which tolerates the public administrator. The justness of these criticisms may be conceded, but the correction of the abuses, if any, must remain with the legislative branch of our state government. Our whole duty is accomplished if we correctly interpret the law as it exists.

We are of opinion that under the findings of fact the title to the premises is shown to be in the defendant purchaser under a valid sale, and the court erred in vacating the original judgment and substituting therefor the judgment from which the appeal is taken.

Judgment reversed and cause remanded, with instructions to the trial court to enter a judgment in favor of defendants and against plaintiffs.

We concur: SHAW, J.; TAGGART, J.





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